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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 20, 1978 and APRIL 3, 1979

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1978 and JANUARY TERM 1979

VOLUME CCII

MARVIN L. GREEN

OFFICIAL REPORTER

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LINCOLN, NEBRASKA

1979

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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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[3] Retired January 4, 1979

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[1] Died in office January 29, 1979

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1978

ALBERT PEAK, APPELLEE AND CROSS-APPELLANT, V. C. RICHARD BOSSE ET AL., APPELLANTS, IMPLEADED WITH FIDELITY & CASUALTY CO. OF NEW YORK AND SUPERIOR INSURANCE SERVICE, APPELLEES AND CROSS-APPELLEES, AND JOHN M. HOGAN, APPELLEE.

272 N. W. 2d 750

Filed December 20, 1978. No. 41735.

1. **Workmen's Compensation: Jurisdiction.** The Nebraska Workmen's Compensation Court has exclusive original jurisdiction in actions arising under the Workmen's Compensation Act.
2. **Declaratory Judgments: Jurisdiction.** As a general rule declaratory relief is not available where a statutory remedy has been provided with another tribunal given exclusive jurisdiction over the action.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

William J. Riedmann and Eric W. Kruger, for appellant Bosse. Robert G. Mahlin, Mark Eves, Barbara Allen Babcock, Edward G. Warin, Robert F. Kokrda, Leonard Schaitman, and John F. Cordes, for appellant Small Business Administration.

Norman Denenberg, for appellee Peak. Richard L. Walentine of Walsh, Walentine & Miles, for appellee Fidelity & Casualty. Michael P. Cavel of the Law Offices of Emil F. Sodoro, P.C., for appellee Superior Insurance.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

On September 22, 1975, the defendant John M. Hogan was operating a refuse hauling business at Offutt Air Force Base pursuant to a contract with the defendant Small Business Administration (SBA). Hogan's contract with the SBA required Hogan to remove refuse at Offutt Air Force Base and several housing areas in accordance with a contract between SBA and the United States of America. On that day the plaintiff, Albert Peak, who was employed by Hogan, was injured in an accident which resulted in his left arm being amputated above the elbow. On January 20, 1976, the plaintiff recovered an award for his injury against Hogan in the Nebraska Workmen's Compensation Court.

Both contracts, which were effective July 1, 1975, required the "contractor" to procure and maintain workmen's compensation insurance and submit a certificate of insurance prior to the commencement of work. On July 14, 1975, Hogan received a letter from the contracting officer at Offutt Air Force Base requesting that he submit a certificate of insurance.

Hogan consulted the defendant C. Richard Bosse, an insurance agent, in regard to obtaining workmen's compensation insurance. Bosse unsuccessfully attempted to secure insurance for Hogan and then contacted the defendant Superior Insurance Service, another agency, for that purpose. Superior was unable to place the insurance directly so it submitted an application to the North Central Compensation Rating Bureau to obtain insurance for Hogan through the assigned risk pool.

On September 11, 1975, the North Central Compensation Rating Bureau wrote to Hogan stating that the risk had been assigned to the defendant Fidelity

& Casualty Co. of New York, and that a binder or policy would be issued effective on the day following the receipt by the carrier of the deposit premium of $3,830.

Hogan and Bosse had a conversation at Bosse's office on or about September 15, 1975. According to Bosse, he and Hogan went over the letter that Hogan had received from the rating bureau and Bosse explained to Hogan that he would have no insurance until the deposit premium had been received by the company issuing the policy. A statement for the premium was prepared on one of Bosse's forms and delivered to Hogan.

On September 22, 1975, Hogan notified Bosse the plaintiff had been injured. On the following day Hogan delivered a check for the premium, dated September 18, 1975, to Bosse. Bosse forwarded the check to Superior and a policy was issued by Fidelity & Casualty Co., effective September 27, 1975.

This action was commenced on May 25, 1976, to obtain a declaratory judgment that Fidelity & Casualty Co., Bosse, Superior, and Fireman's Fund American Insurance Co. were liable for the compensation award obtained by the plaintiff.

Fireman's Fund is the errors and omissions carrier for Bosse and Superior. The demurrer of Fireman's Fund was sustained by the trial court and there is no issue in this court as to that order.

On June 11, 1976, the petition was amended to add SBA as a defendant on the theory that SBA was a "statutory employer" under section 48-116, R. R. S. 1943.

The trial court found that SBA was a statutory employer of the plaintiff and jointly and severally liable to the plaintiff for the amount of the award; that Bosse had agreed to obtain insurance for Hogan and had extended credit to Hogan for the premium due and was liable for the award to the plaintiff; and that both Superior and Fidelity & Casualty Co. were

not liable for the award. SBA, Bosse, and the plaintiff have appealed.

The plaintiff's theory of liability so far as the SBA is concerned is that the SBA, as the prime contractor, became a statutory employer under section 48-116, R. R. S. 1943, when its subcontractor Hogan failed to procure workmen's compensation insurance. See, Gardner v. Kothe, 172 Neb. 364, 109 N. W. 2d 405; Hiestand v. Ristau, 135 Neb. 881, 284 N. W. 756.

By demurrer and answer SBA challenged the jurisdiction of the District Court over the subject matter of the action. By statute the Nebraska Workmen's Compensation Court has exclusive original jurisdiction in actions arising under the Workmen's Compensation Act. § 48-161, R. R. S. 1943; Zurich General Accident & Liability Ins. Co. v. Walker, 128 Neb. 327, 258 N. W. 550. As a general rule declaratory relief is not available where a statutory remedy has been provided with another tribunal given exclusive jurisdiction over the action. Stewart v. Herten, 125 Neb. 210, 249 N. W. 552. See, also, St. Paul Fire & Marine Ins. Co. v. Littky, 60 Mich. App. 375, 230 N. W. 2d 440; State v. Breckinridge (Okla.), 442 P. 2d 506; Cox v. Pitt County Transportation Co., 259 N. C. 38, 129 S. E. 2d 589.

The plaintiff argues that this is not a compensation case but is an attempt to collect a judgment and that the plaintiff could not sue the SBA in the compensation court. Neither argument has merit. The action sought to establish the liability of the SBA directly to the plaintiff under the Workmen's Compensation Act and was not a proceeding in aid of execution. Whether federal law permitted the plaintiff to sue the SBA in the compensation court or not, the federal statute could not modify the state law which establishes the exclusive original jurisdiction of the compensation court over actions under the compensation law. The finding by the trial court that it had jurisdiction over the subject matter of

the action as regards the SBA was erroneous.

So far as the defendant Bosse was concerned, the plaintiff's theory of liability was based upon an alleged breach of contract or negligent failure to perform a duty owed to Hogan. Any such claim against Bosse would be personal to Hogan and could not be enforced directly by the plaintiff. The finding by the trial court that the defendant Bosse was directly liable to the plaintiff for the amount of the award was erroneous.

The defendant Hogan did not file a cross-petition against the defendant Bosse although Hogan's amended answer prayed that Bosse be required to reimburse Hogan for the cost of the defense of the action in the compensation court, attorney's fees, and the amounts paid by Hogan under the award. Bosse filed no pleading responsive to the answer of Hogan and, apparently, the matter was submitted on the theory that the matter being litigated was the plaintiff's right to recover directly from Bosse. Hogan's motion for new trial complained only of that part of the judgment which dismissed the action as to Fidelity and Casualty Co. Hogan has made no appearance in this court.

Upon this state of the record we think the finding that Bosse should reimburse Hogan for all payments made under the award was erroneous.

The plaintiff's sole assignment of error is that the trial court erred in failing to find Superior was a joint venturer with Bosse, and therefore jointly and severally liable with Bosse.

The record shows the plaintiff had no contact directly with Superior. Bosse was primarily a life insurance agent. When Bosse was unable to place Hogan's insurance directly, he contacted Superior to see if Superior could find a carrier who would assume the risk. When Superior could not place Hogan's insurance directly, Superior obtained coverage for Hogan through the assigned risk pool. Bosse and Super-

ior had an arrangement to share commissions but Superior made no promise to Hogan or Bosse that it could provide insurance. The finding by the trial court that Superior was not liable to the plaintiff was correct.

Fidelity & Casualty Co. had no contact with the plaintiff except through the assigned risk pool. The finding by the trial court that Fidelity & Casualty Co. was not liable to the plaintiff for the award was correct.

That part of the judgment which dismissed the action as to Fireman's Fund, Superior, and Fidelity & Casualty Co. is affirmed; the balance of the judgment is reversed and the cause remanded with directions to enter a judgment in accordance with this opinion.

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

IN RE ESTATE OF VIVIAN W. BOOTH, DECEASED. BILLY D. BOOTH, APPELLANT, V. STEVEN J. REISDORFF, ADMINISTRATOR DE BONIS NON, AND AUDREY J. BOOTH, APPELLEES.

272 N. W. 2d 915

Filed December 20, 1978. No. 41800.

Personal Representative: Probate and Administration: Property: Statutes. The personal representative of a deceased person acting reasonably for the benefit of the interested persons may sell any real property of the estate following a court order with notice given in the manner prescribed by statute. § 30-2476 (23), R. R. S. 1943.

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

John McArthur, for appellant.

Peake & Navis, P.A., for appellee Reisdorff.

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

PER CURIAM.

This is an appeal in a proceeding to administer the estate of Vivian W. Booth, deceased. On May 6, 1977, Steven J. Reisdorff, the administrator de bonis non, filed his application in the county court for a license to sell a residence property of the deceased. After notice and hearing the county court granted the application and ordered the property sold. Billy D. Booth, a son of the deceased and the former executor of the estate, perfected an appeal to the District Court.

After trial de novo in the District Court the judgment of the county court was affirmed. Billy D. Booth has appealed to this court.

Section 30-2476 (23), R. R. S. 1943, provides that a personal representative of the deceased acting reasonably for the benefit of the interested persons may sell any real property of the estate following a court order with notice given in the manner prescribed in the statute. The appellant contends the order authorizing the sale of the residence property of the deceased was erroneous because the evidence does not show what personal property there is in the estate or its value and the claims against the estate have not been determined.

The inventory filed by the administrator lists three items of real estate: a business property in Crete, Nebraska, valued at $14,000; the residence property in Crete, Nebraska, valued at $30,000; and an 80-acre farm in Lancaster County valued at $31,200. The administrator testified that the farm is the major asset of the estate; there are some problems concerning the marketability of the title to the business building; and that it was his opinion that it was in the best interests of the estate and the heirs to sell the residence property at this time. He estimated the present value of the residence property at $45,000 to $50,000.

The inventory listed the following personal property as belonging to the estate:

"PERSONAL PROPERTY

	VALUE
Shares of stock, Booth Seed Company, Inc.	Unknown
Notes Owned (sic) to Vivian W. Booth by Booth Seed Company, Inc.	$61,000
Liquidated value of Booth Seed Company, Inc.	Unknown"

The administrator testified that the estate had obligations in the amount of approximately $11,000 at this time which should be paid. These included a claim in the amount of $3,500 from a law firm by the name of Marchetti which had been allowed; a claim by an accountant in the approximate amount of $2,000; a claim from Blevens, Blevens and Bartu in the amount of $2,500; a claim by an engineering firm in the amount of $500; Federal estate tax estimated to amount to $5,000 or more; and delinquent real estate taxes in the amount of approximately $2,000.

The administrator further testified the income from the business building was approximately $150 per month; there was no income from the residence property because it was being held for sale; and that the income from the farm was unknown at this time because the administrator had been unable to discover what agreement had been made by the prior executor. The estate had no cash available to pay the expenses and obligations of the estate and income to be received during the next year would not be adequate to pay these amounts.

The appellant presented no evidence.

The evidence which has been summarized will sustain a finding that it is in the best interests of the estate and the persons interested in the estate that the property be sold.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL LANG, APPELLANT.

272 N. W. 2d 775

Filed December 20, 1978. No. 42083.

1. **Criminal Law: Attorney and Client.** The present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.
2. **Words and Phrases: Attorney and Client.** Prejudice is an essential element of a claim of ineffective assistance of counsel and a defendant must show that he was prejudiced in the defense of the case by the actions or inactions of his counsel.
3. **Criminal Law: Attorney and Client: Time: Witnesses.** It is the duty of a defense attorney in a criminal case to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. Ordinarily, a reasonably competent attorney will conduct an in-depth investigation of the case, which includes an independent interviewing of the witnesses.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and remanded for a new trial.

Thomas A. Vakulskas, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

BRODKEY, J.

This is the second appearance of this case in this court. In 1976, the appellant, Mike Lang, also known as Michael Lang, was tried in the District Court for Dakota County on a charge of assault with intent to inflict great bodily harm, and was found guilty by a jury. The court imposed a sentence of 5 to 8 years imprisonment, and Lang filed a direct appeal to this court. We affirmed defendant's conviction and

sentence in State v. Lang, 197 Neb. 47, 246 N. W. 2d 608 (1976); and the general factual background for the occurrences in question which took place in the parking lot of a liquor store in South Sioux City, Nebraska, on the night of September 22, 1975, are set forth in our opinion in that case.

Thereafter, on December 7, 1977, the defendant, acting pro se, filed a Motion to Vacate and Set Aside Conviction and Sentence under the Nebraska Post Conviction Act, in the Dakota County District Court; and on that same date the court appointed Thomas A. Vakulskas, attorney at law, to represent the defendant in his motion. Mr. Vakulskas had represented the defendant in his prior appeal to this court, but was not the attorney who represented the defendant in his original trial.

In his motion to vacate and set aside his judgment and conviction, defendant alleges he was denied effective assistance of counsel because his trial counsel, Joseph E. Marsh, failed to interview and subpoena witnesses known to him that would corroborate the defendant's version of what took place on the night of September 22, 1975. A full evidentiary hearing was held on the motion on January 18, 1978, and on March 24, 1978, the court entered its order denying defendant's motion. Defendant then perfected this appeal to this court.

In defendant's original trial, in which he was convicted of the offense of assault with intent to inflict great bodily injury, the main witness for the State was the alleged victim, Gene Boykin, who testified as to his version of what took place with reference to the shooting in the parking lot of the liquor store on the night in question. Several witnesses confirmed his version of the affair, and one witness, Brenda Frazier, confirmed the defendant's version. No other witnesses were called for the defense. However, at the evidentiary hearing held in the post conviction proceeding, the county attorney for Dakota

County stipulated with defendant's attorney for the admission into evidence of affidavits of eight persons who allegedly witnessed the incident on September 22, 1975, and stipulated that the eight affiants would testify in conformity with the contents of their respective affidavits, if called. The county attorney also waived his right to cross-examine the eight affiants. In this connection we feel compelled to note that by virtue of the above stipulation, the county attorney effectively denied to the trial court, and also to this court on review, an opportunity to weigh fully the possible prejudice to the defendant of the alleged failure of defense counsel to interview and summon witnesses. However, we are bound by the record before us and cannot supply what is not contained therein.

The affidavits of two affiants, Dennis Red Owl and Robert Cavanaugh, state that they were in a bar in Sioux City, Iowa, at approximately 7 p.m., on September 22, 1975, when they were approached by Tommy Downs, Gene Boykin, and two other unidentified men. Downs and Boykin asked Red Owl and Cavanaugh "where is Mike Lang?" Dennis Red Owl told Downs and Boykin that Mike Lang was at Mahon's Liquor Store in South Sioux City, Nebraska. While the group was talking "Tommy Downs pulled a revolver from his waist and gestured in a menacing manner." Tommy Downs, Gene Boykin, and the two unidentified men then left in two cars for Mahon's Liquor Store. The group arrived at Mahon's and after approximately 10 minutes Mike Lang arrived with three or four other persons in Kenny Frazier's car. Lonnie John, Laverne Taylor, and Larry DeGroot were also present at the liquor store when Downs and Boykin first arrived. In Kenny Frazier's car, in addition to Kenny, were Mike Lang, Leilla Fields, Ted Mallory, and Brenda Frazier. Kenny Frazier left the car and went inside Mahon's Liquor Store. The affidavits of Kenneth Frazier,

Leilla Fields, Ted Mallory, Lonnie John, Laverne Taylor, Larry DeGroot, Dennis Red Owl, and Robert Cavanaugh were all substantially to the same effect as to occurrences in the parking lot of Mahon's Liquor Store. Those events, as related in the affidavits, were that Mike Lang got out of the car and as he proceeded towards the store was confronted by Boykin and Downs. Boykin struck Lang and a scuffle on the ground began. Downs then pulled a revolver from his waist and fired two shots toward Lang and Boykin. Brenda Frazier then ran towards Downs who knocked her to the ground and aimed his revolver at her. Ted Mallory then pulled a revolver and fired three shots at Downs, causing him to drop his revolver. Mallory emptied his revolver and reloaded it as Boykin and Downs ran behind the liquor store. Lang, Brenda Frazier, Kenny Frazier, and Mallory then left the scene in their car. Affiants all stated in their affidavits that if they had been subpoenaed or permitted to testify they would have testified at the defendant's trial to the facts as set out in their affidavits.

The standard for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is set out in State v. Leadinghorse, 192 Neb. 485, 222 N. W. 2d 573 (1974): "Our present test would be that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client." See, also State v. Fowler, 201 Neb. 647, 271 N. W. 2d 341 (1978); State v. Bartlett, 199 Neb. 471, 259 N. W. 2d 917 (1977); State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776 (1975). We have also held that prejudice is an essential element of a claim of ineffective assistance of counsel. Defendant must show that he was prejudiced in the defense of his case by the actions or inactions of defense counsel. State v. Bartlett, *supra*; State v. Kelly, 190 Neb. 41, 205 N. W.

2d 646 (1973). See, also, Morrow v. Parratt, 574 F. 2d 411, at 413 (8th Cir., 1978).

The defendant testified at the post conviction hearing that he told his trial counsel at every meeting the names of witnesses he wanted called in his behalf. He testified that he told his trial counsel the names of "Kenny Frazier, Ted Mallory and Dennis Red Owl and Bobby Cavanaugh and Lonny John and I gave him LeRoy Thomas, Larry DeGroot, Earl Mayo, and Laverne Taylor and Leilla and Brenda Frazier and Leroy Brown and Terry Thomas," as eyewitnesses to the incident in Mahon's parking lot on September 22, 1975. The defendant also testified that it was his understanding that his trial counsel was going to subpoena these people to testify in his behalf.

However, defendant's trial counsel testified at the post conviction hearing that: "These names in Mr. Lang's affidavit now, their names were never mentioned to me at any stage of the proceedings." He further testified that he did not contact Lloyd Spince, Debbie Downs, Larry Carpenter, or LeRoy Thomas because "[t]hose names were never given to me, before the trial at least." An examination of the record of the preliminary hearing reveals that the State's witness, Gene Boykin, testified that Lloyd Spince, Debbie Downs, Larry Carpenter, LeRoy Thomas, Tommy Downs, and Terry Walker were all present at the time of the incident. Defense counsel admitted that other than his cross-examination of the two State's witnesses at the preliminary hearing he did not personally contact anyone to seek additional information.

Although the State's witnesses at the preliminary hearing, Gene Boykin and Terry Walker, testified that Ted Mallory and Kenny Frazier were present with the defendant the night of the incident, defendant's trial counsel testified that he did not issue sub-

poenas for Mallory or Kenny Frazier because they were residents of Iowa.

However, both Nebraska and Iowa have statutes under which the attendance of Mallory and Frazier as witnesses could have been obtained. See section 29-1908, R. R. S. 1943; Iowa Code Ann., §§ 781.14, 781.16 (West, 1977), and Iowa Code Ann., § 819.1 (West, 1978 Special Pamphlet).

Although not formally adopted in this State to the present date, we note that the American Bar Association Standards for Criminal Justice relating to the Defense Function, approved in 1971, provides in section 4.1 as follows: "Duty to investigate. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty." In McQueen v. Swenson, 498 F. 2d 207 (8th Cir., 1974), the court stated: "We have no doubt that counsel acted in an effective manner as far as the trial judge was able to observe his conduct. The representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation in preparation of the case or failed to interview essential witnesses or to arrange for their attendance. * * *." Also, in Morrow v. Parratt, 574 F. 2d 411 (8th Cir., 1978), the court stated: "This court has recently stated that ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses."

It appears that the names of many possible eye-

witnesses were known to defendant's counsel both from the defendant's preliminary hearing, and also from the defendant himself in conversations with his attorney. Counsel admits he knew of the two witnesses, Ted Mallory and Kenny Frazier, but did not issue subpoenas for them because they were residents of Iowa, and "I figured if they wouldn't come over voluntarily, they weren't going to do us much good anyhow." It also appears from the record that witness Ted Mallory was confined in the Woodbury County Jail in Sioux City, Iowa, at the time of the trial. Witness Frazier in his affidavit states that he "attempted to testify at the trial of Mike Lang, but I was told, that I would not be able to. * * * That I was never interviewed nor did I talk to Mr. Joseph Marsh, although I attempted on more than one occasion to contact him. * * *." There is evidence in the record, however, that Kenny Frazier arrived at the defendant's trial after argument to the jury had begun, but after an approximate one-half hour recess was taken to await his arrival. Nevertheless, on the basis of facts contained in the affidavits stipulated into evidence at the post conviction hearing, it seems clear that had defendant's trial counsel interviewed the witnesses in question he would have discovered evidence helpful to the defendant which would have shown that the State's witness, Gene Boykin, originally provoked the assault, and Boykin and Tommy Downs conspired to assault the defendant before they arrived at the liquor store where the incident took place. He would also have discovered evidence to the effect that the State's witness, Tommy Downs, was in possession of a firearm and was the one who discharged it, not the defendant. We feel that under the facts of this case there should have been an effort on the part of trial counsel to contact witnesses Mallory and Frazier, and, if necessary, to subpoena them to testify at defendant's trial; and the failure to do so was prejudicial to the

defendant. As was stated in the case of McQueen v. Swenson, *supra*: "[T]he petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt."

We believe that in this instance defendant's trial counsel failed to perform a function which a reasonably competent attorney would perform, and justice dictates that defendant should be given a new trial where all the witnesses can be heard in his defense. We therefore vacate defendant's conviction and sentence, and remand the cause to the District Court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1979

KATHRYN BOKELMAN, APPELLEE AND CROSS-APPELLANT, v. LEONARD BOKELMAN, APPELLANT AND CROSS-APPELLEE.

272 N. W. 2d 916

Filed January 3, 1979. No. 41727.

1. **Statutes: Trial: Courts: Judgments: Time.** After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment, except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943.
2. **Divorce: Property: Fraud.** A property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification, and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity.
3. **Judgments.** If the language used in a judgment is ambiguous, there is room for construction, but if the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect of the decree must be declared in the light of the literal meaning of the language used.
4. **Divorce: Minors: Parent and Child.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part reversed.

Brian F. Beckner, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and COLWELL, District Judge.

MCCOWN, J.

This is a proceeding to modify a decree of dissolution of marriage. The wife filed an application to modify the decree by granting her custody of the two minor children of the marriage and the possession and use of the former family residence, rights which had been awarded to the husband in the decree. The District Court denied the application for change of custody and use of the residence, but ordered the residence sold and the proceeds divided between the parties. The husband has appealed and the wife has cross-appealed.

The decree of dissolution of marriage in this case was entered on May 16, 1975, with matters of custody and property division reserved for later decision. On August 26, 1975, the District Court granted custody of the two minor children, then 6 and 10 years old, to the husband, with reasonable visitation rights to the wife; ordered a division of property; and ordered payment of alimony to the wife. As a part of the property division the court ordered that the husband "be and he is herewith awarded the use of the home of the parties and the furnishings contained therein for so long as he retains custody of the minor children of the parties, up to and including their eighteenth birthday, at which time the remaining leasehold interest in the home and said furnishings shall be sold and the net proceeds divided in equal parts between the parties. It is the further order of the Court that during his term of possession of said home and furnishings the respondent shall be responsible for normal maintenance costs, taxes, insurance and like items."

The decree became final in due course and the husband lived in the residence with the minor children until May 1977. At that time he was transferred by his employer from Columbus, Nebraska, to Lincoln, Nebraska. He and the children thereafter moved to Lincoln. He testified he intended to rent the Columbus residence and that there was a possibility he and the children would return to Columbus.

In May 1977, the wife filed her application for modification of the decree as to custody and the right to use the residence upon the ground that there had been a substantial change in conditions pertaining to child custody and the use of the residence of the parties. The husband demurred to the application on the grounds that the court had no jurisdiction to modify the decree as to the residence and the application did not state facts sufficient to justify the modification requested.

The evidence presented at the hearing was that the change of circumstances relied upon to justify the modification requested was the fact that the husband and children had moved from Columbus, Nebraska, to Lincoln, Nebraska. The record fails to establish that the husband had failed to properly care for the children or was unfit in any way to care for them, or that it was in the best interests of the children to have the custody changed to the mother.

The District Court found there was not a sufficient change of circumstances to justify a change of custody of the minor children to the wife, but found that since the residence of the parties was no longer being "occupied" by the husband and the children, the residence should be sold and the proceeds distributed. The court thereupon denied the application to modify the decree as to change of custody, but ordered the residence of the parties sold and the proceeds divided pursuant to the original decree.

The husband contends on appeal that the provi-

sions of the original decree with respect to the use of the residence of the parties was a division of property and was not subject to modification except under conditions and circumstances set forth in the decree itself. The wife contends that the decree with respect to the use of the residence was an order dealing with the maintenance and welfare of minor children and not a division of property. She, therefore, contends that the decree was subject to modification upon showing of a material change of circumstances, and that the move to Lincoln by the husband and children was a substantial and material change of circumstances.

The provisions of the decree with respect to the use of the residence constitute a division of property rather than an order for the support and maintenance of the children, even though the right to use the property was given to the husband because he had the custody of the minor children and the consequent financial burden of support. The decree is not ambiguous, and, by its own terms, specifies the one material circumstance which is a precondition of any modification, namely, the change of custody of the minor children. It may well be that if the court were to order a change of custody of the children from the husband to the wife it might have authority to modify the decree as to the use of the residence, but that issue is not before us.

The order to sell the residence was not requested by either party, nor was any direct evidence on the issue of an interpretation of the original decree, in the absence of a change of custody, considered or presented. The District Court attempted to modify the decree as to the use of the residence by reading into it a provision that the right to use the residence terminated if the husband and the children ceased to personally occupy and live in the residence. There is no such limitation in the decree. It seems clear that the decree intended to, and did, grant the eco-

nomic benefit of the use of the residence to the party having custody of the children so long as custody was retained, and until the children reached their eighteenth birthdays. At that time the property is to be sold under the terms of the decree. On the present state of the record, there is no basis for modification of the decree as to the use of the residence, since there has been no change in custody.

This court has consistently held that after the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment, except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Lienemann v. Lienemann, 197 Neb. 449, 249 N. W. 2d 902.

We have also consistently held that a property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification, and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Klabunde v. Klabunde, 194 Neb. 681, 234 N. W. 2d 837; Corn v. Corn, 190 Neb. 383, 208 N. W. 2d 678.

If the language used in a judgment is ambiguous, there is room for construction, but if the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect of the decree must be declared in the light of the literal meaning of the language used. See 49 C. J. S., Judgments, § 436, p. 863.

In her cross-appeal, the wife contends that the District Court erred in dismissing her application for a change of custody and argues that because there was evidence she was fit to have custody of the children, the court should have changed the custody from the father to her.

The record fails to establish, however, that the husband had failed to properly care for the children or was unfit in any way to care for them, or that it

was in the best interests of the children to have the custody changed. The only real change in circumstances relied upon to justify a change of custody was the fact that the father and children had moved to Lincoln.

A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Carper v. Rokus, 194 Neb. 113, 230 N. W. 2d 468.

That part of the order of the District Court which denied the wife's application to change the custody of the minor children was correct and is affirmed. That part of the order of the District Court directing the residence of the parties be sold and the proceeds distributed is vacated and set aside, and the provisions of the original decree with respect to the use of the home of the parties is reinstated in all respects.

AFFIRMED IN PART, AND IN PART REVERSED.

WHITE, J., not participating.

COLWELL, District Judge, concurring.

I concur in the result of the majority opinion. However, I object to the finding that the original decree of dissolution, as it relates to the use of the residence, did constitute a division of property and that the decree was not ambiguous.

Those findings might be warranted if those particular issues were presented by pleadings and the evidence at the modification hearing. They were not. The only issue there presented was whether the decree should be modified to change child custody. The trial court had no jurisdiction to either consider

or order the sale of the residence, and this court should not determine any issue related to that void finding.

THE WICKES CORPORATION, A DELAWARE CORPORATION, APPELLEE, V. KENNETH FRYE, DOING BUSINESS AS INTERIOR DESIGNERS, APPELLEE, IMPLEADED WITH LOYD REISIG ET AL., APPELLANTS, IMPLEADED WITH PINE TREE BUILDERS, A PARTNERSHIP, ET AL., APPELLEES.

273 N. W. 2d 663

Filed January 3, 1979. No. 41779.

1. **Mechanic's Liens: Intent.** The intent of the lien law is to protect the materialman. The law puts the burden on the owner at his own risk to make certain that payment has been made for all materials delivered to the job.
2. **Mechanic's Liens.** The lien of a materialman for materials furnished for the erection of a building, by virtue of an agreement with the contractor, extends to such materials only as are used in or delivered at the building for use therein.
3. **Trial: Appeal and Error.** In a trial de novo 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.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Wright & Simmons and John A. Selzer, for appellants.

J. L. Zimmerman of Atkins, Ferguson, Hahn & Zimmerman, for appellee Wickes.

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

SPENCER, C. J., Pro Tem.

This is an action to foreclose a mechanic's lien. The District Court found in favor of The Wickes Cor-

poration and entered a decree of foreclosure. The homeowners, Loyd Reisig and Ruth B. Reisig, filed this appeal. Loyd Reisig died November 2, 1978, and his interest is represented on appeal by his wife as the personal representative of his estate. Defendants contend plaintiff did not establish its lien and in any event should be estopped from enforcing it. We affirm the judgment of the District Court.

The mechanic's lien was filed November 13, 1975, in the amount of $2,003.33. This figure represents the purchase price of sheetrock, casement windows, and a patio door, allegedly incorporated into the house. The materials which are the subject of the lien were ordered from plaintiff's Fort Collins, Colorado yard by Kenneth A. Frye, the general contractor. They were shipped from Fort Collins and delivered on August 22, 1975. Defendants were informed by Frye on November 24, 1975, that plaintiff had filed a lien against their property. Frye did not complete the contract.

As a result of a meeting held on November 24, 1975, between Frye and Loyd Reisig, a mutual release was executed. Part of this release agreement required Reisig to satisfy the mechanic's lien which had been filed by Wickes. Frye left town in December 1975, without performing any of the obligations contained in the release.

Michael Webb, a contractor associated with Pine Tree Builders, testified his company subcontracted with Frye to do part of the work on the house. Frye was responsible for providing the materials and Webb suggested he purchase the materials from Wickes Lumber Company in Fort Collins, Colorado. Webb was present at a building project in Henry, Nebraska when a truck arrived loaded with shake shingles, sheetrock, and windows. He stated he did not remember who provided the truck although he referred to it once as the Wickes' truck after plaintiff's counsel referred to it as such. Two of his em-

ployees unloaded some of the shake shingles in Henry and then accompanied the truck to the Reisig house. The next day Webb observed shingles, sheetrock, and windows in the front of the Reisig house. On his next visit to the house the drywall work had been completed.

Webb's company was not paid for its work on the house and it filed a mechanic's lien. At the end of November or the first part of December, after the lien had been filed, Webb received a call from Loyd Reisig. Reisig promised to pay the amount owing if Pine Tree Builders would perform some extra work. Webb agreed. Part of the work was to set the windows, which was done shortly after the telephone conversation. Webb did not measure the windows but he knew they were casement windows. He stated, "As far as I know they came off of the Wickes' truck." One of the windows was not installed because it was broken. Pine Tree Builders was paid for its work.

Loyd Reisig testified he and his wife contracted with Frye for the construction of their home. The contract called for a 10 percent downpayment with progress payments to be made as follows: 15 percent upon the completion of footing and foundation work; 20 percent upon completion of framing; 20 percent upon completion of drywall work; 15 percent upon completion of all interior and exterior carpenter work; and the balance upon taking possession. The total contract price was $41,000. Reisig made the downpayment and the first two progress payments for a total of $18,450. The last check to Frye was written on August 5, 1975. Reisig testified he considered this last check, in the amount of $8,200, as covering the next purchases to be made by Frye, including the sheetrock and the windows.

Frye stopped work on the project in early September 1975. Reisig testified he had no idea where Frye was purchasing materials during the period of con-

struction from May to August. He further stated he was not present when any of the materials were delivered to the construction site except for one occasion when the trusses and asbestos shingles were unloaded. Later in his testimony he stated Frye told him before the windows were delivered that they had been ordered from Wickes and he showed him a copy of the invoice. The invoice indicated the transaction was to be C.O.D. Frye told him, "I have to pay for them before they're unloaded." Following delivery of the windows, Frye told Reisig they had been paid for and showed him a check stub. Reisig thought he was shown the check stub the day after delivery.

Reisig testified he became aware 2 or 3 weeks after construction started that Frye had not obtained a performance bond as required by the contract. He stated because of this knowledge, "I would check if a truck would come or a driver would come like a C.O.D. that Frye would show me from Wickes on the windows I checked that with him and that is what I used as a sure thing that Frye would have to pay for them was the C.O.D.'s." He testified he would not have let the windows be unloaded had he known they were not paid for, or else he would have stopped construction until payment was made. He also would have inventoried the materials which were unloaded and those which were removed by Frye to another location.

Reisig testified he learned about the 20th of September that the windows and others items from Wickes had not been paid for, when he called Wickes or Wickes called him concerning the shake shingles which had been delivered, but which were supposed to have been delivered to another house Frye was building. Reisig at this time was told there was an outstanding bill in an amount over $2,000.

Reisig was asked to examine the copies of the invoices attached to the mechanic's lien filed by

Wickes. He testified a patio door and casement windows had been installed in his residence. Two windows which had been delivered were not installed because one was broken and the other was not meant for his house. Sheetrock was also used in the construction of his house. After stating Frye had told him the windows were ordered from Wickes, Reisig was asked whether there were other materials which had come from Wickes. He replied, "I think there was. I think the trucks come from Wickes. I'm not sure." Reisig testified that several times Frye removed materials which had originally been delivered to his property.

Jimmy Pask, the manager of Wickes Lumber Company in Fort Collins, testified he met Frye in July 1975, when he came in with Mike Webb for material to build a home in Nebraska. To the best of his knowledge, all the materials ordered by Frye were to be used in the construction of a house for a Lee Schwartzkopf. In early September 1975, he learned for the first time that some of the materials had gone to Reisig. This was when Reisig telephoned to complain that one of the windows which had been delivered was broken and another was the wrong size. He checked into the matter and returned Reisig's call on September 15, 1975. During this conversation he informed Reisig that the sheetrock, the windows, and the shake shingles delivered to him had not been paid for. Pask told Reisig he would order new windows when the correct sizes were determined. Reisig said he would call back with the measurements and later come in to pick up the windows in Fort Collins. Pask testified that during this same conversation they discussed the drywall and cedar shake shingles that were delivered to the Reisig house. Reisig told him they were going to use the drywall but the shakes did not belong to him, and per his attorney's intructions he was going to put them in the shed. Reisig called the Wickes yard

on September 20 when two men came to pick up the shake shingles to deliver them to the Schwartzkopf residence. Pask called back to assure him he would be held harmless on any mechanic's lien for the shake shingles if he would release them to the two men. Pask called Reisig on October 1 to confirm that the shake shingles had been picked up. At this time they also discussed whether Reisig was coming in to pick up the windows. Reisig told him to contact his attorney.

Pask testified about the copies of the invoices which were attached to the mechanic's lien. Two different forms were used. One of these forms served as both a purchase order and an invoice, and was used by Wickes when it had to special order the merchandise from other companies. This type of form contained one original and six carbon copies, which form was used for the casement windows and patio door. The other type of form, consisting of five copies, was labeled "Invoice" and was used by Wickes when it had a product on hand. The order for the sheetrock was placed on this type of form.

The purchase order date on the form for the windows and patio door was July 17, 1975. The merchandise arrived at Wickes in Fort Collins on August 19. The column for the product description contained the words "casement" and "patio door." The total amount for these items is $1,448.93. The name "Risick" appears at the top of the form. Pask testified he wrote this on the form after talking with Reisig and learning the materials had been delivered to him. The form does not show a delivery date. Under "type of sale" both cash and C.O.D. have been checked.

Frye is listed as the customer on the second form. Pask wrote "Risick" at the top of the form after talking with Reisig. The date shown on that form is August 21, 1975. Under the heading "delivery and time" appears the date "8/22/75." There is no sig-

nature showing receipt of the goods. Included in the description of materials are 220 sheets of "gyp board." The price of this material is stated to be $554.40. The name "Risick" appears between the description and the price. The names "Swartzcoff" and "Frye" appear after the other material which was ordered on the same form, including the shake shingles. Pask testified these names were placed after the product descriptions following a conversation with Frye's attorney in September 1975, or thereafter. Under the heading "special instructions" is the entry "include windows." Under "type of sale" an "X" appears in the box labeled "C.O.D." It appears there may also have been an "X" in the box labeled "charge," but this has been scratched out. The designation "chg" appears twice in large letters across the face of the document. The two amounts, $1,448.93 and $554.40, total $2,003.33, the amount of the lien.

Pask testified he had personal knowledge that all of the materials listed on these two documents were shipped out on the same truck, which belonged to Wickes, on August 22, 1975. He described the company policy with regard to the terms of payment as follows: "Whenever we have a builder — and the C.O.D. is in reference to this — whenever we have a builder, especially out of state, and we have to run credit information on him normally what I do is call the lender to determine that there is funding and that there is a job going that they say there is. Once that requirement is made by me then I release the materials on a Code 88, 88L, 85 which is a C.O.D. account in our books, which allows materials to leave the center and then at the end of the day that account is actually put in a charge status. It is only an account that we use to release materials out."

Pask called Nebraska Security Bank and learned that Frye had an account for the construction of Lee Schwartzkopf's home. He then OK'd the release of

the materials. When asked if he knew how the letters "chg" had gotten on the invoice, he stated, "Yes, after the paperwork gets back into the yard, which is normally the following day, and our accounting system just changes it to a charge and writes across the face of it and that account then goes to a charge status."

In support of Reisig's contention that he viewed copies of invoices prior to delivery of material from Wickes, exhibits 8 and 9 were introduced. Exhibit 8 is a customer copy of an invoice for 12 trusses, signed by Ken Frye. The date is shown as July 17, 1975. The type of sale is marked "C.O.D." and "C.O.D." appears across the face of the document in large letters. Reisig testified Frye told him these trusses had been used in the construction of his house. Exhibit 9 is a customer copy of a combination purchase order and invoice. Most of the document is illegible. The purchase order date is July 10, 1975. Under "type of sale" an "X" appears in the "C.O.D." box, and scratch marks appear in the "charge" box. However, neither of these invoices is included in the mechanic's lien being foreclosed. Reisig testified Frye gave him these documents in September 1975, although they had been shown to him earlier.

Pask testified the trusses described in exhibit 8 were delivered to and paid for by Lee Schwartzkopf. He did not know what exhibit 9 pertained to, but the code numbers indicated it was also an order for trusses. Disputing Reisig's testimony that he had seen a copy of the invoice for the windows prior to delivery, Pask testified the forms used by Wickes are such that the customer copy is not given to the purchaser until the goods are delivered.

Wickes denied the following request for admission: "All items sold by Plaintiff to Frye on which a lien is claimed by Plaintiff upon the premises of these Defendants, were sold C.O.D." In explaining

its denial, Wickes answered: "It was originally discussed and agreed when Frye initially contacted Plaintiff, that all deliveries would be made C.O.D., however, when the delivery to the Reisig residence made on August 22, 1975, was made, and Mr. Frye was not found on the premises, because of the past payment record that they had with Frye, Plaintiff decided to go ahead and drop the materials instead of taking them back to Colorado."

We first consider the question of estoppel. Defendants assert plaintiff is estopped to assert a mechanic's lien against the Reisig property because invoices shown to Reisig indicated Wickes' dealings with Frye were C.O.D. Reisig argues if he had known that was not the situation, he then could have protected himself by not accepting delivery of the materials, or by stopping construction, until Frye paid for the materials. Defendants argue the reason Reisig did not know the facts in time was because plaintiff had put into Frye's hands an invoice showing a C.O.D. sale which provided the means of deceiving Reisig. There were no representations made to Reisig by Wickes. Reisig is relying entirely on statements by Frye concerning the invoices. None of the materials shown on exhibits 8 and 9 are included in the lien filed herein.

The course of dealing between Frye and Wickes was such that it would be highly unlikely Reisig could have seen the invoice for the material included in the lien prior to the delivery of the material. In any event, Wickes explained the C.O.D. terminology and why the lien materials were delivered without receiving payment.

The intent of the lien law is to protect the materialman. The law puts the burden on the owner at his own risk to make certain that payment has been made for all materials delivered to the job. It is not enough to ascertain that some of the bills were paid. Nor is the fact that some of the items may have been

sold C.O.D. sufficient to create an estoppel. The homeowner still has the burden to ascertain whether payment has been made for all materials delivered to the premises.

If it is the position of the defendants that Reisig was an innocent party in this transaction, who relied upon an instrument negligently furnished by Wickes to the contractor, they are still without remedy herein. First, assuming Reisig saw the C.O.D. instrument before the delivery of the materials, was it reasonable for him to place any reliance upon the assurances made by Frye? He testified he knew 2 or 3 weeks after construction started that Frye had not obtained a performance bond. If he was seriously concerned about Frye paying for the materials, other precautions should have been taken. We also note that Reisig testified it was customary for him to pay Frye for materials before they were delivered to the premises or incorporated in the house. His testimony is that the payment of August 5 was to include the materials furnished by Wickes on August 22. It tests credulity to believe Reisig would engage in this course of dealings when Frye was unable to furnish a performance bond. This is particularly true when we consider the fact that Reisig was obligated to make the August 5 payment under the terms of the contract for the work performed to that date. The materials included in the lien would be included in the work covered by the next payment due under the contract.

The fact that Wickes decided to leave the materials on August 22 when Frye could not be found at the building site does not in any way change the law or create an equitable estoppel. In every such situation the supplier has a statutory right to rely on his lien if he decides to extend credit at that time.

After Reisig learned in early September that the materials had not been paid for, he executed a mutual release with Frye and arranged with Webb to

have the windows installed. Under the terms of the release, Reisig agreed to pay for the materials in consideration of Frye completing certain work on the house. The loss to defendants was occasioned by Frye leaving town in December without performing the work called for in the release. Under the circumstances of this case, even if the defendants' argument had merit, there is no way to hold that their loss should be shifted to Wickes.

The remaining issue presented for review is whether Wickes sustained its burden of proving it actually furnished the materials used in the construction of the Reisig house. The rule to be applied is: "The lien of a materialman for materials furnished for the erection of a building, by virtue of an agreement with the contractor, extends to such materials only as are used in *or* delivered at the building for use therein." (Emphasis supplied.) Occidental S. & L. Assn. v. Cannon, 184 Neb. 659, 171 N. W. 2d 166 (1969).

Reisig acknowledged that casement windows, a patio door, and sheetrock went into the building of the house. Webb had observed the sheetrock and windows in front of the Reisig house. He had also set the casement windows and hung the door. Pask testified that the items in the lien were all delivered to the premises at the same time. Wickes was only required to prove the materials had been delivered to the premises. The evidence is sufficient for this purpose. In a trial de novo 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. Menke v. Foote, 199 Neb. 800, 261 N. W. 2d 635 (1978).

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAN ROJEWSKI, APPELLANT.

272 N. W. 2d 920

Filed January 3, 1979. No. 42057.

1. **Trial: Appeal and Error: Time.** Errors at trial should be called to the attention of the trial court at the earliest practicable time so that appropriate remedial action may be taken.
2. **Trial: Courts: Waiver.** The better practice is for the trial court to inquire whether counsel desire to present closing arguments, but in the absence of a request the right to make a closing argument is waived.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Richard E. Gee, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

BOSLAUGH, J.

The defendant was charged in five counts with obtaining money by false pretenses and in one count with conversion by bailee. A jury was waived and trial had to the court. The defendant was found guilty on all counts and sentenced to 2 years probation including 20 days imprisonment in the county jail and ordered to make restitution in the amount of $1,400.

The defendant has appealed and contends the evidence was insufficient to support the judgment, the trial court erred in failing to allow the defendant's counsel to make a closing argument, and the sentence was excessive.

The five false pretense counts all relate to paychecks received by Carla Jones, a foster child who was living in the defendant's home in 1975. The five paychecks amounted to $111.28, $111.28, $111.28,

$98.49, and $47.38. The information alleged in each count that on the date alleged the defendant obtained money in excess of $35 from Carla Jones on the pretense that the money would be used to pay her tuition at Central Catholic High School.

At the time of the trial Carla Jones was 19 years of age. She had been graduated from high school in May 1977 and was in training to be a medical assistant at the Central Technical Community College. She testified she gave each paycheck to the defendant who then returned a small amount, between $11.28 and $7.38, to her for spending money. She testified the defendant had agreed to put the money in the bank so that it could be used to pay her tuition at the high school. The evidence established the tuition was never paid but was forgiven by the school and the money received by the defendant was not returned to Carla Jones.

The checks which are in evidence show the endorsement of both Carla Jones and the defendant and that the checks were cashed and not deposited. The defendant stipulated her signature appeared on the checks.

The foster home care agreement between the defendant and the welfare department was received in evidence. This agreement provided for the payment of $145 per month to the defendant "to cover the cost of food, housing, clothing, personal and school expenses for the care of the child," with a "Special needs exception." The evidence shows there was a special clothing allowance for Carla in June 1975, in the amount of $150 in addition to the monthly payments to the defendant provided for in the agreement.

The defendant denied there had been any discussion about using the money earned by Carla Jones for her tuition and claimed the money had been spent for clothing and other personal expenditures for Carla. Much of the defendant's testimony was

impeached and the evidence presented questions of credibility for the trier of fact.

The conversion by bailee count related to money belonging to Herbert Walker, a person who lived in the Rojewski home in 1975. Walker was 39 years of age at the time of the trial. He was a former inmate of the Beatrice State Home who had been returned to the community. He was employed as a laborer at Delicious Foods with take-home pay in excess of $200 biweekly. Walker testified that when he was living at the Rojewski home he cashed each paycheck on the way home and then handed the money to the defendant. He received $15 or $20 from each check back from the defendant. Walker testified the defendant said she would put his money in his savings account. When Walker first moved into the Rojewski home he was supposed to pay the defendant $110 per month for room and board. Later he moved into a basement apartment and was supposed to pay $140 per month. According to Walker, soon after he moved into the Rojewski home he gave the defendant $300 he had brought from his former residence.

On December 1, 1975, a check in the amount of $1,449.85, representing the proceeds of a personal trust account of Walker at the Beatrice State Home, was received at the office of the mid-Nebraska Mental Retardation Services in Grand Island. The check was delivered to the defendant who then used it to open a savings account for the defendant at the Five Points Bank in Grand Island in the name of "Herbert Walker or Jan Rojewski." The account was opened with a deposit of $1,000. Withdrawals were made as follows by withdrawal slips signed by both Walker and the defendant: 12-15-75 $200; 1-13-76 $600; 1-30-76 $50; 3-8-76 $120; 6-16-76 $30. On June 30, 1976, the account had a balance of $6.58.

The defendant denied she had used any of Walker's money for herself except possibly for rent payments. She claimed the money had been spent by

Walker for clothing and other personal items and entertainment.

In 1976 and 1977 Walker worked as a volunteer at the Nebraska Veterans' Home. It became apparent to the persons supervising and managing the volunteer activities at the home that Walker was not getting enough to eat and had no money. Their efforts led to the disclosure that his savings account had been depleted and that his living accommodations were not satisfactory.

It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence in a criminal case. The evidence of the State was sufficient, if believed, to establish that the defendant had converted funds of Walker amounting to $1,400.

The defendant contends that the testimony of Carla Jones and Walker can not be relied upon to sustain the conviction. She argues that Walker was retarded and Carla Jones was at times unstable and appeared to suffer from delusions or hallucinations. There was evidence she was taken to a psychiatrist at one time after such an episode.

The credibility of the witnesses was a question for the trier of fact. Much of the testimony of Walker and Carla Jones was corroborated by other witnesses and a substantial part of the evidence against the defendant was documentary. The record does not show that either Walker or Carla Jones was incompetent to testify as a matter of law. We conclude that the evidence was sufficient to sustain a finding of guilt beyond a reasonable doubt on each count against the defendant.

The defendant's principal assignment of error relates to the fact that no closing arguments were made at the close of the evidence. The record shows that the following took place on January 18, 1978, at the end of the trial: "MR. GEE: Your Honor, that's all we have in the way of rebuttal.

THE COURT: Gentlemen, I want to see if we have all of the Exhibits before we do anything else. I'm going to take this matter under advisement, for a day or two, until I can get through the Exhibits. I don't want counsel to leave until we have gotten the Exhibits straightened out. The rest of you may be excused if you like. I'll try to have a decision for you on Friday, at 1:30, so be back here at 1:30 on Friday. END OF HEARING".

On Friday afternoon, January 20, 1978, the trial court announced that the defendant was found guilty on all counts. The defendant made no mention about closing arguments until the motion for new trial was filed on January 24, 1978. At the hearing on the motion for new trial on March 9, 1978, the trial court advised defendant's counsel he could make a closing argument at that time and defendant's counsel did so.

The defendant relies primarily upon Herring v. New York, 422 U. S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593. The Herring case involved a New York statute which permitted the trial court to refuse to hear closing arguments in any nonjury criminal case. The United States Supreme Court held the statute violated the defendant's constitutional right to counsel.

It is a general rule that errors at trial should be called to the attention of the trial court at the earliest practicable time so that appropriate remedial action may be taken. In this case there was no denial of a request for argument because there was no request by the defendant for an opportunity to present an argument. The better practice is for the trial court to inquire whether counsel desire to present closing arguments, but in the absence of a request the right to make a closing argument is waived. State v. Weippert, 237 N. W. 2d 1 (N. Dak.). See, also, Lee v. State, 369 N. E. 2d 1083 (Ind.); Casterlow v. State, 267 N. E. 2d 552 (Ind.).

In State v. Mann, 361 A. 2d 897 (Me.), the court said: "A failure of the defendant to insist at the proper time upon his constitutional right to be heard in person or by counsel in argument of his cause at the close of the evidence, absent a showing of incompetency of counsel or the presence of exceptional circumstances, will constitute a waiver of such right and operate as an estoppel to his afterwards setting it up against the state. Henry v. State, 1913, 10 Okl. Cr. 369, 136 P. 982, 986. See Cole v. State, 1916, 14 Ala. App. 71, 71 So. 616. The case of State v. Hale, 1971, Mo., 472 S. W. 2d 365 is on all fours with the instant case. In Hale, the Court at the close of all the evidence after stating upon its reconvening following a short recess that it had again reviewed the evidence, announced without the benefit of argument of counsel the punishment to which the defendant was to be sentenced. At no time was there a request on behalf of the defendant that the finding of guilt be set aside or withdrawn to permit oral argument. The appellate Court ruled that the accused was not unconstitutionally denied the right to orally argue his case. To the same effect, see Long v. City of Opelika, 1953, 37 Ala. App. 200, 66 So. 2d 126, certiorari denied 259 Ala. 164, 66 So. 2d 130; Casterlow v. State, 1971, 256 Ind. 214, 267 N. E. 2d 552; United States ex rel. Spears v. Johnson, 1972, 3 Cir., 463 F. 2d 1024; Cf. Moore v. State, 1969, 7 Md. App. 330, 254 A. 2d 717."

In State v. Hale, 472 S. W. 2d 365 (Mo.), the court said: "The right to orally argue may be waived, Henry v. State, supra, and may be lost by failing to request argument. People v. Berger, 284 Ill. 47, 119 N. E. 975. In this case appellant admits that he made no request to be permitted to argue his case to the court at the close of all the evidence, either before or after the court indicated its findings on the issue of guilt, and there is nothing in the record to show that such a request would have been denied."

The defendant is 42 years of age, married, and has completed 2 years of college. She has an excellent employment record and no record of any prior criminal offense. She is presently operating a day school. Probation with restitution was an appropriate sentence.

The defendant asks that the 20-day jail sentence which was imposed as a part of the probation be eliminated. The trial court imposed the jail sentence because of the nature of the crimes involved, particularly the persons who were the victims. Under the circumstances we find no abuse of discretion by the trial court.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurring in part and dissenting in part.

I concur with the portion of the opinion which concludes that the evidence was clearly sufficient to sustain a finding of guilt beyond a reasonable doubt.

I disagree with the portion of the opinion which finds that the defendant's constitutional right to have her counsel make a summation was waived. As I interpret the record, it seems clear the trial judge did not intend to hear oral argument and counsel's insistence upon the right would have been unavailing. I further feel that the granting of an opportunity for oral argument after the judge had already made up his mind did not cure the error.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. EDMUND HOLLSTEIN, RESPONDENT.

274 N. W. 2d 508

Filed January 10, 1979. No. 41124.

1. **Attorneys at Law: Disciplinary Proceedings: Evidence: Proof.**

In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a preponderance of the evidence, so that the court is satisfied to a reasonable certainty that the charges are true.

2. **Attorneys at Law: Disciplinary Proceedings: Proof.** In disciplinary proceedings of members of the bar the findings must be sustained by a higher degree of proof than that required in civil actions yet falling short of the proof required to sustain a conviction in a criminal action.
3. **Attorneys at Law: Disciplinary Proceedings: Evidence: Proof.** In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence.
4. **Attorneys at Law: Disciplinary Proceedings.** An attorney should not only avoid impropriety but should avoid the appearance of impropriety.
5. **Attorneys at Law: Disciplinary Proceedings: Canons.** DR7-104 (A) (1) provides that during the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
6. **Prosecuting Attorneys: Disciplinary Proceedings: Motions, Rules, and Orders: Criminal Law.** A city or village attorney whose duties include prosecuting violations of ordinances and state statutes may not voluntarily represent anyone charged with a crime, unless his employment as attorney for a defendant is approved by an order of the court in which the case is pending.
7. **Attorneys at Law: Prosecuting Attorneys: Disciplinary Proceedings.** Ignorance of the law is no excuse. It applies with even greater emphasis to an attorney at law who is expected to be learned in the law. It should be particularly applicable to a city attorney who should make himself conversant with the duties of his office. A city attorney should also be aware of disciplinary rules and advisory opinions, particularly those applicable to his duties as a public officer such as a county or city attorney.
8. **Attorneys at Law: Disciplinary Proceedings: Evidence: Appeal and Error.** The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof.

Original action. Judgment of censure.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for relator.

M. J. Bruckner of Marti, Dalton, Bruckner, O'Gara & Keating, for respondent.

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

BRODKEY, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on relation of the Nebraska State Bar Association against Edmund Hollstein, a lawyer duly admitted and licensed to practice his profession in this state.

Formal charges were filed against the respondent in this court on October 28, 1976, alleging respondent had violated DR1-102 (A) (5) and (6); DR5-103 (A); DR5-104; DR5-105 (A) and (B); DR7-101 (A) (1); DR7-102 (A) (3) and DR7-104 (A) (1) and (2) of the Code of Professional Responsibility of the Nebraska State Bar Association. The respondent was also charged with violating EC5-7 and EC8-8 of that code.

The referee appointed by this court held a hearing on the formal charges in the Sheridan County courthouse at Rushville, Nebraska, on June 23, 1977, and filed his report in this court on February 22, 1978. He found that the respondent had violated the aforementioned disciplinary rules as set out in Counts I to V of the formal charges (with the exception of one of the charges contained in Count I), and recommended that respondent be suspended from the practice of law for a period of two (2) years. Respondent has filed exceptions to the report of the referee, and the matter is now before us for review of his report.

Before discussing the merits of the allegations contained in the five counts of the formal charges against the respondent, it will be helpful to examine the background for those charges. With the exception of the allegation contained in Count V of the formal charges, all of the other charges arise out of

dealings he had with various members of the Robins family, longtime Sheridan County residents. Bennett Robins and his wife, Frieda, were married on June 7, 1916. They had four children, including two sons, Clifford and Leonard. Leonard was a mongoloid child who was unable to care for himself to any significant degree. Both Bennett Robins and Leonard Robins are now deceased. Bennett and Frieda owned a ranch consisting of approximately 6,000 acres in Sheridan County.

On April 1, 1959, Frieda commenced an action for divorce against her husband, Bennett Robins, and respondent represented Frieda in that action. The decree entered in that case on April 18, 1961, awarded and set over the Robins ranch to Bennett Robins, and provided, among other things: "That the responsibility for paying for the care, custody, control and supervision and the education of Leonard Edwin Robins, son of said parties shall be and hereby is charged and confided to the defendant [Bennett Robins] and that said party is ordered, as long as is necessary, to support and provide for said son, in the same manner that he has been doing for many years last past." Since respondent participated in the preparation of the divorce decree, and also the stipulation upon which it was based, it is clear that he was aware of the provision imposing the obligation for support of Leonard upon the defendant, Bennett Robins.

Approximately 1 month later, on May 29, 1961, Bennett Robins contracted to sell the ranch to his son Clifford for a price equal to an appraisal made by the Federal Land Bank. In order to acquire a loan from the Federal Land Bank, it was necessary that the judgment lien for the care of Leonard be subordinated to the lien of the Federal Land Bank. On June 1, 1962, Bennett made an application to the District Court for Sheridan County to modify the aforementioned divorce decree so as to make the

"potential lien of care for Leonard Edwin Robins to be junior and inferior to said lien of said Federal Land Bank of Omaha." In support of the application for modification, Clifford filed an affidavit agreeing to assume the potential lien for the support of his brother if his father should default. The court modified the divorce decree on June 4, 1962, providing, among other things: "It is further ordered that subject to the lien of said Land Bank mortgage, the real estate sold by defendant to Clifford Robins shall be changed (sic) with the lien for the support of said incompetent until discharged by the death of said incompetent or otherwise as provided by law; * * *." The court, however, did not transfer the responsibility for the care of Leonard to Clifford Robins. Respondent did not represent any of the parties in this proceeding, but was aware of the lien for support of Leonard by discussions he had with Bennett and Clifford. Bennett deeded the ranch to Clifford on June 12, 1962, and on August 30, 1962, Clifford and his wife, Dorothy, gave a mortgage to Bennett in the amount of $36,000, which mortgage was secured by the ranch but was expressly made junior and inferior to existing liens of record. Respondent did not draft any of the documents involved in these transactions nor represent any of the parties thereto.

However, the record reveals that respondent did represent Clifford Robins in a guardianship proceeding for Leonard Robins. He drafted the necessary documents for that purpose, and on September 9, 1963, filed the petition in the county court of Sheridan County requesting that the court appoint Clifford as Leonard's guardian; and on November 17, 1963, the court entered an order to that effect. Apparently, the guardianship was set up so Clifford could obtain state aid for Leonard, his incompetent brother. Although it is claimed the guardianship was inactive and that nothing further was ever done in connection

with the guardianship after Clifford was appointed guardian, the record does not reveal the guardianship was closed or that Clifford was discharged as guardian. As a matter of law, at all times involved herein, Clifford was the legal guardian of Leonard.

Next, in the chronology of events, it appears that on September 16, 1970, Dorothy Robins filed a petition for divorce against her husband, Clifford, in the District Court for Sheridan County. A divorce decree was entered on February 8, 1971. Prior to filing the petition, both parties had contacted respondent concerning representation; but the respondent, because of his friendship with both parties, declined to represent either of them, and recommended that they obtain their own respective counsel. Dorothy then retained Michael Smith as her attorney, and Clifford retained Gordon Shaffer. The decree provided for specified payments of child support for each of the four children, and alimony to Dorothy, payable in installments, and specifically provided that the settlement be secured by the Robins ranch.

Although respondent did not represent Clifford or Dorothy in their divorce proceedings, it is clear from the record that he did represent Clifford Robins both before and after July 20, 1972, on which date respondent and/or his wife obtained a proprietary interest in the Robins ranch under the circumstances hereinafter related. In this connection, respondent concedes and acknowledges that the interest obtained in the transaction was really his, notwithstanding the fact that his wife's name appears as grantee in the conveyance in question.

The events leading up to the transactions on July 20, 1972, are that on April 5, 1972, Clifford Robins, who had apparently decided to abandon his ranching operations and to commence racing dogs, leased a portion of the ranch to one Don Forney. The lease was drawn by respondent and gave Forney the right of first refusal in the event Clifford decided to sell

the ranch. Shortly thereafter, Clifford became interested in purchasing a dog kennel in Sioux City, Iowa, but lacked sufficient funds at that time to do so. Clifford therefore attempted to borrow the necessary money from the Stockmen's National Bank of Rushville, but was unable to do so because the bank required that it have a second mortgage, which meant there would have to be a subordination of Leonard's support lien, Bennett's mortgage, and Dorothy's child support and property settlement lien. In an effort to accomplish this result, Clifford asked Dorothy Tinsley, his former wife who had since remarried, to meet him in respondent's office to discuss subordination of her liens. While at respondent's office, Dorothy announced that she would like to consult with her own attorney, Michael Smith, of Gordon; whereupon respondent told them to go to Smith's office and discuss the matter. The record reflects that respondent called Michael Smith and informed him that he was sending Dorothy and Clifford to talk to him. On the following day, after discussing the matter with Michael Smith, Dorothy informed Clifford that she would not subordinate her liens against the ranch. These conversations occurred about July 17, 1972.

On or about that same date Clifford visited his father and discussed releasing the mortgage Bennett held against the property, and also discussed the future responsibility for Leonard's care. Clifford testified that Bennett told him he did not want the money but only wanted Clifford to take care of him, and decided they should "Go down and get this mortgage released." Clifford had never made any payments to his father on the mortgage, but testified his father wanted to release the mortgage to assist him in refinancing the ranch. Thereafter, on July 18, 1972, they both went to respondent's law office and requested him to draft the necessary instruments to release the mortgage, which respondent

did. Bennett signed the release at that time. There was also a discussion with reference to transferring the responsibility for Leonard's support back to Bennett so Leonard might continue to obtain state aid. Respondent informed both Bennett and Clifford that while they could file a release of the judgment for Clifford's care of Leonard, it would not be effective until an application for that purpose was approved by the court. These actions would seem to belie respondent's contentions that Bennett did not consult respondent at any time seeking independent professional judgment concerning the advisability of executing the release of the mortgage or the release of the judgment for the care and support of his son. We believe the acts of respondent, with respect to these matters, were clearly more than ministerial, and constituted the practice of law. It would appear respondent was acting as an attorney for Bennett in connection therewith.

In any event, it is undisputed that respondent did draft the release of the judgment for the parties, and Bennett signed it on July 20, 1972. The release was filed in the District Court for Sheridan County on July 25, 1972. Respondent contends, however, that he advised them that the release was of no force and effect until approved by the court. He disclaims any responsibility for obtaining such court approval because of the advice he gave them that the court's approval was necessary before being effective. The record does not reveal any specific instructions or agreement between the respondent and his clients from which it may be concluded that the clients were charged with the responsibility of obtaining the court's approval. It is clear the respondent was consulted by Bennett and Clifford for the purpose of releasing the judgment in order to shift the responsibility for Leonard's support back to Bennett; in fact, the respondent drafted the documents in question for them.

It appears Clifford continued to have problems in arranging financing for the purchase of the dog kennel, and therefore went to respondent's office on July 20, 1972, and asked the respondent to contact Don Forney with reference to purchasing Clifford's ranch. Forney came to respondent's office and talked to Clifford about the sale and purchase of the ranch. Clifford and Forney eventually agreed upon a figure based on an estimate of $40 per acre for the 6,000 acres. Forney testified it was Clifford who set the price and he paid Clifford the price he asked. Forney testified that because he did not have the cash necessary to pay for the ranch, he asked the respondent if he would like to join him as a partner in buying the ranch. Forney testified he knew respondent owned considerable land holdings and might be interested in becoming a partner with him in purchasing the ranch. After thinking about the matter for a short time, respondent agreed to join Forney in the purchase of the ranch. Respondent then called his wife, Marian, into the office and informed her she had just bought some land. This news made Mrs. Hollstein very unhappy, as she did not want her husband to take on any more responsibilities. Nevertheless, on that same date, July 20, 1972, an agreement, drafted by respondent, was entered into between Clifford L. Robins and Madeline C. Robins, husband and wife, as first party, and Donald W. Forney and Marian Hollstein, as second party. Simultaneously Clifford and Madeline executed a warranty deed conveying the property to Donald W. Forney and Marian A. Hollstein as tenants in common, as grantee. Respondent has admitted and agreed that although the instruments were drafted listing his wife as the grantee and purchaser, the transaction should be considered the same as if he had personally been a party thereto. Respondent has cited authority to the effect that it is not illegal for an attorney to purchase property

owned by his client, providing full and fair disclosure is made of all the circumstances. It is not clear from the record why respondent placed the title to the property in the name of his wife, and also made her a party to the contract with Clifford Robins and his wife Madeline; but it is suggested in the record that it may have been for estate planning purposes. Under the agreement which respondent drafted, Clifford, Donald Forney, and Marian Hollstein, agreed, among other things, to assume the property settlement and child support judgments owed to Clifford's first wife Dorothy. The agreement provided: "It is agreed that any possible liability of Clifford L. Robins for the support of his brother, Leonard E. Robins is the responsibility of First Party and shall not be in any way a lien or charge on said land and Bennett A. Robins having today for valuable consideration received from Clifford L. Robins, executed a release to the said Clifford L. Robins, also known as Clifford Leon Robins, this consideration being $500.00 is held for the benefit of the said Leonard E. Robins, also known as Leonard Edwin Robins." The warranty deed to Donald W. Forney and Marian A. Hollstein, as tenants in common, was also made subject to the Federal Land Bank mortgage, the property settlement judgment with Dorothy L. Robins and the child support judgment, which Donald Forney and Marian Hollstein assumed and agreed to pay on or before the due dates and to save and hold grantors free and clear of any liability thereon; and was also subject to the 1971 taxes, and other items.

Thereafter, on August 11, 1972, the State terminated the payments it had been making for Leonard's care; and the respondent, feeling the court would probably not approve the judgment release, informed Clifford that he would continue to have the responsibility for taking care of Leonard. Clifford then took Leonard to the ranch, where Leonard

lived until his death, on June 10, 1974.

Upon learning of the purchase of the property by the respondent, Dorothy Robins Tinsley contacted him concerning a possible lump sum agreement for the property settlement payments provided for in her divorce decree from Clifford. It appears Dorothy and her family had been friends and social acquaintances of respondent and his family prior to her divorce from Clifford, and respondent relies on this fact as justification for his having conversations with Dorothy relative to her lien upon the ranch arising from her divorce decree. The record does not reveal the exact date upon which Dorothy initiated her first contact with respondent about the release of the judgment lien; but it is clear both she and Michael Smith, her attorney, had conversations with respondent about the situation. The record reveals instances in which respondent made calls of a social nature to Dorothy, but in each of these calls it appears respondent also discussed business matters with Dorothy relative to the settlement of her claims against the ranch. Introduced into evidence at the hearing before the referee was a letter written by Dorothy to her attorney, Michael Smith, under the date of January 3, 1973, in which she stated, among other things: "I received a letter from Ed Hollstein about my property settlement he claims they can't pay me off because of you. * * * He claims since you are after Cliff about Leonard that makes my situation different because you are going to put a lien on the ranch. * * * He did say if I would call you off they would be glad to settle it in full at 9%. I just told him I never had anything to do with what you had to do. * * *

"Please write and let me know what you think and see if you think I can still get my yearly income." Michael Smith thereupon wrote his client Dorothy, suggesting she send him a copy of the letter from the respondent which she referred to and also suggested

she continue corresponding with the respondent and provide him with copies of all future letters the respondent wrote to her. Michael Smith testified he had never received a copy of the letter Ed Hollstein wrote to Dorothy, referred to in her letter to Smith dated January 3, although Dorothy wrote Smith that she had sent him the letter. However, Dorothy testified she might have been mistaken as to whether the communication between Ed Hollstein and her was by letter or not, and it might very well have been in a telephone conversation. She insisted, however, there had been such a communication by respondent to her in which the statements about which she had written Michael Smith had been made to her by respondent. Apparently Michael Smith was the person who filed the original complaints which resulted in this disciplinary action.

Count V of the formal charges filed against respondent concerns itself with a totally unrelated matter. It appears that in 1975 respondent was the city attorney and part-time city prosecutor for the city of Hay Springs; and was retained to represent one Donald Toof, who had a criminal complaint filed against him by the county attorney of Sheridan County. The defendant, represented by respondent, subsequently entered a guilty plea and was fined. At that time advisory opinion No. 72-13 of the Nebraska State Bar Association provided that a city or village attorney whose duties include prosecuting violations of ordinances and state statutes may not voluntarily represent anyone charged with a crime. That opinion was later supplemented by the addition of the words "unless his employment as attorney for defendant is approved by an order of the court wherein the case is pending." Respondent admits he did not obtain approval of the court of his representation of Mr. Toof before appearing as defense counsel in the case. Respondent admits his violation of the afore-

mentioned advisory opinion, but in mitigation thereof alleges he was unaware of the opinion and has since entered into an agreement with the city of Hay Springs to the effect that he would only represent the city in civil matters and as legal advisor, and would not act as city prosecutor henceforth.

It will be helpful at this point to set out the standard of review in this court of proceedings such as this. We have held that the relator must establish the allegations in the formal charges by a clear preponderance of the evidence, so the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Rhodes, 177 Neb. 650, 131 N. W. 2d 118 (1964). The findings must be sustained by a higher degree of proof than that required in civil actions yet falling short of the proof required to sustain a conviction in a criminal action. State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136 (1957). Also, in a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Richards, *supra*; State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641 (1953).

Count I charges respondent with violating DR5-105 (B) and DR7-104 (A) (2) by participating in transactions whereby Clifford Robins secured a release from Bennett Robins of a $36,000 mortgage without consideration or with inadequate consideration; and with shifting the burden of support of Leonard, Bennett's incompetent son, from Clifford to Bennett at a time when Bennett himself was ill and destitute. The referee found the charges in Count I, with reference to Clifford Robins securing the release from Bennett Robins of the $36,000 mortgage, were not sustained by a clear preponderance of the evidence, as the testimony is undisputed that Bennett wanted

to give the mortgage to Clifford and to release it of record in order to assist Clifford in refinancing the ranch. We agree. However, the referee did find the respondent had violated DR7-104 (A) (2), with reference to shifting the burden of support for Leonard Robins, by giving advice to Bennett Robins who was not represented by a lawyer, when Bennett's interests were in conflict with the interests of the respondent's client, Clifford Robins; and by so advising at a time when the father was ill and without financial resources. There can be little doubt that an attorney-client relationship existed between respondent and Clifford Robins on July 18, when Clifford and Bennett came to respondent's office to get the release of the mortgage prepared, and they discussed the release of the judgment for Leonard's support. There is, however, a question as to whether the evidence clearly shows an attorney-client relationship existed at that time between respondent and Bennett Robins, although respondent, in his testimony with reference to what transpired at that time, admitted he told Clifford with regard to his representation: "So let us just say I was representing both of you when I made the release, right?" And Clifford answered "Yes. Right." The referee concluded that in advising both Clifford and Bennett in reference to the release of the judgment of the support of Leonard, respondent was in violation of either DR7-104 (A) (2) or DR5-105 (B), since Clifford was being relieved of the obligation for Leonard's care, which was adverse to Bennett's interest because he was reassuming the obligation for Leonard's support for a cash consideration of only $500. The referee concluded, however, if there was an attorney-client relationship between respondent and Bennett Robins at the time of the conference on July 18, 1972, there would not be a violation of DR7-104 (A) (2) because respondent would be representing both parties to whom he gave advice in reference to

releasing the judgment for the support of Leonard. We conclude that while the circumstances were, indeed, highly suspicious, and susceptible to more than one construction, we do not believe the evidence establishes to a reasonable certainty that the charges are true.

With respect to Count II, the referee found respondent violated DR5-105 (B) and DR7-101 (A) (1) in failing to take steps to protect the interest of Clifford's incompetent brother, Leonard, and that respondent knew, at that time, Clifford was the guardian for Leonard, since respondent was the attorney who conducted the guardianship proceedings in which Clifford was appointed. While the evidence with reference to this charge is again susceptible to more than one interpretation, we conclude that this charge, too, has not been established by a clear preponderance of the evidence. There seems to be little question that the obligation which was imposed upon Bennett A. Robins by the provisions of the divorce decree of 1961 for Leonard's care, custody, control, and supervision, whether or not those provisions resulted in a lien on the ranch, was never modified so as to shift the responsibility from Bennett to Clifford, as a matter of law. However, it is clear Clifford assumed that responsibility and took care of Leonard up until the time of his death. It seems clear Leonard Robins was not at any time a client of respondent, and hence there was no violation of DR5-105 (B) which prohibits "Continuing multiple employment when exercise of independent professional judgment adversely affected representation of another client." Respondent's client was Clifford Robins. It must also be remembered that the release of the judgment in question was probably ineffective under Nebraska law because of the fact it was not approved by the court, and there is a question in this case as to who had the responsibility of obtaining such court approval. Apparently the At-

torney General also agrees there was no violation of Count II, about which more will be said later in this opinion.

The referee next found the respondent guilty of the charges contained in Count III, which alleged a violation of various Disciplinary Rules and Canons of Ethics set forth in the formal charges. This count concerns itself with the propriety of respondent obtaining an interest in the Robins ranch from Don Forney who had purchased it from Clifford Robins. The entire transaction was negotiated in one day, July 20, 1972, in respondent's office. It seems clear, however, that the transactions between Clifford Robins and Don Forney were initiated by Clifford, and the sale price was arrived at by conversations between Robins and Forney. It was only after the terms had been agreed upon that respondent was invited by Forney to become his partner in the transaction. Respondent acquired a proprietary interest in the property through his wife, in whose name title to the property was taken as a tenant in common with Forney. We concede the transactions in question were of a very suspicious nature which might lead someone, not knowing the facts, to conclude there was overreaching and unethical procedures involved. In State ex rel. Nebraska State Bar Assn. v. Richards, *supra,* we stated, quoting from Opinion 49 of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134: "An attorney should not only avoid impropriety but should avoid the appearance of impropriety." Had respondent been charged with the violation of this canon, or DR9-101 which apparently limits somewhat the scope of that prohibition, we would have little difficulty finding a violation thereof by the respondent. However, respondent points out that it is not a breach of ethics for an attorney to acquire an interest in property of his client where full disclosure of all the circumstances are made.

See Annotation, Attorney and Client: Disciplinary proceeding based upon attorney's direct or indirect purchase of client's property, 35 A. L. R. 3d 674, et seq. There seems little doubt that full disclosure was made to all the parties involved in the transaction of July 20, 1972, and all parties involved knew the facts and circumstances regarding the transaction. Under the standard of review adopted by this court, we find no violation occurred as charged in Count III.

The referee also found respondent guilty of violating DR7-104 (A) (1) as charged in Count IV of the formal charges. That disciplinary rule provides that during the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. While respondent did not represent either Dorothy or Clifford in their divorce proceedings, primarily because of his friendship with both of them, he knew at all times that attorney Michael Smith represented Dorothy, and he did have certain conversations with her on various occasions regarding the release of Dorothy's lien on the ranch. Respondent also knew on July 20, 1972, when he entered the transaction with Forney to purchase the Robins ranch, that Michael Smith represented Dorothy Robins Tinsley in reference to her property settlement liens. Michael Smith also testified he had a personal telephone conversation with respondent on July 31, 1972, with reference to the property settlement payments, and again on August 8, 1972. It is also clear from the record that after respondent acquired an interest in the ranch in the transaction of July 20, 1972, he talked to Dorothy in person, corresponded with her by letters and talked to her on the telephone on various occasions with

reference to the settlement of the property lien against the ranch and in regard to the child support payments due under the divorce decree. Respondent also had invited Dorothy to call at his office the next time she was in Rushville so they could discuss certain matters.

The referee found, in mitigation of this charge, that subsequent to January 12, 1973, Michael Smith wrote a letter to Dorothy in which he instructed her to write a letter directly to respondent and to demand the property settlement as required by the divorce decree. He found that Smith's consent to further correspondence between respondent and Dorothy was implied and fell within the exception clause of DR7-104 (A) (1) prohibiting communication with a party he knows to be represented by a lawyer "unless he has the prior consent of the lawyer representing such other party." Dorothy also testified she had no complaint against the respondent, and respondent did nothing to take advantage of her. While we do not believe prior existing friendships and social contacts between an attorney and third parties justify a violation of DR7-104 (A) (1), we feel constrained to hold that the charge contained in Count IV is not sustained by a clear preponderance of the evidence.

The referee also found the respondent had violated DR5-105 (A) and EC8-8 of the Code of Professional Responsibility and Ethical Considerations. Although originally denied, respondent has now admitted that the allegations in Count V are true and correct. He attempts to excuse his conduct on the ground he was unaware of the advisory opinion of the Nebraska State Bar Association prohibiting a city or village attorney, whose duties include prosecuting violations of ordinances and state statutes, from voluntarily representing anyone charged with a crime. Respondent did so in the case of his representation of Donald Toof. In State ex rel. Nebraska

State Bar Assn. v. Holscher, 193 Neb. 729, 230 N. W. 2d 75 (1975), we stated: "We have repeatedly recognized the ancient maxim that ignorance of the law is no excuse. It is a maxim sanctioned by centuries of experience. * * * It applies with even greater emphasis to an attorney at law who is expected to be learned in the law. It should be particularly applicable to a county attorney who should make himself fully conversant with the duties of his office." While Holscher dealt with the failure of a county attorney to know the statutory law of the state, we believe the same reasoning may be applied with reference to disciplinary rules and opinions on disciplinary matters, particularly those applicable to the performance of his duties as a public officer, such as a county or city attorney. We take judicial notice that the Code of Professional Responsibility of the Nebraska State Bar Association, including the Disciplinary Rules and advisory opinions, have been circulated to all members of the Nebraska State Bar Association. Respondent is clearly guilty of the charge against him contained in Count V.

We call attention to a rather unique aspect of this case, which is that the Assistant Attorney General of the State of Nebraska, representing the relator, Nebraska State Bar Association, in his brief filed on appeal in this matter, as well as in his oral argument, apparently agrees with the contentions made by respondent and states he is not fully persuaded that some of the findings in the report of the referee are supported by a clear preponderance of the evidence. He states: "The only disciplinary or ethical consideration violation which we feel is supported by a clear preponderance of the evidence is that under Count V, pertaining to respondent's representation of a defendant in a state statute criminal prosecution." He further states, however, that Count IV, relating to communications with a party represented

by counsel, is, in his judgment, borderline. He concludes: "The final, and in some respects possibly the most difficult, matter for consideration is the fact of the respondent having previously been suspended from practice by this court, in 1961, on account of a federal income tax violation." It is his opinion that the 2-year suspension recommended by the referee "would appear to be unduly severe if this court should conclude, as have we, that not all of those findings are supportable on the record."

This brings us to a consideration of what the proper sanction to be applied to the respondent in this case should be. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. Rhodes, 177 Neb. 650, 131 N. W. 2d 118 (1964). There is little question that we may properly consider, and, in fact we should consider, that respondent has heretofore been suspended from the practice of law in this state for a period of 1 year from August 3, 1961, for income tax evasion. He has since reapplied for admission to the bar of Nebraska and has been readmitted. However, he is subject to further discipline in this case. On the totality of the circumstances in the record before us, we believe that censure of respondent would be an appropriate penalty. We feel what we have stated in this opinion is a sufficient censure of respondent's failure to fully live up to his responsibility as a lawyer; and we therefore censure him, with the admonition that in the future he be more circumspect of his conduct.

Costs, including the fee of the referee, are taxed to the respondent.

JUDGMENT OF CENSURE.

SPENCER, C. J., PRO TEM., dissenting.

I respectfully dissent from the majority opinion herein because I believe the findings of the referee

are sustained by the record. Edmund Hollstein should be suspended from the practice of law as recommended by the referee.

I agree with the referee, respondent violated DR5-105 (B) and DR7-101 (A) (1) in failing to take steps to protect the interests of Clifford's incompetent brother Leonard. Respondent knew his client Clifford was the guardian for Leonard, since he was the attorney who conducted the guardianship proceedings in which Clifford was appointed the legal guardian for Leonard. He knew that Clifford's interest in releasing the ranch from the lien of support for Leonard was in conflict with Leonard's interest of having this lien as security for his continuing support. As attorney for the guardian, he essentially was the attorney for the incompetent, and owed a duty to the ward to protect his interest in the property.

Respondent argues it was the duty of the court to protect the rights of the incompetent. This to me demonstrates a woeful lack of appreciation for his responsibility. Respondent was an officer of the court, who had full knowledge of the situation and who actually was the attorney for the incompetent. It was his duty to fully apprise the court of what was happening and to show how it would affect the rights of the incompetent.

I also agree with the referee that the respondent violated all of the disciplinary rules and canons of ethics set forth in Count III of the formal charges. In addition to the evidence enumerated in Count I, disclosing there was an attorney-client relationship between respondent and Clifford Robins on several occasions prior to July 20, 1972, the record shows on that date Clifford again came to respondent's office and asked him to get in touch with Don Forney about buying the ranch. Respondent called Forney on the telephone and Forney came to respondent's office that same day and talked to Clifford Robins about

the sale of the ranch. Respondent was the only attorney involved and helped the parties negotiate the terms. During the negotiations Don Forney asked respondent to become a partner with him in purchasing the ranch from Clifford. Respondent did so, and named his wife as a tenant-in-common with Forney in the contract and deed. At all times respondent knew the ranch was subject to a lien for the support of Leonard, as ordered by the court. He also knew that it was subject to liens for property settlement and child support in the District Court for Sheridan County in the divorce proceedings between Dorothy Robins Tinsley and Clifford Robins. In both of these cases the ranch was the subject matter of litigation in which respondent acquired a proprietary interest through his wife.

I also agree with the referee that respondent violated DR7-104 (A) (1) of the Code of Professional Responsibility, as alleged in Count IV. Respondent did not represent either Dorothy L. Robins or Clifford L. Robins in their divorce case. Sometime in June 1972, Clifford and his second wife, and Dorothy Robins Tinsley, formerly Dorothy L. Robins, came to respondent's office in Rushville. At that time Dorothy told respondent that Michael Smith was her attorney. Dorothy Tinsley had gone to respondent's office with Clifford Robins to discuss the subordination of her liens for property settlement and child support against the ranch so Clifford could get another loan from the bank. Respondent subsequently called Smith so he was well aware that Smith was her attorney.

The evidence is clear that on July 20, 1972, when respondent entered into the transaction with Donald Forney to purchase the ranch from Clifford Robins, he had personal knowledge of Michael Smith's representation of Dorothy Robins Tinsley in reference to her property settlement and child support liens against the ranch. After he acquired a proprietary

interest in the ranch, he talked to Dorothy Robins Tinsley in person, corresponded with her directly by letters, and talked to her on the telephone numerous times in reference to settlement of her property settlement lien against the ranch and in regard to child support payments due under the divorce decree. His conduct in talking directly to the client of another attorney cannot be excused on the ground they had been personal friends. If respondent did not understand that when a friend is represented by another attorney he could not deal with her personally about the subject matter of the other attorney's employment, he is not qualified to practice law.

For all of these reasons, I believe the recommendation of the referee should have been adopted. I cannot go along with a slap on the wrist in this instance. The respondent should be suspended from the practice of law.

CLINTON, J., concurring in part and dissenting in part.

I believe the evidence supports the finding of the referee that the respondent did violate DR5-105 (B) and DR7-101 (A) (1), in acting adversely to the interest of the incompetent ward and was therefore guilty on Count II of the complaint. However, as the report of the referee shows, no harm did result from the violation, nor does it appear that harm was intended or likely to result.

I believe also that the evidence clearly supports the finding of the referee on Count IV of the complaint in that respondent communicated with the client of another lawyer without consent. The referee properly points out, however, that the violation was a technical one with no harm resulting or intended and no advantage was taken of anyone.

I otherwise agree with the majority opinion.

The judgment of reprimand is sufficient under the circumstances of this case.

ELAINE M. WITT, APPELLANT, V. SCHOOL DISTRICT NO. 70, FRONTIER COUNTY, NEBRASKA, APPELLEE.

273 N. W. 2d 669

Filed January 10, 1979. No. 41673.

1. **Schools and School Districts: Statutes: Waiver: Notice.** Participation in the hearing required under section 79-1254, R. R. S. 1943, is ordinarily a waiver of any defect in the notice of the hearing.
2. **Public Meetings Act: Notice: Waiver: Time.** Any person who has notice of a meeting and attends the meeting should be required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given.
3. **Public Meetings Act: Statutes: Limitations of Actions.** The right to collaterally attack orders made in contravention of the Public Meetings Act for a period of 1 year is specifically provided by section 84-1414, R. R. S. 1943.
4. **Schools and School Districts: Tenure: Notice.** A tenured teacher whose position has been abolished has a right to be retained to fill any vacancy for which she is qualified for the next school year which occurs after notice of the elimination of her position.

Appeal from the District Court for Frontier County: JACK H. HENDRIX, Judge. Reversed and remanded.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

McCarthy, McCarthy & Vyhnalek, for appellee.

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

SPENCER, C. J., PRO TEM.

This is a declaratory judgment action to declare the termination of plaintiff's teaching contract void pursuant to section 84-1414, R. R. S. 1943, for the failure of the school board to comply with the Public Meetings Act. The District Court held plaintiff had waived any defects in the notice; determined the school district had substantially complied with the statutory requirements; and dismissed the plain-

tiff's petition. We reverse and remand.

Plaintiff began her employment with the school district in 1968. For the first 3 years, she taught third grade students at the Curtis grade school. From 1971 until the termination of her contract in 1976, she was assigned to teach a special reading program for all grades at the elementary level. Her duties also included teaching a class in sixth grade English, and a class in sixth grade reading.

For the first half of each school year the special reading program was devoted to remedial reading. The second half of the school year involved a developmental reading program in which plaintiff instructed average or above average students. Both programs required that students be removed from the regular classrooms.

In 1975, the school district hired a resource teacher who was specially trained to instruct children with learning disabilities. This teacher was supplied by Educational Service Unit (ESU) No. 15. The testimony indicated that the instruction offered by the resource teacher overlapped with the program taught by plaintiff. In early 1976, the superintendent recommended to the school board that the special reading program be eliminated because of the duplication of effort and expense. The matter was discussed at the regular board meeting held on February 9, 1976, but the minutes of the meeting do not recite that any formal action was taken.

On February 13, 1976, the following letter, drafted by the superintendent and signed by the secretary of the school board, was mailed to plaintiff: "This letter is to inform you that the School Board of District #70 will have a staff reduction for the 1976-77 school year involving Special Reading. The tentative plans are to not have the Special Reading position next year. With the increased service and expense involved with being in E.S.U. #15 we feel this move is both financially and educationally sound. The Board

feels that the current scope and anticipated growth of E.S.U. influence in District #70 makes retention of the Special Reading position unnecessary.

"State law requires that any person in the above position may have a hearing in front of the Board of Education if requested in writing to the Board Secretary within five days of the receipt of this letter. The situation, however, is *not* a dismissal of a teacher for lack of professional competence, but merely the elimination of a position."

Plaintiff testified that immediately after receiving the letter she telephoned the secretary of the school board and was informed that it meant she would not have a job the following year. Plaintiff thereupon submitted a written request for a hearing which read in part: "On February 13, 1976, I received your letter dated February 13, 1976, advising me that the Board of Education will consider termination of my teaching contract due to your stated intentions of a reduction in force of the staff at Curtis Public School for the 1976-1977 school year.

"Pursuant to Section 79-1254, I request a hearing before the Board of Education for the purpose of determining if just cause exists for termination." Plaintiff was notified that a hearing would be held February 23, 1976. No public notice was given.

Plaintiff appeared at the hearing with counsel and testified on her own behalf. Testimony supporting the elimination of the position was offered by the superintendent. There is no transcript of that hearing in the record.

The next regular board meeting was held on March 8, 1976. Plaintiff was in attendance. The minutes of the meeting contain the following: "A discussion on the continuation or suspension of the Special Reading program. Moved by Jorgensen to suspend the program, seconded by A. Peterson. Voting aye: A. Peterson, Jorgensen, Heathers, and Traster. Motion carried."

On March 9, 1976, the secretary of the school board mailed the following letter to plaintiff: "At the March 8th School Board meeting of District 70 it was voted 5-0 to eliminate the Special Reading position. The contract will be terminated as of May 24th, 1976."

The next day plaintiff mailed the following letter to the school board: "This is to let you know that I am still interested in a position on the Curtis Grade School faculty and would appreciate being given first consideration for any vacancy which may occur." Plaintiff was interviewed for the position of fourth grade teacher but the vacancy was filled by another applicant. For the 1976-77 school year the district also hired a replacement kindergarten teacher, a music teacher, and a fifth and sixth grade science teacher. This declaratory judgment action was filed June 18, 1976, more than 3 months after plaintiff was notified her contract was being terminated.

Section 84-1414, R. R. S. 1943, provides that any motion or formal action taken by a public body in violation of any of the provisions of the Public Meetings Act shall be declared void by the District Court. Among the provisions of the act are the requirements that advance, publicized notice of each meeting be given, § 84-1411, R. R. S. 1943, and that minutes of each meeting be kept, § 84-1413, R. R. S. 1943. Neither of these requirements was met with regard to the school board meeting held on February 23, 1976.

No formal action was taken by the board at the February 23 meeting. The motion to suspend the special reading program was made and the vote was taken at the regular board meeting of March 8, 1976, at which plaintiff was present. The March meeting was held in full compliance with the statutory requirements. Thus, it would appear section 84-1414, R. R. S. 1943, is inapplicable.

In any event, as the District Court determined, we have specifically held participation in the hearing required under section 79-1254, R. R. S. 1943, is ordinarily a waiver of any defect in the notice of the hearing. Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N. W. 2d 335 (1976). Plaintiff and counsel participated in the hearing without raising any question about the public hearing notice.

Plaintiff, by participating in the hearing, waived any defect in the notice. Alexander is controlling. We there said: "The defendants argue that the plaintiffs waived any right to object to the lack of public notice of the meeting by appearing at the hearing and participating in it. We think this argument has merit. Any person who has notice of a meeting and attends the meeting should be required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. See Carter v. City of Nashau, 113 N. H. 407, 308 A. 2d 847. Since the plaintiffs had personal notice of the hearing and appeared and participated in the hearing, but made no objection concerning a lack of public notice, they cannot now complain that the defendant failed to comply with the Public Meetings Act."

The right to collaterally attack orders made in contravention of the Public Meetings Act for a period of 1 year is specifically provided in section 84-1414, R. R. S. 1943. In this action plaintiff is also raising a violation of section 79-1254, R. R. S. 1943. The proceedings had did not foreclose plaintiff's rights under section 79-1254, R. R. S. 1943. That section specifies the procedure to be followed in terminating the contract of a tenured teacher. It provides that a teacher's contract "shall be deemed renewed and shall remain in full force and effect until a ma-

jority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period." The section further provides: "The secretary of the board shall, not later than April 15, notify each * * * teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers may be just cause to either terminate or amend the contract for the ensuing school year."

The notice given to Mrs. Witt advised her the board planned to discontinue the special reading program. It advised her that it was not a dismissal for lack of professional competence but merely the elimination of a position. While the secretary told Mrs. Witt she would be terminated, at no time does the record indicate that the board did other than terminate the particular program. It does not appear the board ever specifically voted to terminate plaintiff's contract. It does not appear this action was even contemplated. The inference is the board believed because it eliminated the program, it terminated the contract. It did not have that effect. Plaintiff was a tenured teacher and was entitled to continued employment unless just cause existed for her removal, or there was a change in circumstances necessitating a reduction in the number of teachers to be employed by the board.

The record indicates Mrs. Witt was qualified to teach all elementary grades. Mrs. Witt was considered for a fourth grade position which became open, but a new teacher was hired. It cannot be said there was a reduction in force when a new fourth grade teacher was hired before the end of the term at which Mrs. Witt's contract was terminated. We hold a tenured teacher whose position has been abolished has a right to be retained to fill any vacancy for which she is qualified for the next school

year which occurs after notice of the elimination of her position. In other words, no new teacher may be hired to fill a vacancy she is qualified to fill. To hold otherwise would simply allow a total emasculation of the tenured teacher act.

An imaginative school board could simply transfer a teacher into a position it knew it intended to abolish; abolish the position the following year; hold the hearing; and terminate the position and the teacher's contract, even if a vacancy should occur for which she was qualified. While this may not have been the intent herein, it does have that effect.

The clear intent of the tenured teacher act is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) Discharge for cause; and (2) reduction in the teaching force. Neither is present in this instance.

The judgment of the trial court is reversed and the cause is remanded to the trial court for an order declaring that Mrs. Witt's employment shall continue until the applicable provisions of law have been complied with.

REVERSED AND REMANDED.

D & J HATCHERY, INC., APPELLEE, V.
FEEDERS ELEVATOR, INC., APPELLANT.

274 N. W. 2d 138

Filed January 10, 1979. No. 41678.

1. **Officers and Directors: Ratification: Corporations.** Unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the acts in question.
2. **Officers and Directors: Agency: Ratification: Corporations.** Ratification of unauthorized acts may be express or may be inferred from silence and inaction; if the corporation, with knowledge of the unauthorized act or of facts putting it upon notice thereof, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it.

3. **Officers and Directors: Agency: Ratification.** The retention of benefits secured by an unauthorized act of an agent with knowledge of the source of such benefits and the means by which they were obtained is a ratification of the act of the agent.

Appeal from the District Court for Wayne County: EUGENE C. MCFADDEN, Judge. Affirmed.

John V. Addison, for appellant.

Neil R. McCluhan and Michael W. Ellwanger, for appellee.

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

KUNS, Retired District Judge.

This is a suit upon a note brought by D & J Hatchery, Inc., appellee, against Feeders Elevator, Inc., appellant. The District Court for Wayne County, Nebraska, entered judgment for the balance found due against the appellant, who prosecutes this appeal. We affirm the judgment.

The record shows a series of transactions occurring between April 8, 1974, and November 22, 1974. During this period, D & J Hatchery, Inc., the appellee, hereinafter referred to as the hatchery, was a corporation, whose president was Dale E. Booth, hereinafter referred to as Booth; Feeders Elevator, Inc., the appellant, hereinafter referred to as the elevator, was a corporation, whose vice president and general manager was John A. Krause, hereinafter referred to as Krause, whose position and employment was terminated on June 8, 1974. On April 8, 1974, Krause told Booth that the elevator was in need of $45,000 to cover an overdraft and outstanding note, and requested a temporary loan for that amount. Booth agreed to make the loan and thereupon issued his personal check payable to Krause; in exchange, Krause drew a corporate check on the elevator and gave it to Booth, stating that funds

would be available to meet it when the check was presented for payment. Krause deposited the Booth check in the elevator account, said check being paid upon presentment. When the elevator check arrived from Booth's bank, the elevator did not have sufficient funds upon deposit to meet it. Thereupon, stockholders of the elevator, who were sureties for the elevator account, were notified that the check had been presented. They testified they informed the bank that the signature was not authorized and directed the bank to return the check unpaid. The bank did return the check unpaid, with a notation there were insufficient funds for the payment of the check. Neither the elevator nor its officers or stockholders communicated in any way with the hatchery or with Booth, either to inquire about the transaction or to disavow Krause' actions. The record does not show what, if any, entries were made upon the elevator books in connection with the transaction.

After the elevator check was presented for payment a second time and remained unpaid, the hatchery sent its field manager, Harold Sankey, to confer with Krause on April 26, 1974. Krause executed and delivered the note in suit on behalf of the elevator, promising to pay the sum of $45,000 upon demand; at the same time, they made an oral agreement that the elevator should pay the note by delivering feed at market prices to the hatchery. Furthermore, they executed a written market egg agreement by which the hatchery agreed to lease 20,200 egg-laying chicks to the elevator and the elevator agreed to provide care for the chicks and to sell the eggs produced at the hatchery at prices scheduled therein. The elevator accepted delivery of the chicks and detailed an employee to care for the chicks and to gather the eggs. The agreement was finally abandoned after the death of a large number of chicks. Krause' authority to bind the elevator on the market

egg agreement was never questioned nor was his action disavowed.

Krause had been engaged in commodity speculations using the credits and accounts of the elevator. The auditor for the elevator testified that during the period subsequent to July 1, 1973, the shortage in the accounts of Krause to the elevator amounted to $88,009, and when he inquired of the president of the elevator how the $45,000 credit item for the Booth check should be treated, the president told him to show it as a payment from Krause for credit upon the above account. This instruction is not shown to be based upon any book entry nor upon any statement either from Booth or Krause.

The evidence refers to the delivery of three shipments of feed to the elevator, charged as follows:

June 1, 1974	$ 8,021.94
July 1, 1974	5,827.38
August 1, 1974	3,509.50
	$17,358.82.

The details of the shipments as to the ordering thereof, the prices charged, and the book entries thereof do not appear in the evidence. At least one or two of the shipments were made after Krause' employment was terminated on June 8, 1974. In November 1974, the hatchery made a written demand upon the elevator for the payment of the balance due upon the note after the application of the three credit items. The elevator made no response. The hatchery then filed suit, alleging both the making of the check and the note, giving credit for the amounts of feed received and praying judgment for the balance. The answer of the elevator contained a general denial and allegations that Krause lacked authority to bind the elevator, that there was no consideration for the note, and that the exchange of checks was a kiting transaction. It filed a cross-petition for recovery of the amounts charged for the feed and also for the sums due to it upon the market egg agreement. The

hatchery replied denying the allegations in the answer, realleging credit for the cost of the feed, denying any amount due upon the market egg agreement, and further counterclaiming for damages resulting from the negligence of the elevator in caring for the chicks. The elevator denied the allegations of negligence against it.

After trial to the court, a jury being waived, a judgment was rendered for the amount due the hatchery upon the note after the credits were applied for the feed shipments and for the amount found due the elevator upon the market egg agreement. Judgment was rendered for the elevator upon the counterclaim for negligence. No appeal was taken from the findings and judgment upon the market egg agreement.

The elevator assigns as error the following: (1) Finding the elevator liable upon the note; (2) finding that Krause had authority to execute the note; (3) the amount of recovery; (4) speculation by the court shown by its memorandum letter of July 19, 1977; and (5) finding that Krause had implied authority to execute the note.

Assignment of error (3) is not supported by any argument or citation of authority and is deemed waived. The elevator did not demand that the trial court make findings of fact and conclusions of law under section 25-1127, R. R. S. 1943. The letter of the court of July 19, 1977, is an informal expression of opinion by the court and is not subject to any assignment of error. The second and fifth assignments do not relate to any express findings made by the court. The general finding by the court does not depend upon a finding of express, implied, or apparent agency of Krause to represent the elevator, and such specific assignments of error are immaterial to this appeal. Our consideration of the case will, therefore, be in the light of the first assignment of error.

Appellant argues that the transaction between

Booth and Krause amounted to "kiting," and was therefore fraudulent. "Kiting" is a fraudulent misuse of credit obtained upon the deposit of false or fictitious paper during the time required for such paper to clear or to be presented for payment. In the instant case, the Booth check was valid and was paid upon presentation; there is no evidence that the elevator check made by Krause was the basis for the securing and use of any credit during the time it was clearing. Appellant's argument on this point is unfounded.

The basic question involved in this appeal is whether the elevator ratified the actions of Krause in the transactions relating to the check and the demand note. In Citizens Savings Trust Co. v. Independent Lumber Co., 104 Neb. 631, 178 N. W. 270, the general rule regarding ratification was stated as follows: "The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it."

In McCook Livestock Exchange Co. v. State, 173 Neb. 766, 115 N. W. 2d 147, after one corporate officer accepted an overpayment in ignorance of the true facts and other corporate officers, with knowledge of the facts, did not disaffirm the transaction and return the benefits thus obtained, it was held that the corporation had ratified the acceptance of the overpayment with all attendant consequences. Furthermore, in Drainage Dist. No. 2 v. Dawson County Irrigation Co., 140 Neb. 866, 2 N. W. 2d 321, when an officer executed an unauthorized contract and made a payment upon it with corporate funds, the failure of the board of directors to disaffirm the transaction

within a reasonable time after receiving notice thereof was held to constitute a ratification. The evidence in this case shows Krause acted in behalf and in the name of the elevator, the deposit of the benefits obtained to the credit of the elevator, there was knowledge by the remaining corporate officers of facts sufficient to put them upon notice of such matters, the delivery of feed shipments constituted apparent part payment, and there was a total failure to disavow and disaffirm Krause' acts and commitments or to return the benefits received during the lapse of considerably more than a reasonable time. We find, therefore, the elevator had ratified Krause' acts and commitments entirely. It has thus made itself liable upon the note in suit and the judgment of the trial court in favor of the hatchery is correct.

AFFIRMED.

RICHARD H. GRUBAUGH, APPELLEE, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.

273 N. W. 2d 673

Filed January 10, 1979. No. 41703.

1. **Administrative Law: Parties: Penalties.** The Real Estate Commission of the State of Nebraska, in imposing penalties for violation of state law, may consider the relative culpability of parties to the same transaction.
2. **Statutes: Courts: Judges.** An adjudicative fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (a) generally known within the jurisdiction of the court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. § 27-201 (2), R. R. S. 1943.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Reversed and remanded.

Paul L. Douglas, Attorney General, and Robert H.

Petersen, Special Assistant Attorney General, for appellant.

William L. Walker and Earl Ludlam, for appellee.

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

CLINTON, J.

This is an appeal from an order of the District Court for Butler County, Nebraska, modifying an order of the Real Estate Commission of the State of Nebraska which suspended the real estate license of Richard H. Grubaugh for 1 year by reducing the suspension to 60 days. The Real Estate Commission has appealed to this court. We reverse and reinstate the order of the commission.

This action by the commission originated under the provisions of section 81-885.24, R. R. S. 1943, against Richard H. Grubaugh, Marvin Grubaugh, and Grubaugh Brothers, a partnership, all holders of licenses as real estate brokers. The licenses of the partnership and Marvin Grubaugh were suspended by the commission for 60 days and no appeal was taken by those parties from the order of suspension. The appellee Richard H. Grubaugh contends his suspension for a period of 1 year is so disparate, compared with the 60-day suspension of the parties who did not appeal and whose suspension involved the same transactions for which he was disciplined, that the action of the commission in his case was arbitrary and unreasonable and therefore the action of the District Court must be affirmed. He makes the same argument of disparateness by asking us to take judicial notice of other disciplinary actions by the commission in allegedly similar cases which he describes in his brief.

The charges of which the three parties were found guilty by the commission involve violations of stat-

utes of the State of Nebraska and regulations of the commission relating to shortages in the trust account of the partnership, payment of a real estate commission before closing of the sale, and preparation of sales contracts showing earnest money payments which had not in fact been made or which were "made" by checks which could not be cashed because the buyer had insufficient or no funds, all without the facts being noted on the contract as required by regulation. It does not appear from the evidence that any person did or was likely to suffer financial loss on account of the offenses in question.

Richard H. Grubaugh's argument that his suspension is disproportionate does not take account of the fact that he was the person in charge of the office of Grubaugh Brothers and it was his personal actions which led to the violations. The responsibility of Marvin Grubaugh was vicarious as he apparently was unaware of and did no act connected with the offenses. Marvin Grubaugh would also suffer unduly if the partnership license were suspended for a period longer than his own.

The Real Estate Commission was entitled to consider the different roles the parties played in the transactions and thus determine their relative culpability. The order of suspension of Richard H. Grubaugh was not therefore arbitrary and unreasonable. We hold the Real Estate Commission of the State of Nebraska, in imposing penalties for violation of state law, may take into consideration the relative culpability of parties to the same transaction.

The second horn of Richard Grubaugh's argument must fail because we cannot take judicial notice of the proceedings in other cases. The courts do not take judicial notice of the acts of government officials or boards in particular transactions. City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543; Housman v. Board of Medical Ex-

aminers of California, 186 P. 2d 187 (Cal. App.); 31 C.J.S., Evidence, § 40, p. 987. An adjudicative fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (a) generally known within the jurisdiction of the court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. § 27-201 (2), R. R. S. 1943.

The order of the Real Estate Commission relative to Richard H. Grubaugh is therefore reinstated with credit to be given for the period of suspension actually satisfied. The unsatisfied portion of the suspension shall begin with issuance of the mandate of this court in this case.

REVERSED AND REMANDED.

CECIL L. NICKMAN AND LAVAGHN NICKMAN, APPELLANTS, v. CHARLES L. KIRSCHNER AND LOIS B. KIRSCHNER, APPELLEES.

273 N. W. 2d 675

Filed January 10, 1979. No. 41705.

1. **Waters: Drainage.** An owner of land has a right in the interest of good husbandry to drain ponds or basins thereon of a temporary character which have no natural outlet or course of flow by discharging the waters thereof by means of an artificial channel into a natural surface water drain on his own property and through such drain over the land of another proprietor in the general course of drainage in that locality even though the flow of such natural drain is thereby increased over the lower estate and provided that this is done in a reasonable and careful manner and without negligence. The same rule applies to the collection and discharge of other surface waters on the owner's land.
2. ____: ____. An artificial drain constructed for the disposition of surface waters need not itself follow the precise course of drainage. It is sufficient if it follows the general course of drainage and drains into a natural watercourse which is reasonably accessible.
3. **Waters: Drainage: Easements.** Continuous use of a prescriptive right of drainage is the uninterrupted use of such right as the need

therefor requires, even if such required use is intermittent in nature.

4. **Waters: Drainage: Jurisdiction.** When a trial court has determined the right to dispose of surface waters into an artificial drain under the rule of Arthur v. Glover, and the construction of said drain has not been completed, such court should retain jurisdiction of the cause to determine the proper criteria for the construction of the drain and until the construction has been done in accordance therewith.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

Parker & Grossart, for appellees.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

RIST, District Judge.

This is an action in which plaintiffs-appellants seek injunctive relief against defendants-appellees enjoining the latter from increasing the flow and volume of water from lands farmed by defendants over and through plaintiffs' lands.

Defendants are the owners of the northwest quarter of Section 33, Township 12 North, Range 16 West of the 6th P.M., in Buffalo County, Nebraska, and lease adjacent thereto and on the west side thereof the north one-half of Section 32, Township 12 North, Range 16 West.

Plaintiffs are the owners of the west one-half of the northeast quarter and the northwest quarter of the southeast quarter, all in Section 4, Township 11 North, Range 16 West of the 6th P.M. in said county, which land lies approximately one-half mile south and immediately east of defendants' lands above described. The South Loup River bisects plaintiffs'

lands running generally west to east in that area.

At all times material herein there was a natural watercourse near the southeast corner of the land owned by defendants which runs a short distance east then southerly across lands belonging to owners not parties to this action and onto and through plaintiffs' land to the river.

In 1918 a culvert was placed under the north-south county road at the southwest corner of the land owned by defendants and a 30-inch cement tube was extended easterly therefrom approximately one-quarter mile along defendants' south boundary to a point where it connected with the natural watercourse above described. The purpose of the culvert and tube was to drain surface water from a lagoon or low area of approximately 80 acres located on the land both owned and leased by defendants. This low area had no natural drainage and would from time to time hold rain and runoff waters until the same evaporated. Surface waters from a drainage area of approximately 1,625 acres also flowed into this tube.

Over the years the cement tube began to deteriorate and break away in the eastern portion thereof causing some washouts and silting so that it did not drain efficiently. In the summer of 1976 defendants replaced the culvert under the road with the approval of the Buffalo County authorities and replaced the cement tube extending easterly with an open ditch having a 12-foot flat bottom and variable height sidewalls. Before the construction of this ditch was completed plaintiffs instituted this action and work on the ditch halted pending its outcome.

Plaintiffs, in their second amended petition, plead what they denominate as two causes of action. The first cause alleges in substance the construction in 1918 of the 30-inch tube, the removal thereof, and its replacement with the flat bottom ditch in 1976; that such construction increased the velocity and volume

of both irrigation and natural waters onto plaintiffs' lands and damaged the same by increasing the deposit of silt and causing erosion. Plaintiffs in their second cause incorporate the allegations of their first cause of action and plead additionally that defendants negligently constructed said open ditch, thereby causing the damages complained of.

Trial was had during which the trial judge viewed the premises. Subsequent thereto the court entered its judgment finding defendants had the legal right to drain the surface water from the lagoon or low area to the natural drain which ran through the defendants' property, citing the case of Arthur v. Glover, 82 Neb. 528, 118 N. W. 111, as authority therefor. The court further found that while the artificial drain represented by the ditch was not in the exact direction of natural drainage it did result in the surface water entering a natural watercourse upon plaintiffs' property at or about the same place as surface waters would naturally drain and that defendants' rights of drainage were not limited by the precise size of the cement tube formerly used by defendants. The trial court denied the relief sought in plaintiffs' first cause of action.

With respect to plaintiffs' second cause of action, the trial court found that although plaintiffs' real estate had been damaged, defendants had not yet completed the construction of their ditch, that they were entitled to a reasonable time in which to do so, that the second cause of action was premature, and the court dismissed it without prejudice.

From this judgment, plaintiffs have appealed.

This being an action in equity, it is triable de novo in this court subject to the rule that where the trial court made a personal inspection of the premises and the physical facts, and where oral evidence is conflicting and cannot be reconciled, this court will consider the fact that such examination was made and considered by the trial court and that such court

observed the witnesses and their demeanor in testifying and must have acepted one version of the facts rather than the other. Erickson v. Tyler, 186 Neb. 743, 186 N. W. 2d 123.

A consideration of the evidence justifies the conclusion that no irrigation waters of any substance ran through the former cement tube or the new open ditch and onto plaintiffs' lands but rather that surface waters from the drainage area previously described, including the lagoon or low area, are the only waters which flowed through the same. This condition has existed since the year 1918. It is also clear from the evidence that the construction of the open ditch, as of the time of trial, had not been completed in accordance with the plans therefor.

The evidence further shows that drainage through the open ditch in its present condition has resulted in some additional silting upon plaintiffs' lands and that the velocity of the water flowing from the open ditch into the drainway has been increased over that which formerly flowed through the cement tube.

The trial court correctly announced the applicable rule to be that set forth in Arthur v. Glover, *supra*, which case cited Aldritt v. Fleischauer, 74 Neb. 66, 103 N. W. 1084, to the effect that "An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence." The fact that this ditch drained a basin or low area located partially upon land owned by defendants and partially upon land owned by others,

but leased by defendants, does not change this rule as two or more adjoining landowners may lawfully join in the construction of a ditch solely upon the premises of one where the object and purpose is to drain a pond situated partly on the lands of all of said proprietors. Arthur v. Glover, *supra.*

The same rule applies to the surface waters which flow to the ditch from the 1,625-acre drainage area and thence into the natural drainway here involved.

Plaintiffs argue that an artificial channel into which surface waters are drained must itself follow the natural course of drainage, and cannot vary therefrom. Plaintiffs assert this is what defendants have done.

This is not a correct assessment of the law. The same argument was made in Bures v. Stephens, 122 Neb. 751, 241 N. W. 542, in which the court said: "The appellant contends that the ditch does not follow the general course of drainage; that without the ditch the water would never run there. That is undoubtedly true, for without it the basin would not drain. We are of the opinion that the ditch carries the water in the general course of drainage." The trial court in the instant case found the ditch upon defendants' land was consistent with the general course of drainage of the area involved. This is a sufficient compliance with the rule. It is also clear that the natural watercourse into which the ditch drains is the only one reasonably accessible to defendants.

It should be noted that the surface waters here involved have flowed into the cement tube and the open ditch which replaced it since 1918 and even if the tube and ditch were at material variance with the general course of drainage, defendants have a prescriptive easement for the purpose of such drainage. The fact that defendants replaced the broken and silted cement tube with a ditch to regain effi-

cient drainage does not destroy the easement. Bures v. Stephens, *supra*.

Plaintiffs argue that intermittent use of the tube and ditch affords no basis for an easement, claiming such use is not a continuous use that would give rise to a prescriptive right. The correct rule as to continuity of use is that it can be stated only with reference to the nature and character of the right claimed. Uninterrupted use of the right as necessary is a continuous use. 25 Am. Jur. 2d, Easements and Licenses, § 56, p. 464; 28 C. J. S., Easements, § 13, p. 648. Where drainage of surface waters into an artificial drain occurs only on those occasions when such waters exist in sufficient quantity to so flow, such use would be continuous for that purpose. This is the case here.

Plaintiffs urge defendants have no right to increase the velocity and volume of water in the ditch over what it had been in the former tube when such increase damages plaintiffs. As to such argument we note the following. First, additional waters are not involved. The volume is always the amount of surface waters within the drainage area and lagoon described earlier. The variance in amount depends only upon rainfall or snowmelt within that area. Second, volumes and velocities which increase from the collection of surface waters in an artificial drain constructed within the scope of the rule of Arthur v. Glover, *supra*, are a burden which the subservient estate must accept. Aldritt v. Fleischauer, *supra*; Todd v. York County, 72 Neb. 207, 100 N. W. 299; Erickson v. Tyler, 186 Neb. 743, 186 N. W. 2d 123. Third, with respect to the efficiency of the tube or ditch, defendants are entitled to maintain its efficiency when such efficiency is curtailed by silting or breakdown. Velocities which increase as a result of proper maintenance or construction are likewise a burden which must be accepted by the subservient estate. Bures v. Stephens, *supra*. Fourth,

it is the obligation of the landowner collecting the surface waters in the artificial drain to do so in a reasonable and careful manner and without negligence, and if he is negligent and thereby damages the subservient land, the owner of the latter is entitled to relief. Arthur v. Glover, *supra*.

This case, therefore, comes to the question of whether defendants were negligent in the construction of the ditch and what, if anything, the trial court should do about it. Again, the evidence shows construction of the ditch has not been completed and the trial court found plaintiffs were damaged as a result of the ditch in its present condition.

It is clear that a final determination of whether the ditch has been constructed in a reasonable and careful manner and without negligence cannot be made until that construction has been completed. The trial court concluded the second cause of action, alleging negligent construction, was premature and dismissed said cause without prejudice. If this disposition is affirmed it might require a second action at the time of the completion of the ditch to determine whether or not the construction was proper.

We believe the trial court should retain jurisdiction of the second cause of action, determine the appropriate construction criteria for the ditch, grant defendants an adequate period of time to so construct it, and if so constructed, then to dismiss the cause, otherwise to grant plaintiffs such relief as would be appropriate. Such retention of jurisdiction is proper. It is within the power of the court, it will prevent a possible multiplicity of suits, and it affords an orderly and timely procedure to protect the rights of both parties. Such procedure has been approved and ordered by this court in similar cases. See Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73; Nickerson Township v. Adams, 185 Neb. 31, 173 N. W. 2d 387.

We therefore affirm the trial court's denial of

plaintiffs' first cause of action, reverse the dismissal of plaintiffs' second cause of action, and remand the latter to the trial court for further proceedings in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DARLENE BRAHATCEK, LEGALLY APPOINTED ADMINISTRATRIX OF THE ESTATE OF DAVID WAYNE BRAHATCEK, APPELLEE, V. MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT #17, A CORPORATE GOVERNMENTAL BODY, APPELLANT.

273 N. W. 2d 680

Filed January 10, 1979. No. 41710.

1. **Trial: Evidence: Judgments.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Trial: Evidence: Negligence: Proximate Cause.** In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was a proximate cause of the plaintiff's injury or a cause which proximately contributed to it.
3. **Negligence.** Negligence must be measured against the particular set of facts and circumstances which are present in each case.
4. _____. Negligence is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances.
5. **Proximate Cause: Negligence: Words and Phrases.** Where lack of supervision by an instructor is relied on to impose liability, such lack must appear as the proximate cause of the injury.
6. **Negligence.** Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is evidence of negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences.
7. _____. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension,

of injury to another person, that is taken into account in determining the existence of the duty to exercise care.

8. **Proximate Cause: Negligence: Words and Phrases.** "Proximate cause" as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred.
9. **Proximate Cause: Negligence.** Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor.
10. ____: ____. The law does not recognize precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen.
11. **Negligence: Minors.** Whether or not a minor 14 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact for the jury.
12. **Negligence.** The doing of an act with appreciation of the amount of danger is necessary in order to say as a matter of law a person is negligent.
13. **Verdicts: Judgments: Juries.** A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Michael P. Cavel and Lee H. Hamann of The Law Offices of Emil F. Sodoro, P.C., for appellant.

John T. Carpenter of Carpenter, Fitzgerald & Coe, P.C., for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

SPENCER, C. J., Pro Tem.

This is a wrongful death action brought by Darlene Brahatcek as administratrix of the estate of her son, David Wayne Brahatcek, hereinafter called David, against Millard School District No. 17. David

died as a result of being accidentally struck in the left occipital region of his skull by a golf club during a physical education class. Trial was had to the court. The District Judge entered judgment in favor of the plaintiff in the amount of $3,570.06 special damages, $50,000 general damages, and costs. Defendant appeals.

Defendant essentially alleges four assignments of error: (1) The insufficiency of the evidence; (2) the failure to find decedent contributorily negligent; (3) the failure to hold the negligence of the classmate who struck decedent was an intervening cause of death; and (4) the award of general damages was excessive. We affirm.

David, who was a ninth grade student 14 years of age, was injured on April 3, 1974, during a physical education class conducted in the gymnasium of Millard Central Junior High School. He was struck by a golf club swung by a fellow student, Mark Kreie. He was rendered unconscious and died 2 days later without regaining consciousness.

Mandatory golf instruction during physical education classes at the school began on Monday, April 1, 1974. Because decedent was absent from school on that day, his first exposure to the program was when his class next met on Wednesday, the day of the accident. Classes on both dates were conducted in the school gymnasium because of inclement weather. Instruction was coeducational. Decedent's class of 34 boys combined with a girls' physical education class having an enrollment of 23. Two teachers, one male and one female, were responsible for providing supervision and instruction. The faculty members present on Monday were Max Kurtz and Vickie Beveridge, at that time Vickie Lindgren.

On Monday, after attendance was taken, the students were gathered around in a semicircle and received instruction on the golf grip, stance, swing, etiquette, and safety. Mr. Kurtz then explained to

them the procedure that would be followed in the gym.

With the bleachers folded up, the gym was nearly as wide as it was long. Approximately 12 mats were placed across the width of the gym, in two rows of six each. One row of mats was located in the south half of the gym about even with the free throw line on the basketball court. The other row was placed along the free throw line in the north half of the gym. The mats measured about 2 feet square and were spaced 10 to 12 feet apart. Each row contained approximately six mats. A golf club and three or four plastic "wiffle" balls were placed by each mat.

The students were divided into groups of four or five students and each group was assigned to the use of one of the mats. The boys used the mats on the south side of the gym and hit in a southerly direction. The girls used the mats on the north, and hit the golf balls in a northerly direction. At the start of the class all of the students were to sit along the center line of the basketball court between the two rows of mats. On the signal of one of the instructors one student from each group would go up to the assigned mat, tee up a ball, and wait for the signal to begin. After the student had hit all of the balls on the mat he was to lay the club down and return to the center of the gym. When all of the students were back at the center line, the next student in each group was directed to retrieve the balls and the procedure was repeated.

Mr. Kurtz was not present for class on Wednesday, the day of the accident, because his wife had just given birth to a baby. His place was taken by a student teacher, Tim Haley, who had been at the school for approximately 5 weeks and had assisted with four to six golf classes on Monday and Tuesday. At the beginning of the class on Wednesday, Mrs. Beveridge repeated the instructions which had been

given by Mr. Kurtz on Monday. The groups were again divided. One student went up to each mat and Mrs. Beveridge testified she gave the signal for the first balls to be hit.

Plaintiff's decedent, who prior to the date of his death had never had a golf club in his hands, was either the second or third student to go up to the easternmost mat on the boys' side of the gym. He had difficulty and asked his group if anyone could help him. Mark Kreie, who had been the last to use the club, came forward and showed decedent how to grip the club and told him that he (Kreie) would take two practice swings then hit the ball. Decedent moved to the east and stood against the folded up bleachers about 10 feet to the rear of Kreie. Kreie looked over his shoulder to observe decedent before taking two practice swings. He then stepped up to the ball and took a full swing at it. Unaware that decedent had moved closer, he hit decedent with the club on the follow-through. During all of this time, Mr. Haley was helping another boy a few mats away. Mark did not know whether Mr. Haley saw decedent and him standing together at the mat. Mrs. Beveridge was positioned along the west end of the girls' line.

Mark Kreie testified Mrs. Beveridge gave instructions to the students as to the proper use of the clubs. They were also told to remain behind a certain line on the gym floor when they were not up at the mats. He also testified on Wednesday Mrs. Beveridge told them they were to help any of the students who didn't understand. Mrs. Beveridge denied making this statement. The fact that the deceased asked for help of the students might support Kreie's statement.

Mrs. Beveridge testified she was in charge of the entire class on Wednesday but after telling the students when they could hit the ball, she concentrated on the girls. At the time of the accident she was standing on the west side of the gym, between the

center line and the row of girls' mats. She testified that had she seen Mr. Haley devoting all of his attention to one boy she would have watched the entire class. She did not instruct Mr. Haley prior to class that he should not spend too much time with one student. Neither did she see the decedent get hit.

Mr. Haley, who was a second semester senior at Wayne State Teachers College, had been student teaching at Millard Central Junior High School for approximately 5 weeks. He testified he told the boys when to start and Mrs. Beveridge told the girls. He testified during the class he walked up and down between the boys standing at the mats and those seated at the center of the gym. A short time after the first student went up to the mats a few boys in decedent's group stood up, although not close to the mats. He told them to sit down and they complied. At the time of the accident Mr. Haley was giving individualized instructions to a boy near the middle of the gym. He did not see decedent get hit.

David Thompson, who was in the group with decedent and Mark Kreie, testified he was in the class on both Monday and Wednesday, although the attendance records indicate he was absent on Monday. He stated instructions were given on Monday but not on Wednesday. On Wednesday, the students were standing and talking between groups. From the beginning of class until the time of the accident, Mr. Haley and Mrs. Beveridge were holding a discussion in the southwest portion of the gym in front of the door to the girls' locker room. Defendant points out that standing in this location would have placed them in the line of flight of golf balls being hit by the boys.

Thompson testified decedent was the fourth or fifth in the group to go to the mat. He was having some trouble so Mark Kreie, who had just finished hitting, returned to the mat and took the club to show decedent the grip and stance. Decedent then

moved a couple of feet behind Mark and to his right while Mark took two practice swings. Mark then attempted to take a full swing but he hit decedent while bringing the club back. This testimony, that decedent was hit during the back swing, is contrary to the testimony of Mark Kreie, and inconsistent with the physical evidence that decedent was struck on the left side of the back of his head. There are other inconsistencies between his deposition and trial testimony. He admitted his recollection was hazy. The trial was held 3 years after the accident.

Mark Kreie stated he was simply doing what Mrs. Beveridge instructed, namely to assist a student in need. During his instruction of David he did not receive any warning or admonition from either teacher. During the class various students from each group were intermingling around the court, visiting with each other. Mrs. Beveridge did not hear what instructions, if any, student teacher Haley gave his charges and did not see the incident which led up to the fatal injury of David.

Ike F. Pane, principal of Millard Central Junior High School, testified golf was a mandatory course of instruction. Golf instruction was provided to ninth grade students in April of 1974, with the first class on Monday, April 1, 1974. Pane identified exhibit 9 as his school's written rules of instruction which stated the objectives to be achieved in teaching golf to the ninth grade class, and specifically setting forth in what manner or procedure the instruction was to be undertaken and achieved. The objectives were to develop the skills and appreciation for the sport of golf, with the coequal consideration that the instruction be accomplished with safety. On page 2 of exhibit 9, the following appears: "Safety should be stressed at all times, especially when you are rained out. If in the gym, one can set up stations on the floor along one side of the bleachers,

divide all students into that many stations and have them sit on the outstretched bleachers on the opposite side. Have the first person hit four or five balls, (sic) to the second person across the gym. When the first is done hitting, he will go to the end of his group and the second person hits and the third retrieves the ball and so on."

On the next page of exhibit 9, the following appears under "Safety Hints:" "1. Never hit a shot until you are sure those in front of you are out of your range. If you hit another player, you may be liable for damages. 2. Never swing a club, especially on the tees, unless you are sure no one is standing close to you."

Pane testified he approved of exhibit 9 and the procedure set forth therein, and that it was his understanding the instruction was undertaken in conformity with exhibit 9. However, after David's fatal injury he discovered that the physical arrangements for instruction were quite different than that specified.

Pane acknowledged that if the instructions had been followed it would have been difficult to have two people on a mat at the same time. It was not until after the accident that he realized the arrangement was different from what was recommended. He recognized that in any of the areas where there might be danger there is a potential for harm if the students were not properly supervised. If the procedure recommended had been followed, it would have made it more difficult for another student from the group to walk across the width of the gymnasium. It was Mr. Kurtz and Mrs. Beveridge who decided to vary the placement of the mats from that recommended in exhibit 9.

Mr. Kurtz testified that on Monday when he was giving the instruction, one from each group would go up all at the same time to the respective mats. Both he and Mrs. Beveridge would see that only one indi-

vidual was at each mat when the students were to commence their swings. While the students were shooting their two or three balls, he would walk up and down in the back of them, more or less patrolling to make sure everything was okay. They walked the students through the hitting of the first ball. The second ball the students would hit on their own. In the instruction, he followed the curriculum guide, which is exhibit 9.

After each person had hit his three balls, he was supposed to lay his club down on the carpet and go back to his group and sit down. After all the stations had been cleared and no one else was standing, the next golfer would be told to go out and gather the wiffle balls, bring them back, and set them on the carpet, standing there by the proper mat. Then when that group had gathered all the balls and the designated students were standing at their respective mats, they would go through the same procedure again.

It is evident the instruction procedure used Monday was not followed on Wednesday. If it had been, the instructor would have observed the dilemma of the deceased and given him the instruction he had missed. Also, the students would not have been assisting one another.

Mr. Haley testified he had received no instruction from any of the regular teachers or faculty prior to the commencement of the class, nor did he have a lesson plan because Mrs. Beveridge was going to handle that. He further stated he gave no oral instruction to any of the students as a whole. He recognized he was teaching unskilled young people in a game dealing with potentially dangerous instruments. At the time David was injured, Haley was at the fifth mat, giving some individual instruction. Haley testified that if he had seen another student approach the mat, he would have directed him to sit down. At the time in question his attention was

diverted from those students who were supposed to be observing rather than using the clubs. When he was giving specialized instruction the only persons he was seeing were the individuals who were using that particular mat he was working with. Haley was asked the following question: " 'Who told you after — instructed you, if anybody, that once the instructions started on the mat that you were to lead the group from center court and go down and pass in review, more or less, in front of the mats, and if the students needed help to give them help. A. Who told me personally to do that? Q. Yes. A. No one.' "

Plaintiff called a retired school gym teacher who had a B.A. degree in physical education. He had been an instructor in golf until he entered the naval service. He played golf regularly, besides teaching and supervising the instruction of the sport. He knew, understood, and appreciated the basic techniques used in pursuing the sport of golf. He would have used the procedure outlined in exhibit 9 rather than that used on the occasion of the accident. He testified the teacher should be supervising and keeping an eye on all the students using the mats; that if he noticed a boy or girl having difficulty or needing specialized instruction, the appropriate way would be to blow the whistle, call the class to a halt, and stop the children from talking or engaging in conversation, if any, on the bleachers, so as to gain their control and attention. Then he would demonstrate to the one student in need while all students, those seated and those standing by the mats, would watch and listen, and thereby, in effect, give a public lesson to all in attendance.

Mr. Kurtz and Mrs. Beveridge testified they did not use the procedure outlined in exhibit 9 because they did not want the wiffle balls hit toward other students. They also felt there was a danger of a golf club flying loose. Mrs. Beveridge also envisioned a problem with wiffle balls going underneath the

bleachers if they were hit across the width of the gym.

In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Daniels v. Andersen, 195 Neb. 95, 237 N. W. 2d 397 (1975).

In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was a proximate cause of the plaintiff's injury or a cause which proximately contributed to it. Hosford v. Doherty, 198 Neb. 211, 252 N. W. 2d 154 (1977). Negligence must be measured against the particular set of facts and circumstances which are present in each case. Krehnke v. Farmers Union Co-Op Assn., 199 Neb. 632, 260 N. W. 2d 601 (1977).

Negligence is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances. Sacco v. Gau, 188 Neb. 808, 199 N. W. 2d 605 (1972).

Under the Political Subdivisions Tort Claims Act, trial is to the court without a jury, section 23-2406, R. R. S. 1943, and on appeal the findings of the trial court will not be disturbed unless clearly wrong. Buttner v. Omaha P. P. Dist., 193 Neb. 515, 227 N. W. 2d 862 (1975).

Recovery in this case is sought on the ground of lack of supervision. Where lack of supervision by an instructor is relied on to impose liability, such lack must appear as the proximate cause of the injury, with the result that the liability would not lie if the injury would have occurred notwithstanding the presence of the instructor.

In the instant case, we are dealing with a ninth

grader who had never before swung a golf club. The instruction was conducted indoors, in close quarters. There was some testimony, which the trial court could have accepted, that the physical arrangement, which was contrary to defendant's suggestion, as indicated by exhibit 9, would have prevented the opportunity for injury if followed. There is a question as to whether there was adequate safety instruction regarding the use of a golf club prior to the commencement of the class at which the fatal injury occurred. There is evidence, which the court could have accepted, that on the day the accident occurred the teaching procedure outlined by the regular instructor was not followed by the student teacher. The record would also indicate the student teacher may not have been properly informed as to the procedure to be followed. There is no question the trial judge could have found that, at the very best, there was ineffective observation and attention on the part of the student teacher when ordinary care or supervision would have prevented the occurrence which resulted in the death of David. In Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902 (1952), we held: "Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences.

"The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care."

In this instance, working with ninth graders, who were not familiar with the rules of golf, and in the case of the deceased, who had never before been exposed to the game, includes a duty to anticipate danger that is reasonably foreseeable.

We have no difficulty in finding that the lack of supervision was a proximate cause of the death of David. "Proximate cause" as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred. Daniels v. Andersen, 195 Neb. 95, 237 N. W. 2d 397 (1975).

Defendant contends that even if it were guilty of negligence its negligence was superseded by that of Mark Kreie, decedent's classmate, and Kreie's negligence was an efficient intervening cause which produced the injury. In Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 205 N. W. 2d 523 (1973), we said: "Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor." In that same opinion we stated: "The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen." There should be no question about foreseeability in this case. If defendant's employees had exercised proper supervision, the death would not have occurred.

Defendant further argues that the deceased is guilty of contributory negligence. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid obvious danger is negligent or contributorily negligent. Garcia v. Howard, 200 Neb. 57, 262 N. W. 2d 190 (1978). In Caradori v. Fitch, 200 Neb. 186, 263 N. W. 2d 649 (1978), we held: "A minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use."

Whether or not a minor 14 years of age is of suffi-

cient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact for the jury. Sacca v. Marshall, 180 Neb. 855, 146 N. W. 2d 375 (1966). The trial court in this instance must have found the deceased was not contributorily negligent. The golf instruction was a required subject. David, a ninth grader, had no understanding of the game and the record is not clear that he was properly warned of the apparent danger in the sport. If the testimony of Mark Kreie is accepted, Mark was complying with the directions of Mrs. Beveridge and giving help to another student. The mere fact there is a recognized amount of danger in the activity by reason of a swinging club is not contributory negligence unless the knowledge of the danger is made known to the child. The doing of an act with appreciation of the amount of danger is necessary in order to say as a matter of law a person is negligent. It cannot be said that deceased had sufficient knowledge of the danger involved, considering the fact he was not familiar with the game of golf and had never before had a golf club in his hands. He had not attended the first class where instruction and practice were provided. He had not received any instruction on any aspect of the game by any teacher prior to his attempted use of the club. The only instruction he received was that provided by the fellow student who struck the fatal blow. On the record in this case, we cannot say that the findings of the trial court are clearly wrong.

Defendant's last assignment is that the award is excessive. Since Selders v. Armentrout, 190 Neb. 275, 207 N. W. 2d 686 (1973), the rule in this state has been that the measure of damages for the wrongful death of a minor child includes the loss of society, comfort, and companionship of the child.

Defendant seeks to compare this case with Vandenberg v. Langan, 192 Neb. 779, 224 N. W. 2d 366

(1974), in which the parents were awarded $32,650 in general damages for the loss of their 16-year-old son who was described in the opinion as being "a very unusual youth, with great potential for a bright and promising future, both athletically and scholastically." They argue the decedent in the present case, who was 14 years of age at the time of his death, was not an exceptional student and did not have the potential of the deceased in the Vandenberg case. We have heretofore answered the point defendant is attempting to raise. In Caradori v. Fitch, 200 Neb. 186, 263 N. W. 2d 649 (1978), in affirming a jury verdict of $40,000 for the death of an 11-year-old girl, we stated: "We will not enter into a discussion in which we compare the relative accomplishments of deceased children in wrongful death actions. A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law."

The judgment of the trial court is affirmed.

AFFIRMED.

COLWELL, District Judge, dissenting.

I respectfully dissent on the issue of contributory negligence.

David Wayne Brahatcek was a normal, healthy, responsible 14-year-old boy who had a part-time job with Samson Construction Co., Omaha, Nebraska. On the day of the fatal accident he attended the golf class instruction, which included the subject of safety. He followed instructions given concerning his waiting to take his turn and then advancing alone to the mat where he held the club and attempted to use it. He had the opportunity to examine the golf club and become aware of its size and weight. After fellow student Kreie briefly explained the fundamentals, Brahatcek retreated to the side and rear from

Kreie about 10 feet, and Kreie informed him that he would take two practice swings with the club and then hit the ball. After two practice swings, Kreie advanced further away from Brahatcek towards the ball and hit it. Thereafter, in some unexplained circumstance, Brahatcek came into the area of the golf swing arc and he was struck, causing his tragic death.

Considering these facts and circumstances, Brahatcek had an opportunity for knowledge and appreciation of possible injury to him. However, he failed to exercise ordinary and reasonable care to avoid danger and injury to himself. Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559. Brahatcek was negligent to a degree more than slight.

The golf class included group and personal instruction and student participation. This same circumstance occurs daily in all schools, whether it be sport programs or the curriculum related to science, home economics, shop, agriculture, mechanics, and other courses, many involving potential injury to students. The standard of care of the defendant and its teachers here does not require continuous and direct supervision and surveillance of each student. The test is what a person of ordinary prudence, charged with the same duties involved, would exercise under the same circumstances. Lueck v. City of Janesville, 57 Wis. 2d 254, 204 N. W. 2d 6; Woodsmall v. Mt. Diablo Unified School Dist., 188 Cal. App. 2d 262, 10 Cal. Rptr. 447; Fagan v. Summers, 498 P. 2d 1227 (Wyo.); Berg v. Merricks, 20 Md. App. 666, 318 A. 2d 220.

Although the record could support a finding by the trial court that defendant was negligent, such negligence was less than gross.

The negligence of Brahatcek was more than slight and the negligence of the defendant was less than gross. Plaintiff's petition should be dismissed. Main v. Sorgenfrei, 174 Neb. 523, 118 N. W. 2d 648.

The judgment of the trial court was clearly wrong and it should be reversed.

McCOWN, J., joins in this dissent.

DAVID PIERCY, APPELLANT, V. ROBERT F. PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, THE NEBRASKA BOARD OF PAROLE, APPELLEES.

273 N. W. 2d 689

Filed January 10, 1979. No. 42093.

1. **Criminal Law: Habeas Corpus: Incarceration.** To release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void.
2. _____: _____: _____. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

T. Clement Gaughan, Lancaster County Public Defender, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellees.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, McCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

McCOWN, J.

This is a habeas corpus proceeding brought by the petitioner against Robert F. Parratt, Warden of the Nebraska Penal and Correctional Complex, the Nebraska Board of Parole, et al. He alleges that in 1975 the Nebraska Parole Board, by a hold order, prevented him from making bail on a subsequent

criminal charge, and that the board failed to grant him a prompt parole revocation hearing, in violation of his constitutional rights and in violation of statutory requirements. The respondents filed a motion to quash and dismiss. On April 7, 1978, the District Court for Lancaster County found that the petition failed to allege facts upon which habeas corpus relief could be granted and dismissed the petition.

This is the second appearance of this habeas corpus proceeding in this court. The first proceeding was filed April 19, 1976, against the Nebraska Board of Parole, which did not have custody of the petitioner. The warden, who did have custody, was not a party. On October 6, 1976, a motion for evidentiary hearing was denied and the petition was dismissed by the District Court for Lancaster County because it "does not state facts or parties upon which (the) court may enter relief." On March 14, 1977, this court summarily affirmed that order of dismissal. Thereafter the United States District Court declined to intervene, and its decision was affirmed on appeal by the Eighth Circuit Court of Appeals pending disposition of this case. See Piercy v. Parratt, 579 F. 2d 470 (8th Cir., 1978).

The current proceeding was filed in the District Court for Lancaster County on March 14, 1978, against the current respondents. Essentially, Piercy alleges that on April 10, 1975, while on parole from the Nebraska Penal and Correctional Complex, he was arrested and jailed in Douglas County, Nebraska, on charges of attempted burglary and possession of burglary tools. He pleaded not guilty and bail was fixed at $1,000. An attempt to post bail allegedly failed because the board of parole lodged a parole violation hold against Piercy following his arrest. Piercy also alleged that although the parole board held a probable cause hearing, it deferred action on a parole revocation hearing in violation of sections 83-1,119 (3) and 83-1,120, R. R. S. 1943. Those

sections require an immediate investigation and a written report of the reason for the arrest and detention of a parolee, and a hearing on a parole violation charge within 30 days after receipt of the parole officer's written report. Piercy also alleged a violation of the prompt hearing requirements of Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484.

On August 11, 1975, Piercy was convicted and sentenced on both of the April 1975 felony counts in the District Court for Douglas County, Nebraska. On August 29, 1975, the board of parole revoked Piercy's prior parole. The period of allegedly illegal detention extended from April 10, 1975, to August 11, 1975, a period of approximately 4 months. This is the period of allegedly illegal detention for which Piercy now seeks habeas corpus relief.

By order of this court the record now establishes the following additional facts. David Piercy was convicted of burglary on March 29, 1971, and sentenced to imprisonment for 5 years, with credit for jail time of 98 days. Piercy escaped custody on October 12, 1972, was subsequently apprehended, and returned to custody on January 23, 1973. On March 26, 1973, Piercy was sentenced to 1 year imprisonment for the escape, to be served consecutively to the burglary sentence of March 29, 1971. On December 19, 1974, Piercy was paroled. On April 10, 1975, Piercy was arrested for attempted burglary and possession of burglary tools in Douglas County, Nebraska, the charges which gave rise to the detention period involved here. On August 11, 1975, Piercy was sentenced to 3 to 5 years imprisonment for attempted burglary and 20 months to 5 years for possession of burglary tools, the two sentences to be concurrent to each other but consecutive to any previous sentences. Jail time of 123 days was ordered credited on the concurrent sentences received on August 11, 1975.

Piercy was again paroled on May 1, 1978. On May 27, 1978, Piercy was arrested and charged with burglary and possession of burglary tools in Council Bluffs, Iowa. A Nebraska Board of Parole warrant for parole violation detainer was issued on June 2, 1978. On August 10, 1978, Piercy was sentenced to the Iowa Division of Adult Corrections for a term of 10 years.

The record establishes that on April 1, 1977, Piercy completed serving his sentences of March 29, 1971, and March 26, 1973, including loss of parole creditable time, good time, dead time for the 1972 escape, and 3 months 8 days jail time on the original sentence of March 29, 1971. At the time of Piercy's parole on May 1, 1978, the time remaining on his Nebraska sentences showed a maximum expiration of sentence to be April 1, 1982, and an earned discharge time, including parole good time, of August 5, 1981.

Piercy received credit for the 4 months detention in 1975 not only on his sentence of August 11, 1975, but apparently on the 1971 sentence as well. The record also establishes that he was still serving the 1975 sentences at the time this proceeding was commenced and that he was not entitled to release.

The availability of habeas corpus in Nebraska is restricted. Section 29-2801, R. R. S. 1943, provides in part: "If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, * * * now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, * * *" or is imprisoned or detained without any legal authority, a writ of habeas corpus may issue.

We have consistently held that to release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the

court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124; Gamron v. Parratt, 199 Neb. 163, 256 N. W. 2d 867. Piercy does not challenge any of his sentences, nor does he contend that he was being illegally held at the time this action was instituted.

Under the facts here habeas corpus is not available to Piercy. Although he might have a civil action for damages if his allegations can be proved, it is apparent that damages, if any, would be minimal or nonexistent.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE INTEREST OF LAWRENCE G. LUX, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. LAWRENCE G. LUX, APPELLANT, V. THE MENTAL HEALTH BOARD OF POLK COUNTY, NEBRASKA, ET AL., APPELLEES.

274 N. W. 2d 141

Filed January 17, 1979. No. 41744.

1. **Constitutional Law: Legislature: Appeal and Error.** The Legislature may not prescribe a de novo standard of review for judicial review of an exercise of legislative authority as this would violate the constitutional requirement of separation of powers.
2. **Mental Health: Separation of Powers.** It is the nature of the function, and not merely its statutory origin, which determines whether a governmental function is legislative or judicial.
3. _____: _____. The determination of whether a function is legislative or judicial must necessarily be made on a case-by-case basis as it is not possible to define precisely the line between the functions.
4. **Mental Health: Courts: Appeal and Error.** Commitment proceedings are judicial in nature, and District Courts must review the decisions of mental health boards de novo on the records.

5. **Judgments: Appeal and Error.** Where a correct judgment or order has been made, the mere fact that it contains erroneous declarations of law does not require reversal.
6. **Mental Health: Statutes: Evidence.** The requirements of section 83-1009, R. R. S. 1943, which defines a mentally ill dangerous person, are met when medical diagnoses of paranoid schizophrenia and an unprovoked assault and threatening behavior are shown by clear and convincing proof.
7. _____: _____: _____. The opinion of a general practitioner of medicine as to mental condition is admissible in commitment proceedings, § 83-1010, R. R. S. 1943, provided a proper foundation is laid.
8. **Mental Health: Statutes: Words and Phrases.** Section 83-1009(1), R. R. S. 1943, although it refers to "recent violent acts," does not require evidence of more than one violent act or threat. § 49-802, R. R. S. 1943.

Appeal from the District Court for Polk County: HOWARD V. KANOUFF, Judge. Affirmed.

Alan G. Gless of Mills & Mills, for appellant.

Philip H. Nyberg and Ronald E. Colling, for appellees.

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

PER CURIAM.

This is an appeal under the provisions of section 83-1043, R. R. S. 1943, from an order of the District Court for Polk County, affirming the county mental health board's order finding that the appellant, Lawrence G. Lux, was a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943, and committing him to the Lincoln Regional Center for treatment under the provisions of sections 83-1037 and 83-1041, R. R. S. 1943.

Upon appeal to this court the following errors are assigned: (1) The District Court erred in not reviewing the findings of the mental health board de novo as provided by section 83-1043, R. R. S. 1943. (2) The board erred in admitting and the District

Court erred in considering the opinion of a certain physician that Lux was a mentally ill dangerous person. (3) The evidence is insufficient to support a finding that Lux was a dangerous person because the record contains evidence of only one assault upon a person.

Section 83-1043, R. R. S. 1943, provides for appeals of final orders of the mental health board and states: "Such appeals shall be de novo on the record." The District Court, in its order of affirmance, recited that the function of the mental health board "is a legislative one delegated to it," and consequently the court's review was limited to determining whether the order was supported by substantial evidence, whether the board acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. The District Court apparently assumed that, because the function of the board is prescribed and regulated by statute, the board was exercising a legislative function, and that the appropriate standard of review was therefore the limited one enunciated in recent cases such as Haller v. State ex rel. State Real Estate Commission, 198 Neb. 437, 253 N. W. 2d 280, Herink v. State ex rel. State Real Estate Commission, 198 Neb. 241, 252 N. W. 2d 172; American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1; and Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683.

Those cases do hold that if a court is reviewing an exercise of authority which is in its nature legislative, then the Legislature may not prescribe a de novo standard of review, because that would constitute a violation of the constitutional requirement of separation of powers. Art. II, § 1, Nebraska Constitution; Keller v. Potomac Elec. Co., 261 U. S. 428, 43 S. Ct. 445, 67 L. Ed. 731. However, the District Court erred in assuming that merely because the board's function is prescribed by statute the board was there-

fore exercising a legislative function. None of the above-cited cases so held. It is the nature of the function, not merely its statutory origin, which determines whether a governmental function is legislative or judicial. For example, the Legislature has the authority under the Nebraska Constitution to create certain courts. Art. V, § 1, Nebraska Constitution. It would not follow from that, however, that a new court created by statute is exercising legislative authority.

We have not heretofore attempted to define precisely the line between the judicial function and power and the legislative one. Probably we cannot do so. See Prendergast v. Nelson, 199 Neb. 97, 256 N. W. 2d 657 (concurring opinion of Clinton, J.). We must necessarily proceed upon a case-by-case basis. Utility ratemaking, for example, is a legislative function and subject only to limited judicial review. Keller v. Potomac Elec. Co., *supra*. The licensing and regulation of the professions dealing with health is a legislative function, and there is a similar limitation upon judicial review. Scott v. State ex rel. Board of Nursing, *supra*. The initial determination of terms and conditions of employment is also a legislative function, Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172, as is the regulation and licensing of businesses. Haller v. State ex rel. State Real Estate Commission, *supra*; Herink v. State ex rel. State Real Estate Commission, *supra*. See, also, 16 C. J. S., Constitutional Law, § 107, p. 493. On the other hand, the determination of whether a party's statutory rights have been violated is clearly a judicial function and a legislature mandate requiring de novo review is proper. Snygg v. City of Scottsbluff Police Dept., 201 Neb. 16, 266 N. W. 2d 76.

One method of determining whether a function is legislative or judicial is to examine its origins. Lunacy proceedings, as they were formerly called,

had their English origin in the executive power of the crown as parens patriae. The determination of lunacy was made by a commission which was under the supervision of the chancery courts. Hamilton v. Traber, 78 Md. 26, 27 A. 229; Bliss v. Bliss, 133 Md. 61, 104 A. 467. A similar pattern has apparently been followed in the United States, although the manner of proceedings in such matters is subject to regulation by statute. See, generally, 44 C. J. S., Insane Persons, §§ 14 et seq., p. 68. In accord with that historical practice, the members of the mental health boards in Nebraska are appointed by the presiding District Judge. § 83-1018, R. R. S. 1943. Appointment of similar boards under prior statutes was also entrusted to the District Judge.

Furthermore, Nebraska courts have long been permitted to make independent determinations of mental incompetency for the purposes of protecting the person and the property of the incompetent. Hall v. Hall, 122 Neb. 228, 239 N. W. 825; 44 C. J. S., Insane Persons, § 8, p. 54. Commitment proceedings are clearly judicial, and a court must therefore review the determination of a mental health board de novo on the record as the statute requires. Thus, the District Court erred in not following the statutory requirement to look at the evidence de novo.

However, we have concluded the court's error does not require reversal. We have carefully examined the evidence, and, whatever standard of review might be applied, the court could not reasonably have found other than as it did. A mistake by the court as to the extent of its authority is not reversible error if the court nonetheless reached the right result. Where a correct judgment or order has been made, the mere fact that it contains erroneous declarations of law does not require reversal. State v. Alexander, 78 Wyo. 324, 324 P. 2d 831. This principle is analogous to our frequently stated rule that no judgment will be reversed merely because the

court has given a wrong reason for it. Schmitt v. City of Omaha, 191 Neb. 608, 217 N. W. 2d 86.

The hearing before the mental health board commenced on February 16, 1977, and after considerable evidence had been produced by the State, the hearing was, at Lux' insistence, continued to February 23, 1977, at which time it was concluded. Lux was represented throughout the proceedings by counsel, although at his own insistence he was permitted to examine witnesses and in the course thereof to make rather extended unsworn statements.

Section 83-1009, R. R. S. 1943, defines a mentally ill dangerous person as "any mentally ill person who presents: (1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm." The board found Lux to be a mentally ill person who was dangerous in that he had committed an unprovoked assault upon his father. The board also determined that neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty were available to prevent further harm, and committed Lux to the Lincoln Regional Center at Lincoln, Nebraska, on March 4, 1977.

Two psychiatrists, who had at various times examined Lux, testified concerning his mental condition, as did one general practitioner of medicine who was acquainted with Lux and had observed him. Both psychiatrists were called by Lux as his witnesses. One of the psychiatrists diagnosed Lux as in a paranoid state while the other simply described him as having paranoid reactions and was unwilling to label him as a schizophrenic because such labels seriously affect possibilities of future employment. The above diagnoses are uncontradicted by any testimony or evidence other than Lux' implicit denials and his insistence his thinking was not delusional

because his claims of persecution were founded upon fact.

Lux asserted in a question that his paranoid state "was caused by persecutional pressures exhibited by my environment," to which statement one psychiatrist responded, "But this is assuming that people are doing these things to you Larry." One of the psychiatrists testified that, despite the fact that Lux' parents were in Nebraska, Lux believed the influence of his parents on other persons was such that people whom Lux sought to engage in conversation while he was in Florida would walk away from him. The psychiatrist, under Lux' cross-examination, acknowledged that he had made no attempt to verify the above "fact." Lux also at times heard voices speaking to him when no one was present. Lux told one of the psychiatrists that "he would deal with injurious individuals as he deemed appropriate and on one occasion stated that this may include homicide." He did not care whether or not he might be imprisoned. The psychiatrist's ultimate diagnosis was "Paranoid State," including "assaultive and homicidal ideation."

The incident which precipitated the current proceedings occurred at the home of Lux' parents on November 23, 1976. At that time Lux made an unprovoked attack upon his father and attempted to strangle him while his father was sitting in a recliner watching television. Both Mr. and Mrs. Lux testified to the incident. His mother attempted to stop the assault by picking up a heavy cane and hitting Lux repeatedly, but he did not stop. Finally she exclaimed, "My God Larry, you're killing your dad." At that time he stopped and helped pick his father up off the floor.

The attack upon the elder Mr. Lux was apparently motivated by Lux' belief his father would not tell him the truth "about any theft and development of mechanical systems whose theory I was working

on." The parents knew nothing about matters concerning which Lux sought information. The fact Lux assaulted his father in the manner described is not denied; nor was the attack defended in the record other than by Lux' stated beliefs of his reason for the attack which was to choke the truth out of his father.

Mrs. Lux further testified that on previous occasions Lux had, without apparent provocation, deliberately damaged furniture in the Lux home to the extent it could not be repaired. He had told his parents he was going to do harm to other people and once left the home with a shotgun for that apparent purpose but later returned without having done anything. Mr. Lux testified he was frightened of Larry. Mrs. Lux stated she was not frightened for herself, but was frightened for her husband and for Larry.

We have not recited all the evidence of delusional thinking by Lux. We point out merely that the diagnoses and evidence of the assault and the threats are not contradicted.

Lux had either been committed or held on five previous occasions for treatment or diagnosis of mental illness. The evidence indicated that when Lux was treated as an outpatient he would not on some occasions take the prescribed medication and for that reason the doctor sometimes did not give a prescription. Lux believed the medication was in part responsible for his delusions and, at the continued hearing on February 23, 1977, indicated that during the prior part of the hearing he had not been able to "defend" himself because someone had been putting hallucinogenic drugs in his food. The conclusion of the board that confinement was necessary to treatment could hardly have been otherwise.

Dr. Clarence Davis, Jr., M. D., a general practitioner since 1957, testified for the State. Dr. Davis had visited Lux in the county jail a couple of weeks before the hearing, was acquainted with the history

of Lux' past commitments, and had seen him professionally. The doctor was made aware of the unprovoked assault by Lux on his father. On the same day the assault occurred, Dr. Davis was advised by a member of the sheriff's department that Lux' mother had informed the sheriff's office Lux was on his way to the doctor's office and she feared he might harm the doctor. The doctor then locked the doors of the office. Lux did arrive and could not get in. He returned to the office twice more, attempting to enter. One of the receptionists who observed Lux said he seemed disturbed.

The doctor testified that in his opinion Lux was, at the time of hearing, a paranoid schizophrenic and a dangerous person. He stated: "My observations of his condition has indicated a progressive progression of his illness and a progression of his danger — of potential danger to himself and to the community," and that he could not be helped much as an outpatient. The foundational evidence indicated Dr. Davis had the usual amount of psychiatric training given to medical students, that is, 1 month of clinical experience as well as textbook study. He could and did define paranoid schizophrenia.

Lux contends that "the foundation presented for Dr. Davis' testimony was insufficient to qualify him as an expert and failed to show his opinion was founded upon proper bases." He argues that the requirements of section 27-703, R. R. S. 1943, have not been met. That statute provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Lux' specific contention seems to be that the information Dr. Davis relied upon was not "of a type reasonably relied

upon by experts in the particular field in forming opinions" because Davis administered no psychiatric or psychological tests and because the types and sources of information on which the doctor relied were not disclosed and that that is what section 27-703, R. R. S. 1943, requires. Lux, in his brief, discusses a number of opinions of this court, all antedating section 27-703, R. R. S. 1943, which he claims support his position.

His position is not well founded. It is clear the doctor's professional qualifications were sufficient. It is further clear enough that his opinion was based upon his observation of Lux as well as on what he was told. The testimony of the two psychiatrists disclosed that clinical observation of the patient, that is, talking to him and observing him, are prime factors in the formation of expert opinion. Dr. Davis' testimony was properly admitted. We note in passing that the Nebraska Mental Health Commitment Act includes in its definition of mental health professional, "a practicing physician licensed to practice medicine in this state under the provisions of section 71-102." § 83-1010, R. R. S. 1943.

The contention of Lux that the evidence is insufficient because the evidence shows only one violent act against a person is also without merit. It is true that section 83-1009(1), R. R. S. 1943, refers to "recent violent acts." However, to read the statute as requiring evidence of more than one violent act or threat would be ridiculous. It obviously contemplates the admission of evidence of as many recent violent acts or threats as there may be. We have implied as much in Kraemer v. Mental Health Board of the State of Nebraska, 199 Neb. 784, 261 N. W. 2d 626. We further point out that section 49-802, R. R. S. 1943, which sets forth the general rules of construction which the Legislature wishes applied to the statutes which it enacts, includes the following: "(6) Singular words may extend and be applied to

several persons or things as well as to one person or thing. (7) Plural words may extend and be applied to one person or thing as well as to several persons or things."

AFFIRMED.

ARDEN E. HERRICK AND PAUL D. HERRICK, APPELLANTS, V. LIBERTY MUTUAL FIRE INSURANCE COMPANY, A FOREIGN CORPORATION, ET AL., APPELLEES.

274 N. W. 2d 147

Filed January 17, 1979. No. 41753.

Contracts: Motor Vehicles: Insurance: Liability. An exclusion in an automobile liability insurance policy which excludes coverage under uninsured motorist coverage for an insured while occupying an owned highway vehicle, other than an insured automobile, is valid.

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

Warren C. Schrempp and Thomas G. McQuade of Schrempp & McQuade, for appellants.

D. Nick Caporale and Michael A. Nelsen of Schmid, Ford, Mooney, Frederick & Caporale, for appellee Liberty Mutual.

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

BOSLAUGH, J.

This is a suit on the medical expense and uninsured motorist coverage provided by an automobile liability insurance policy issued by the defendant, Liberty Mutual Fire Insurance Company, to Arden E. Herrick and Betty J. Herrick, the parents of the plaintiff, Paul D. Herrick. The policy insured a 1963 Chevrolet automobile owned by the named insureds.

The plaintiff was injured on July 7, 1975, when the 1973 Kawasaki motorcycle which he owned and was operating was in collision with a 1973 Dodge automobile owned by Dorothy L. Cowell and being operated by Jeannine G. Harvey. There was no liability insurance on the 1973 Dodge automobile at the time of the accident and Jeannine G. Harvey was an uninsured motorist.

The plaintiff appeals from an order sustaining a general demurrer of the defendant insurance company and dismissing the action as to that defendant.

With respect to the claim under the medical expense coverage, the policy provided coverage to the named insured or a relative "while occupying the owned automobile." Since the accident occurred while the plaintiff was occupying an owned vehicle which was not "the owned automobile" described in the policy, the medical expense coverage was not applicable. The plaintiff does not contend otherwise in this court.

With respect to the uninsured motorist coverage, the policy contained the following exclusion: "Exclusions This policy does not apply: * * * Under the Uninsured Motorists Coverage, (q) to bodily injury to an insured while occupying a highway vehicle (other than an insured automobile) owned by the named insured or by any person resident in the same household who is related to the named insured by blood, marriage or adoption, or through being struck by such a vehicle; * * *."

In Shipley v. American Standard Ins. Co., 183 Neb. 109, 158 N. W. 2d 238, the plaintiff was operating an uninsured motorcycle when he was injured in a collision with another motorcycle operated by an uninsured motorist. We held that the plaintiff could not recover under the uninsured motorist coverage of a policy which insured a Chevrolet automobile owned by the plaintiff and excluded coverage for "bodily injury to an insured while occupying an automobile

(other than an insured automobile) owned by the named insured * * *." We said: "An uninsured motorist endorsement should be interpreted in light of statutory requirements concerning victims of negligent and financially irresponsible motorists. 'The uninsured motorist on the highway is a real risk.' Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133. An overriding public policy of protecting an owner-operator who inexcusably has no applicable bodily injury liability coverage is not presently discernible.

"An insurance contract should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. See Stephens v. Allied Mut. Ins. Co., *supra*. Plaintiff does not assert that he had bodily injury liability coverage applicable to his motorcycle under any contract. He might expect the uninsured motorist endorsement to cover loss while he was operating his motorcycle, but such expectations are unreasonable."

The plaintiff urges us to overrule the Shipley case and find that the exclusion is invalid as contrary to public policy as expressed in section 60-509.01, R. R. S. 1943. A substantial number of jurisdictions now hold such an exclusion is invalid. See the cases collected in Widiss, A Guide to Uninsured Motorist Coverage, § 2.9, p. 28, and Note, Insurance: Validity of the Owned-but-Uninsured Motor Vehicle Exclusion Under the Uninsured Motorist Act, 28 Okla. L. Rev. 894. These cases proceed, generally, on the theory that the statute is designed to protect persons, not vehicles, and the exclusion violates this purpose.

The statute, of course, relates to automobile liability insurance policies. It requires that uninsured motorist coverage be included in any such policy delivered or issued for delivery in this state unless rejected by the insured. The purpose of the coverage is to protect the insured from uninsured motorists, motorists who do not have liability insurance on

their vehicle. It is difficult to find a policy in the statute to protect one uninsured motorist from another uninsured motorist. This is what the Shipley case referred to when it stated: "An overriding public policy of protecting an owner-operator who inexcusably has no applicable bodily injury liability coverage is not presently discernible."

In Holcomb v. Farmers Ins. Exchange, 254 Ark. 514, 495 S. W. 2d 155, the court stated: "It is a matter of common knowledge that in most automobile use related injuries two automobiles and drivers are involved. Under the broad coverage insisted on by the appellants, by the purchase of single coverage on one automobile an owner could protect himself and his entire family against financial loss caused by uninsured motorists while each of them are themselves driving uninsured and uninsurable automobiles. We are of the opinion such was not the intent of the Legislature in the enactment of § 66-4003."

The Shipley case is controlling and the judgment must be affirmed.

AFFIRMED.

WHITE, J., dissenting.

I believe Shipley v. American Standard Ins. Co., 183 Neb. 109, 158 N. W. 2d 238, was wrongly decided. We should not hesitate to reexamine our conclusions when the reasons to do so are persuasive. The majority has shown in its own opinion that their conclusion is supported by an ever-lessening number of states and that any number of states once holding with Nebraska have reexamined their position and reversed themselves as we should do.

MCCOWN, J., joins in this dissent.

DOMINIC FARRO, APPELLANT, V. CRAIG W. RUBOTTOM, WAYNE L. BEITEL, THE STATE OF NEBRASKA, AND SUE COFFEE, APPELLEES.

274 N. W. 2d 149

Filed January 17, 1979. No. 41795.

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. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which 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.

Appeal from the District Court for Morrill County: ALFRED J. KORTUM, Judge. Affirmed.

Roger C. Lott, for appellant.

Russell E. Lovell, for appellee Coffee.

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

SPENCER, C. J., Pro Tem.

This is an action to recover damages for personal injuries sustained by Dominic Farro, plaintiff, when he was struck by a vehicle operated by Craig W. Rubottom and owned by Wayne L. Beitel, his employer. Sue Coffee was the operator of a vehicle which had stopped in front of the Rubottom vehicle immediately before the accident. The District Court sustained Coffee's motion for summary judgment after reviewing the depositions and interrogatories, and dis-

missed the action against her. Plaintiff prosecutes this appeal from that dismissal. We affirm.

At the time of the accident, Farro was working as a flagman for the State of Nebraska Department of Roads. He was at the east end of a resurfacing project on State Highway No. 2 in Box Butte County, Nebraska. The construction area was about 9 miles in length from the west edge to the east edge.

When defendant Coffee entered the construction project a flagman gave her a signal ring with flag attached. This ring indicated she was the last car from the west through the project. When Coffee was partly through the construction area she saw a yellowish-red International pickup approaching from her right on a side road. This truck turned onto State Highway No. 2 in front of her, proceeding east at a speed she estimates to be 10 to 15 miles per hour. She followed the truck for a time and then passed it at a speed between 25 and 30 miles per hour.

Rubottom, the driver of the pickup, testified he stopped before entering the highway from a graveled road. He did not see any traffic or signs of road construction. The Coffee vehicle came up behind him very quickly after he had traveled one-half to three-quarters of a mile. He estimates his speed at this time at 40 miles per hour. The Coffee vehicle passed him, going about 60 miles per hour. Shortly after being passed he noticed some "Men Working" signs along the side of the road. At this time he could not yet see any construction equipment, and the Coffee vehicle had disappeared from his view over a hill or around a curve. When he next saw the Coffee automobile its brake lights were on and it was slowly approaching the plaintiff. He was less than a quarter of a mile away at that time. When he saw the car, he let up on the gas. Before letting up on the gas, he was still traveling at 40 miles per hour.

Rubottom saw plaintiff standing next to the Coffee vehicle, near the middle of the road. Plaintiff was facing south toward the car. A truck belonging to the State was parked off the road to the south of Coffee's car. He saw Coffee hand the ring or flag to the plaintiff. At some point he attempted to apply the brakes on the truck, but the pedal went all the way to the floor. There was no brake pressure. He pumped the brake pedal. As he turned to the north to avoid hitting the car, plaintiff also stepped to the north, backing away from the car. He did not think plaintiff saw him until immediately before impact. He hit plaintiff with the front of the truck, near its center. After hitting plaintiff, he drove off the north edge of the road. Plaintiff was carried for a distance on the front of the truck until Rubottom jerked the truck back onto the road so plaintiff would not fall underneath it. He stopped the truck after traveling 50 to 100 feet on the road.

Following the accident a state patrolman tested the brakes and told Rubottom he could not drive the truck. The patrolman issued a ticket for tailgating or following too closely, to which Rubottom pled guilty. After the accident Rubottom parked the pickup on a nearby farm. He could not recall whether he had any trouble with the brakes while parking it. He testified he had not had any trouble with the brakes prior to the date of the accident.

Beitel, his employer and owner of the truck, testified he inspected the truck sometime after the accident and it had brakes. The truck also passed a safety inspection after the accident, with no repairs being made to the brakes. Rubottom did not tell him either before or after the accident that the brakes were defective.

Coffee testified she could not estimate the number of miles she traveled after passing the International pickup, but it seemed quite a distance. When she reached the eastern edge of the construction area

and stopped to give the flag to the flagman, she did not know how far the truck was behind her. It had to be some distance because she had time to stop her car, roll down her left window, and give the flag to the flagman. She then drove forward about 3 feet, when her car was struck on the left rear bumper by the truck. When she stopped her car to give the flag to the flagman, she applied her car brakes, which were in good working order, so the brake lights were visible to anyone behind her.

Farro was wearing an orange vest and holding a sign 2 feet wide. One side said "Stop;" the other side said "Go." Farro testified Sue Coffee came to a complete stop and handed him the key ring with the flag through the left window of her car. After she handed him the key ring she started to go away when Farro was struck by the pickup. He was asked the following question: "Now, when you were hit, was this girl's car still where you last remembered it was, or had it started to go yet?" He answered, "It was gone." Farro testified the Coffee car did not strike him in any way.

Plaintiff-appellant Farro argues the trial court erred in sustaining a motion for summary judgment because there were issues of fact to be resolved by the jury. The rule applicable herein is: "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." Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc., 199 Neb. 555, 260 N. W. 2d 310 (1977).

In Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976), we held: "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."

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. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which 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. Or, as we said in Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451 (1976): "The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose."

In the present case, there is essentially no factual dispute concerning Coffee's actions and her role in the accident. The speed of her car before she reached the place of the accident is immaterial. Her car had come to a complete stop; her brake lights were on; she had handed the flag to the plaintiff; and the plaintiff testified her car was gone when he was hit by the pickup.

It seems to be the plaintiff's theory that because the Coffee car passed the pickup after it had come onto the highway from a side road, Coffee is guilty of negligence which is one of the proximate causes of the accident. There is no merit to this contention. The vehicle was a yellowish-red International boom-equipped truck. It was of a color and type that could reasonably be considered construction equipment. Further, in a construction area as long as this one, with intersecting roads, the construction crew could reasonably expect additional traffic.

Sue Coffee had driven a considerable distance after she entered the construction project at the west edge. She testified she did not remember seeing any men or construction equipment on the highway

except the flagmen. A considerable portion of the area between the west and east boundaries was a clear two-lane road showing no characteristics of road construction. She could not estimate the number of miles between the west boundary and the east boundary which showed no sign of construction, but, as she remembered, most of the highway was free and clear of construction equipment and men until she got to the east edge of the area.

Coffee testified: "I entered the construction project from the west side. When I got to Lawn Church Corner, I saw a yellowish-red International pickup truck approaching from my right. I slowed down, and the truck then turned onto the highway directly in front of me and proceeded east. I had never seen the International pickup truck before. I did not know whether it had anything to do with the Highway construction or not. * * * I cannot estimate the number of miles that I traveled after passing the International pickup truck, but it seemed quite a distance."

As we view the record, plaintiff has alleged no actionable negligence on the part of Sue Coffee. It was daylight. The visibility was good. Farro was positioned so he would see oncoming traffic. Sue Coffee did not stop suddenly. The evidence is clear, she slowed to a stop. Rubottom corroborated her testimony that her brake lights were on. Sue Coffee did not strike the plaintiff. As a matter of fact, she had delivered the flag, and had proceeded on when Rubottom struck the plaintiff.

Negligence is never presumed. The record is clear beyond all doubt that Sue Coffee cannot be charged with any negligence which could be said to have contributed to the plaintiff's injuries. In fact, there is no showing of any negligence on Coffee. The motion for summary judgment was properly sustained.

The judgment dismissing the action as to Sue Coffee is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE C. MILES, APPELLANT.

274 N. W. 2d 153

Filed January 17, 1979. No. 42107.

Criminal Law: Post Conviction: Statutes: Hearings. A court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under section 29-3001, R. R. S. 1943, upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

John F. Steinheider, for appellant.

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

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

BRODKEY, J.

Defendant, Lawrence C. Miles, has appealed to this court from an order of the District Court for Otoe County, Nebraska, denying his motion filed pursuant to the Nebraska Post Conviction Act to vacate and set aside his conviction for the offense of burglary following his plea of guilty to that charge, and his subsequent sentence of 5 years imprisonment in the Nebraska Penal and Correctional Complex. Defendant was arrested and charged with that crime on April 19, 1977, and on that same day waived preliminary hearing and court-appointed counsel in the county court of Otoe County, and was bound over to District Court. He was arraigned on April 20, 1977, and pled guilty to the charge, following extensive and thorough questioning by the court. The defendant was not represented by counsel, either private or court-appointed, at his arraignment nor at his subsequent sentencing on May 6, 1977, although it is clear from the record that the court, as

will hereafter be made apparent, repeatedly informed him as to his right to counsel and inquired whether he wished a court-appointed attorney, which defendant refused. However, on May 6, 1977, immediately following defendant's sentencing, the court did appoint counsel for him.

Thereafter, defendant and his counsel appealed to this court in Case No. 41483, alleging that the trial court erred in not appointing counsel to represent defendant at all critical stages of the criminal proceedings, that defendant did not knowingly and intelligently waive his right to counsel, and did not knowingly and intelligently plead to the charges against him. Also included in his assignments of error was the claim that the court erred in not determining that defendant's intoxication was to such a degree that it could be a defense to the crime of burglary, and also that the sentence imposed upon the defendant was excessive. Thereafter, on November 17, 1977, this court sustained a motion for summary affirmance filed by the State of Nebraska pursuant to Rule 20-A(2) of the Revised Rules of the Supreme Court, 1977, because of defendant's failure to file a motion for new trial within 10 days after the verdict was rendered as required by section 29-2103, R. R. S. 1943.

On March 1, 1978, the defendant, acting pro se, filed his motion to vacate and set aside his conviction and sentence under the Nebraska Post Conviction Act, alleging that he was denied his right to counsel at critical stages of the proceedings against him, and that he did not knowingly and intelligently waive his right to counsel. On March 14, 1978, the District Court appointed the same counsel who represented defendant in his prior appeal to this court to represent defendant in the post conviction proceeding. On March 17, 1978, the court, after reciting that it had examined the record, denied an evidentiary hearing and scheduled the matter for argu-

ment to the court on April 7, 1978. On that date, counsel for both parties appeared and argued the motion to vacate the sentence, at which time the court received in evidence certain exhibits and the bill of exceptions, and took the matter under advisement. Thereafter, on April 11, 1978, the court entered an order overruling defendant's post conviction motion to vacate the sentence, and defendant thereafter perfected his appeal from that order to this court.

In his brief on appeal in this court, counsel for defendant alleges as assignment of error: "The District Court committed reversible error in denying the defendant's motion for post conviction relief and in failing to vacate and set aside the judgment of his conviction and sentence and grant him a new trial." Although it is readily apparent the above assignment of error is couched in very general terms, it is clear from a reading of defendant's brief that the specific matters about which he complains involve the failure of the trial court to grant an evidentiary hearing on defendant's motion to vacate his sentence; insufficient time elapsed between defendant's appearance in county court on April 19, 1977, and his arraignment in District Court on April 20, 1977, which defendant claims is in violation of Standard 1.3(b) of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (1968); defendant's arraignment was deficient in that he was not advised that as an indigent he had a right to counsel at no expense to himself; and his right to counsel was never adequately explained to or waived by him nor was his possible defense of intoxication adequately pursued by the court. In his brief defendant argues: "This record does not show a man who was aware of the right to court appointed counsel. This record does not show a man aware of possible defense to a given crime. This record shows a man deprived of

a very basic Constitutional and statutory right, that of right to counsel, even if indigent." However, defendant also states in his brief: "The court at arraignment, took some pains to completely and thoroughly explain all of the defendant's rights to him, except the right to counsel and court appointed counsel if it were determined he were an indigent." The law is well established in this state that a court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under section 29-3001, R. R. S. 1943, upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. State v. Fincher, 189 Neb. 746, 204 N. W. 2d 927 (1973); State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110 (1970); State v. Pilgrim, 184 Neb. 457, 168 N. W. 2d 368 (1969). The record is clear that the trial court, before denying an evidentiary hearing, did examine the records of the case, and had before it the verbatim record of defendant's arraignment and sentencing. Whether the trial court was correct in denying the defendant an evidentiary hearing on his motion clearly turns upon the validity of defendant's plea of guilty to the charge of robbery, and the sufficiency of the arraignment of the defendant. As previously stated, defendant concedes that the court at the arraignment took pains to completely and thoroughly explain all the defendant's rights to him, "except the right to counsel and court appointed counsel if it were determined that he were an indigent."

We have before us the official record of the arraignment of the defendant, and rather than paraphrase the contents of that arraignment, we deem it advisable to set forth herein, verbatim, the response to those questions, particularly with reference to defendant's right to and offer of appointment of counsel: "*EXAMINATION BY THE COURT:* Q- Now Mr. Miles, there's been an information filed here this morning which charges you with the criminal

offense of burglary. Are you familiar with that? A- Yes, your Honor, I am. Q- Now the other matters in the file indicate that a complaint was filed in the county court on the 19th day of April, so that would have been yesterday. The complaint was filed there and the record indicates that you waived your right to have an attorney represent you and to a preliminary hearing. Is this correct as to what happened in that court? A- Yes, it is, your Honor. * * * Q- And what I want to get to here, do you understand that you have the right to have an attorney represent you not only in this proceeding, but at all stages of the proceeding? A- Yes, sir, I understand that. Q- Can you procure an attorney through your own means? A- No. Sir. Q- Would you like to have a court-appointed attorney? A- No, sir, I wouldn't. * * * Q- Well I doubt that even an attorney would come into court where he's charged with a felony and waive his rights to counsel. Now I want you to fully understand that this is a serious matter. A- Yes, sir, I understand. Q- And although you can waive your rights, it's --- A- That's what I'd like to do. Q- It's certainly not something that I would like to advise. A- Well I'd just like to waive it and get it over with if I could. * * * Q- And is it your desire to waive all of these rights we have been discussing and you do so freely and voluntarily? A- Yes, sir, it is. Q- You don't feel that you want to talk to an attorney in this matter? A- No, sir. Q- I'll be glad to see that you have an opportunity to do so. A- No, sir, I just put myself on the mercy of the Court. * * * Q- Well I'm sure that if you had talked to any attorney about this, that he would immediately question whether you had — whether you were sufficiently intoxicated to be able to form a required intent to commit this crime. A- Yes, sir. I knew what I was doing. I just drank enough that I didn't care really. I just want to get it over with. * * * Q- Well I would feel that from

what you've told me that there is a factual basis for the filing of the information here and for the entry of your plea. And I would like you to be fully aware of course that you may have a defense to this. But you say that you knew what you were doing? A- I don't think I'd have a defense at all because I knew what I was doing. Q- You still want to plead guilty; is that correct? A- Yes, sir, that's right. Q- All right. The Court at this time will accept your plea and you will stand convicted in this court of the offense of burglary. I will further make findings at this time that you understand your rights and you freely and voluntarily waive them, that you are acting voluntarily and that you understand the consequences of this plea and the plea is made intelligently, voluntarily and knowingly. Do you have any reason to disagree with any of those findings? A- No, sir, I don't. Q- And you don't want an attorney at this stage? A- No, sir."

It seems clear from the above record that the court did everything in its power, short of actually insisting, to see that the defendant was represented by counsel, and that the court was willing to appoint counsel for him. Nevertheless, defendant argues that, as an indigent, he should have been informed that he had the right to counsel "at no expense to himself." This claim was made and rejected by the court in State v. Brevet, 180 Neb. 616, 144 N. W. 2d 210 (1966). Defendant concedes that the court did ask him: "Can you procure an attorney through your own means," and: "Would you like to have a court appointed attorney." Although not explicitly so stating, the inference is clear from the above two questions that if the court appointed an attorney it would be at no expense to the defendant. Moreover the record is clear that the defendant was no stranger to criminal proceedings. This was made abundantly clear by the comments of the judge when he sentenced the defendant on May 6, 1977:

"The record that's presented to me is almost in reams in so far as your previous conduct is concerned, Mr. Miles. This indicates that you were confined in the Kansas State Penitentiary for five to ten years for second degree burglary and larceny, this was in 1968. 1966, one to three years sentence for the offense of a felonious assault with intent to do great bodily injury, and this was in the Nebraska Penal and Correctional Complex. You served a period of time in the Colorado State Penitentiary in 1964, three to four years sentence for the offense of larceny. And in 1958, five years sentence for the offense of giving a check with intent to defraud mortgage property. Parole violation followed by four years for sodomy and fondling a minor child. 1950, two years in Louisiana Penitentiary for two concurrent thefts of equipment and power saws. And 1950 subsequently that same place of confinement, you were sentenced to an additional six months for simple escape. 1945, conviction in the armed forces, sentenced to three years in military custody. And I have more information here of a more recent period. I believe you were just released last summer from the Nebraska Penal and Correctional Complex; is that so? MR. MILES: Yes, sir, July 22nd. THE COURT: It shows 5/6/74, breaking and entering two to four years, Lincoln, Nebraska. * * *." The 1974 conviction, last mentioned, was appealed to this court in State v. Miles, 194 Neb. 128, 230 N. W. 2d 227 (1975), case No. 39941. We take judicial notice of the records of this court and an examination of the transcript in case No. 39941 reveals that the defendant had not only one, but two court-appointed counsel at various times, and that on December 23, 1974, the defendant in that case, Lawrence Miles, acting pro se, filed a motion for counsel as follows: "Comes now the above named defendant, Lawrence Miles, hereby moves this court for appointment of counsel on appeal to the Nebraska Supreme Court, pursuant to

Nebraska Statute 29-3004, and that compensation be fixed as provided in Nebraska Statute 29-1803.03." The foregoing motion was accompanied by an affidavit of poverty signed by Lawrence Miles in which he states upon oath that he is the defendant in the motion to vacate and that due to his poverty he is unable to retain legal counsel or pay the costs of the proceedings. The above record clearly belies defendant's contention that he did not know that he could obtain court-appointed counsel at no expense to himself.

We now comment briefly on other matters raised by defendant in his brief on appeal. Defendant contends that he should not have been permitted to plead guilty at this arraignment, which was the day following his arrest and waiver in county court. He cites in support thereof section 1.3(b) of the American Bar Association Standards Relating to Pleas of Guilty, which provides that a defendant without counsel should not be called upon to plead to a serious offense until a reasonable time, set by rule or statute, following the date he was held to answer. We note first of all that no issue to that effect was raised in his motion to vacate sentence, his only complaint being that counsel was not appointed for him. Secondly, the only statute in this state, with reference to the lapse of any time before defendant is called upon to plead, is section 29-1802, R. R. S. 1943, which requires that a copy of the information be served upon the accused at least 1 day before the arraignment. Defendant was advised of his right and waived it, which is frequently done by defendants in this state. Finally, and most important, section 29-3001, R. R. S. 1943, of the Nebraska Post Conviction Act, provides for post conviction relief only when the judgment is void or voidable under the state or federal Constitution. See State v. Miles, *supra*. Although it is true that we have adopted the American Bar Association Standards Relating to

Pleas of Guilty in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), and have stated that those standards should be the minimum procedure in the taking of such pleas, we have never stated that those standards, particularly section 1.3(b) with reference to a delay in pleading, involve constitutional rights. Even assuming, without deciding, that it involved a constitutional right of equal dimension with the right to representation by counsel, or the right to trial by jury, or the right against self-incrimination, or the right of confrontation of adverse witnesses — all of which it is clear may be knowingly and intelligently waived — we hold such right would be subject to voluntary waiver. In this case defendant was informed that he was entitled to have the information served upon him at least 24 hours before arraignment, and he waived that right.

In reference to defendant's contention with regard to the possible defense of intoxication, the court brought this to the attention of the defendant at the arraignment clearly and unmistakably, and pointed out that an attorney might raise the question of whether he had the necessary intent to commit the crime. The defendant replied he had known what he was doing, that he had just drunk enough he really didn't care and he did not want to consult an attorney. A review of the record in this case clearly reveals that no error of constitutional dimensions warranting the setting aside of defendant's conviction and sentence occurred, and the order denying defendant's motion for post conviction relief must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL E. CURNYN, APPELLANT.

274 N. W. 2d 157

Filed January 17, 1979. No. 42123.

1. **Criminal Law: Guilty Pleas.** The standard for accepting a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. _____: _____. Before accepting a guilty plea a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.
3. **Criminal Law: Constitutional Law: Guilty Pleas.** The constitutional requirement for acceptance of a guilty plea is that the plea be voluntary and intelligent.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Remanded with directions.

Daniel E. Curnyn, pro se.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

BRODKEY, J.

The defendant, Daniel E. Curnyn, in an information filed on February 10, 1976, was charged with the burglary of a dwelling located at 5209 Western Avenue, in the city of Omaha, in Douglas County, Nebraska. Counsel from the public defender's office was appointed to represent the defendant. On February 19, 1976, the defendant, together with his counsel, appeared for arraignment and entered a plea of not guilty to the charge. Thereafter, on April 15, 1976, pursuant to a plea bargain arranged with the county attorney's office, the defendant and his counsel appeared before the Honorable John T. Grant,

District Judge. Defendant requested and was granted permission to withdraw his prior plea of not guilty. At that time, he was rearraigned on the burglary charge, and entered a plea of guilty. His arraignment at that time was full and complete, and defendant does not challenge the sufficiency of the arraignment, with one exception. It appears from the record that at the arraignment on April 15, 1976, the court did not specifically inform the defendant of the statutory penalties applicable to the offense of burglary. In any event, the record reveals the defendant appeared before the court for sentencing on July 19, 1976, at which time the court inquired whether either the defendant or his counsel had anything to say why sentence should not be passed against the defendant or anything to say with reference to the nature of the sentence. The record also reveals the defendant then addressed the court personally, following which the court sentenced the defendant to imprisonment in the Nebraska Penal and Correctional Complex for a period of 5 years. At the sentencing, neither defendant nor his attorney made any mention of or objected to the failure by the court to inform the defendant of the penalties for burglary at the time he was arraigned.

Thereafter, defendant-appellant perfected his appeal to this court, case No. 40995, alleging in his brief: "The District Court committed reversible error when in arraigning the defendant at the time of the acceptance of the defendant's plea of guilty, the Court, failed to advise the defendant of the statutory penalty for the charge of burglary." We did not, however, reach the merits of the issue presented in that appeal, for the reason that on May 2, 1977, pursuant to a motion filed by the State of Nebraska for summary affirmance under Rule 20-A of the rules of this court, we sustained the motion of the State because of the failure of the defendant to file a motion for a new trial within 10 days after the ver-

dict was rendered. See section 29-2103, R. R. S. 1943, and State v. Price, 198 Neb. 229, 252 N. W. 2d 165 (1977). It appears that nothing further was done in this case until March 22, 1978, at which time the defendant filed a motion to vacate and set aside the judgment and sentence pursuant to the provisions of the Nebraska Post Conviction Act, alleging there had been a denial and infringement of his rights so as to render the judgment and sentence void or voidable under the Nebraska Constitution and United States Constitution because the court failed to advise him of the statutory penalty for the charge of burglary. Defendant further alleged that: "* * * no reference whatsoever was ever made by the Court insofar as would inform him as to the mandatory minimum sentence and/or the maximum sentence which could be imposed on him as sentence for the offense charged; * * *." On April 18, 1978, the court entered an order finding, among other things, that upon examination of the files and records of the case the court concluded the defendant was entitled to no relief; and denied defendant's motion. Defendant has now perfected an appeal to this court from that order.

The sole issue in this case is whether the conviction and sentence of the defendant must be vacated and set aside because of the failure of the court, during arraignment, to inform the defendant of the range of penalties for the offense of burglary. Defendant argues, in support of his position, that in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), we established the rule that the American Bar Association Minimum Standards Relating to Pleas of Guilty, adopted in 1968, shall be the minimum standards to be applied in this state in accepting pleas of guilty, and that section 1.4 of those standards provides, among other things, the court should not accept a plea of guilty without first addressing the defendant personally and advising him of the maxi-

mum possible sentence and the mandatory minimum sentence.

In its brief on appeal, the appellee, the State of Nebraska, sets forth several arguments in support of its position that the judgment of the District Court should be affirmed. It first contends that the sole issue raised on this appeal was previously raised and summarily affirmed in a prior decision of this court. While the issue was raised in the briefs on the appeal of this matter, and it is also true that the former appeal was later summarily dismissed, as previously pointed out, we did not reach the merits of the issue in that appeal, and the summary affirmance was on procedural grounds only. That being so, we do not believe we are precluded in this appeal from considering the issue on its merits.

Appellee next contends the trial court did not err in accepting and entering judgment on defendant's plea of guilty when the record reflects the plea was entered intelligently and voluntarily and when it is clear the defendant was aware of the possible penalties involved as a consequence of his guilty plea. In State v. Turner, *supra*, we stated: " 'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " We also held in that case, however, that: "The criteria is whether or not the defendant understands the relevant factors involved in a guilty plea. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea." We also adopted the Standards Relating to the Pleas of Guilty promulgated by the American Bar Association as the minimum procedure in the taking of such pleas. The State argues that State v. Painter, 195 Neb. 183, 237 N. W. 2d 142 (1976) is precedent for deciding the instant case. In Painter, this court noted

that a guilty plea may be accepted even when a trial judge fails specifically to advise a defendant, on the record, of the potential penalties involved as a consequence of entering a guilty plea. However, appellant contends the instant case is distinguishable from Painter, as in that case the trial court asked the defendant if he was aware of the penalties and whether he had discussed them with his attorney, to which he answered in the affirmative. Also in Painter the defendant's attorney stated he had informed his client of the penalties. There is no evidence of a direct nature in the record to indicate that anything similar was done in the instant case, although the State strenuously argues it may be inferred from the record that defendant was aware of the penalties. We believe this case should be governed by the principles announced in State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815 (1974). In that case we stated: "The practice of advising a defendant who is about to enter a plea to a felony of the possible penalties on conviction, although not made mandatory by any statute in this state, is one of long standing in this jurisdiction and antedates the adoption of the standards in State v. Turner, *supra*. No doubt the failure in this case is the result of oversight and failure to use a check list. In Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, upon which the defendant relies, the Supreme Court of the United States vacated the judgment of conviction and ordered that the defendant be permitted to plead again. We do not interpret that case as holding that under a record such as we have in this case any such procedure is constitutionally required. *The constitutional requirement is that the plea be voluntary and intelligent and the determination of that fact be reliably determined.* * * * The record here supports at least by implication a conclusion that the defendant in fact knew the consequences of her plea. This implication arises from the fact that

she was represented by counsel throughout and had adequate consultation with him, and that when she was advised of the penalties just before sentencing she expressed no surprise, and when asked if she had any reason to give why sentence should not be imposed, she gave no relevant response. Further, at that time her counsel did, in her presence, say that no legal reason existed why sentence should not be imposed." (Emphasis supplied.). Most of the elements, set out above, as justifying an implication that defendant knew the consequences of the plea are also present in the instant case.

It appears that, as stated in Lewis, the constitutional requirement for acceptance of guilty pleas is that the plea be voluntary and intelligent and the determination of that fact be reliably determined. It is difficult to conceive how a guilty plea can be voluntary and intelligent unless and until the defendant is informed or is made aware of the possible penalties to which he may be subjected by making such a plea.

Since, in this case, the extent of the defendant's knowledge of the applicable penalties is a matter in dispute and cannot be clearly determined from the record of this case without indulging in inferences, we deem it advisable, without vacating and setting aside defendant's conviction and sentence, to remand this matter to the trial court with leave to the defendant to apply to the trial court to withdraw his plea. Should defendant fail to do so within 10 days of the issuance of the mandate in this case, then the sentence shall be carried into execution. If the defendant elects to withdraw his plea, the trial court shall hold an evidentiary hearing to determine whether the defendant was, in fact, aware of the possible penalties for the offense of burglary at the time he entered his plea. If the court finds he was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and

he shall be permitted to plead again. If it determines the defendant was aware of the penalties and consequences of the plea, the judgment and sentence shall stand.

REMANDED WITH DIRECTIONS.

FRANK R. WEST, APPELLANT, V. THEODORE JANING, SHERIFF, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

274 N. W. 2d 161

Filed January 17, 1979. No. 42136.

1. **Criminal Law: Extradition: Trial.** Whether or not the state demanding extradition has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine.
2. **Criminal Law: Extradition: States.** It is the obligation of the asylum state in extradition proceedings to determine whether the requisition charges a crime under the law of the demanding state.
3. **Criminal Law: Statutes: Constitutional Law.** An unforeseeable judicial enlargement of a criminal statute applied retroactively is impermissible under the Fourteenth Amendment to the Constitution of the United States.
4. **Criminal Law: Extradition: States: Comity.** In an extradition proceeding, where an examination of prior judicial precedent of the demanding state makes it at least doubtful that the demanding state is attempting to retroactively apply a judicial enlargement of criminal statutes, the asylum state ought, as a matter of comity, to refrain from determining the issue in analogy to the principle that the constitutionality of the statutes of a sister state defining a crime should be tested in the sister state.

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

James P. Linn and B. J. Rothbaum, Jr., of Linn, Helms, Kirk & Burkett, David S. Lathrop of Lathrop, Albracht & Swenson, and Thomas J. Cahill of Nelson & Cahill, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH,

McCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

CLINTON, J.

This is a habeas corpus action commenced in the District Court for Douglas County against the sheriff of that county. The action is in resistance to a warrant of extradition issued by the Governor of the State of Nebraska upon a requisition by the Governor of Iowa. The requisition is based upon an Iowa grand jury indictment charging the petitioner West with obtaining property under false pretenses. After the introduction of evidence and hearing, the District Court for Douglas County denied the relief requested by the petitioner and he appeals to this court.

The petitioner asserts that the District Court committed error of constitutional magnitude in denying him relief, because the record indisputably establishes that the State of Iowa is constitutionally barred from trying West and is therefore also barred from depriving him of his liberty by extraditing him. The assignment is founded upon the three following propositions: (1) The evidence shows that, in a previously commenced prosecution for the same offenses (later dismissed by the State of Iowa without prejudice), the State of Iowa deprived West, over his objection, of his statutory and constitutional right to a speedy trial. (2) In the pending prosecution the State of Iowa is attempting to prosecute him for transactions which were not crimes under Iowa law at the time the prosecution commenced, and became such only through a retroactive interpretation by the Iowa Supreme Court of section 713.1, Iowa Code, after an appeal by the state from the dismissal of the charges against West by the trial court. State v. West, 252 N. W. 2d 457 (Iowa, 1977). The pending prosecution in Iowa is, therefore, in effect a prosecution under an ex post

facto law and deprives West of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States. Bouie v. City of Columbia, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894. (3) It follows from the foregoing that, since an ex post facto law is no law at all, the record shows the defendant West has not been "charged" with an offense within the meaning of Article IV, section 2, of the Constitution of the United States and the pertinent provisions of the Uniform Criminal Extradition Act of the State of Nebraska.

We decline to determine the speedy trial issue. In Wise v. State, 197 Neb. 831, 251 N. W. 2d 373, we said that whether or not the state demanding extradition has violated the right of a fugitive to a speedy trial is a question for that state to determine. It is presumed that the demanding state will recognize any well-founded claims of a violation of the petitioner's constitutional rights.

Since the original draft of this opinion was prepared, the Supreme Court of the United States has released its opinion in Michigan v. Doran, ____ U. S. ____, 99 S. Ct. 530, 58 L. Ed. 2d 521. That case makes it clear that the court of the asylum state has no authority under the Constitution of the United States to determine such issues. The Supreme Court there said: "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable. . . . We hold that once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that prob-

able cause existed, no further judicial inquiry may be had on that issue in the asylum state."

It is not absolutely clear that the Supreme Court's opinion in Doran precludes this court from considering the petitioner's second contention under the facts here. It is clearly our duty to determine whether or not the requisition and its attachments charge a crime under the laws of the demanding state. Austin v. Brumbaugh, 186 Neb. 815, 186 N. W. 2d 723; State of Kansas v. Holeb, 188 Neb. 319, 196 N. W. 2d 387; §§ 29-731, 29-734, 29-738, R. R. S. 1943. See, also, State v. Ritter, 74 Wis. 2d 227, 246 N. W. 2d 552; Michigan v. Doran, *supra*. However, whether we should do more than merely determine that the indictment or information charges a crime under the statutes of the demanding state is not made certain by Doran. We therefore examine West's allegation that the record clearly and conclusively establishes that West is not "charged" with a crime under the law of the State of Iowa.

Section 713.1, Iowa Code, for violation of which West was indicted, insofar as is pertinent, reads as follows: "If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property, . . . shall be imprisoned. . . ." The various informations pled that between certain dates: "The said Frank R. West obtained cattle from (a named person) of (a certain town), Iowa, by means of false pretenses." Pursuant to Iowa practice, bills of particulars were demanded and filed which, briefly summarized, allege that West was an officer of American Beef Packers (hereinafter ABP) which purchased cattle from owners pursuant to "grade and yield" contracts under which no cash changed hands at the time of delivery by the seller as payment was made after grade and yield had been determined. The theory of the prosecution was that West knew when the purchases were made that

ABP was insolvent and that checks issued by ABP in payment for the cattle would not be paid when presented; and West made an implied representation at the time of purchase that funds were or would be available when he knew otherwise.

The trial judge determined that the information as amplified by the bill of particulars did not state crimes under Iowa law and dismissed the information before trial. The State of Iowa appealed from the dismissal and the Supreme Court of that state reversed and remanded the cause for trial. State v. West, *supra*. In that case, the Iowa Supreme Court held that under section 713.1, Iowa Code, a promise to perform a future act made with the intent not to perform it is sufficient to support a charge of obtaining property by false pretenses, that a misrepresentation may be made by words or actions, and that failure to disclose a material fact may be a misrepresentation.

West asserts the opinion of the Iowa Supreme Court is a judicial "expansion" of section 713.1, Iowa Code, and is contrary to the court's previous holdings that a promise to perform an act in the future made with an intent not to perform does not constitute a misrepresentation under section 713.1. It is, therefore, he contends, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively," which the Supreme Court of the United States has held is impermissible under the Fourteenth Amendment to the Constitution of the United States. Bouie v. City of Columbia, *supra*. Bouie does stand for the proposition for which it is cited. The question to be answered is whether it is sufficiently clear that the Iowa court did, in State v. West, *supra*, make an unforeseeable judicial enlargement of section 713.1, Iowa Code, so that we must hold the instruments of extradition do not show West is substantially charged with having committed a crime under Iowa law.

West quotes certain portions of the opinion in State v. West, *supra*, which, read by themselves, would indicate the Iowa court recognized it was in fact enlarging the statute contrary to its prior precedents and was not construing the statute for the first time with regard to the issues at hand. However, when one reads the whole opinion and examines some of the precedents therein mentioned, it is at least doubtful a retroactive enlargement of the statute was being accomplished. On the contrary, it is rather clear a determination of a previously undecided point was being made, and that the situation in State v. West, *supra*, was not covered by prior precedent, except possibly by assumption or dicta. The Iowa court prefaced its review of various prior opinions by noting: "[T]he cases failed to base the results on the issue discussed here, . . . None of the cases hold a charge or conviction of false pretenses invalid because of a failure to allege or prove a misrepresentation of past or existing fact, although the premise appears in the text of the opinions."

Some of the cases reviewed by the Iowa court in fact upheld false pretense charges and convictions where the only misrepresentation was one of present intention. State v. Dowe, 27 Iowa 273 (1869), is such a case. There it was contended that the facts pled showed a mere false promise and not a "misrepresentation." The charge involved the procuring of a signature on a receipt by the false pretense of an implied promise to pay. The court there said: "In the case before us, the pretense was the act of coming, and the averment that defendant had come, to pay the money. These, doubtless, implied a promise to pay, otherwise they could not have operated upon the mind of the party defrauded to induce him to make and sign the receipt. The act of the defendant in coming to the other party, proclaiming his intention and purpose to pay the money, is readily distinguishable from a promise so to do. A pretense

may be gathered from the acts and conduct of a party." The false representation in that case was the undisclosed intention not to pay.

Another early Iowa case discussed in State v. West, *supra*, is State v. Foxton, 166 Iowa 181, 147 N. W. 347 (1914). That case involved a prosecution under the false pretense charge which grew out of the giving of a no-account check. In its discussion of Foxton, the Iowa Supreme Court said: "[T]his court found that the representation of a personal check implied that defendant had the ability to pay, sustaining a false pretenses charge."

The court also discussed State v. Huckins, 212 Iowa 283, 234 N. W. 554 (1931), in which it was held that "intention or knowledge" is a fact regarding which one may make a false pretense and "One's representation that he has actual knowledge may be inferred from the circumstances as may the intent." In that case the holding was related to the propriety of an instruction which in effect took away from the jury the determination of whether the defendant spoke from a personal knowledge and intended to be so understood, or whether, being without personal knowledge, he honestly believed the representations were true, in which case he would not be guilty under Iowa law.

After discussion of the precedents, the court concluded that the allegation the "defendants solicited orders for cattle, entered into a contract for the purchase of the same at a stated price and accepted delivery of them . . . implied the [representation of an] intent to pay for the cattle . . . when . . . the allegations made by the State in the indictments, if proven, would justify a jury in concluding the defendants had no intention to pay for the cattle," and remanded the West case for trial on the merits.

The rationale of Bouie v. City of Columbia, *supra*, is that a retroactive enlargement by judicial interpretation, contrary to previous precedent, of a stat-

ute defining a crime is in effect similar to an ex post facto statute because it fails to give fair warning the act in question is criminal. It is largely mythical to assume that persons who commit crimes consult the criminal code before acting, but if in this case it had been done and prior judicial precedents considered, the accused should have been warned the act of purchasing cattle and impliedly representing that payment was to be made while intending not to pay, might constitute a crime. As we read the Iowa precedents discussed, it is doubtful the interpretation of section 713.1, Iowa Code, in State v. West, *supra*, did constitute a departure from prior precedent. We believe, therefore, as a matter of policy, we ought not to determine the constitutional issue.

The question before us is analogous to that which is present when a contention is made that the statute of the demanding state which defines the crime is unconstitutional. Unless in such cases the statute has been found unconstitutional by either the court of last resort of the demanding state or the Supreme Court of the United States, the asylum state should not assume the determination of constitutionality. In Denton v. Cronin, 187 Colo. 247, 529 P. 2d 644, the Supreme Court of Colorado held the accused could not avoid extradition to a sister state on the ground the law of that state was unconstitutional; comity required the accused to test the constitutionality of the statutes of the sister state in the courts of that state and, if unsuccessful there, then in the appropriate federal courts.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM WHITNEY, APPELLANT.

274 N. W. 2d 165

Filed January 17, 1979. No. 42166.

Criminal Law: Evidence: Proof. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

T. Clement Gaughan, Lancaster County Public Defender, and George R. Sornberger, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

WHITE, J.

The defendant was convicted of the offense of burglary of the Thomsen Music store, 2641 No. 48th Street, Lincoln, Nebraska. Defendant appeals. The defendant assigns one error in this court, i.e., the verdict is not sustained by sufficient evidence and is contrary to law. We affirm.

"The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt." State v. Journey, 201 Neb. 607, 271 N. W. 2d 320.

The defendant was identified by the manager of the Thomsen Music store as having been in his store on January 26, 1978, for approximately 1 hour with a companion, Mark Trautner. The two parties were

playing a Gibson Standard guitar and a Rickenbacker stereo electric bass guitar. A hold was placed on the guitars indicating they were not for sale because the defendant and his companion indicated they would be back for them.

Shortly before 6 a.m., on January 27, 1978, Sergeant Larsen of the Lincoln Police Department was driving his cruiser northbound on 48th Street approaching St. Paul Street when he observed a man running in an easterly direction along the sidewalk area on the south side of St. Paul Street in the crosswalk on No. 48th Street carrying a guitar in each hand. The intersection of St. Paul and 48th Streets is less than 1 block from Thomsen Music store. One of the guitars was dark colored and the second guitar was lighter. The light was sufficient for him to identify the tags attached to the guitars. The person was observed by Sergeant Larsen to be wearing a green hooded parka with the hood up and the strings closed around the hood and blue jeans. Sergeant Larsen followed the suspect for a time. He observed the suspect climb a fence and then later observed two guitars, one approximately 75 feet from the fence and one in a driveway nearby. When the officer observed the suspect climbing the fence, he drove his automobile to the alley which runs opposite the direction in which the suspect was traveling, did not observe him, and returned to the fence. Sergeant Larsen observed tracks, which appeared to be those of a hiking boot and a sole of a type characterized as a "waffle stomper," at the residence at 2621 No. 49th Street. He also observed a door ajar. As he approached the residence, two persons came out the door, one identified as a Joe Holm who is a resident at the address and the other, defendant William Whitney. The defendant was arrested at that time. He was then wearing a green hooded parka with the hood drawn tightly over his head, blue jeans, and hiking boots, which were later examined

and found to be a type known as a "waffle stomper." The witness Joe Holm testified that he was in bed in his bedroom at his parents' home at the above address, that he was awake, and that a man entered through his bedroom into another room. He followed the man, later identified as the defendant, into yet another room and found him in a closet. In response to the question: "What are you doing in my closet?" the defendant responded: "Where are the police?" The witness said he had not seen nor was he acquainted with the defendant prior to this meeting. The witness urged the defendant to leave. It was as he was leaving through the outside back door that the defendant was met by Sergeant Larsen and was arrested. The defendant does not dispute that there was a burglary at the Thomsen Music store. The guitars were identified by the manager as having been in inventory and, indeed, as having been played by the defendant and a companion on the day previous. The entry was conclusively shown to be by force, a chunk of cement having been thrown through a reinforced plate glass door. The tracks found, both near the fence at the home residence and at the rear door of the Thomsen Music store, were shown to match the tread on the boots of the defendant. All prints were measured against the defendant's boots and found to be of the same size. Under the test for circumstantial evidence, there is no rational hypothesis other than the guilt of the defendant.

The judgment of the trial court was correct and is hereby affirmed.

AFFIRMED.

NEWT COPPLE, APPELLANT, V. THE CITY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

274 N. W. 2d 520

Filed January 24, 1979. No. 41649

1. **Administrative Law: Public Meetings: Statutes.** There was no violation of the Nebraska open meeting law, sections 84-1408 to 84-1414, R. R. S. 1943, where at a recess taken during a lawful public meeting called by the board of county commissioners of Lancaster County, certain of the commissioners and others present, retired to an adjoining room, the door to which was open at all times, with no one being excluded, and an informal conversation was had by the commissioners and others with reference to an item of business on the agenda of the meeting, but where no formal action or vote was taken thereon until the board of commissioners reconvened in regular session following the recess.
2. **Municipal Corporations: Ordinances: Courts: Constitutional Law.** Courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenged their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or the general welfare.
3. **Municipal Corporations: Ordinances.** A city ordinance adopting a comprehensive plan is a legislative act.
4. **Municipal Corporations: Ordinances: Constitutional Law.** Under the doctrine of separation of powers, courts should not inquire into the motives of legislators whenever an adopted ordinance is legislative in character.
5. **Municipal Corporations: Public Officers and Employees: Courts.** However, even where the acts of a public body are legislative in character, courts must consider and apply statutes and ordinances disqualifying a public official from voting on or participating in actions taken by a public body, because of an existing conflict of interest on the part of the official.
6. **Municipal Corporations: Public Officers and Employees.** The majority vote of a city council need not be invalidated where the alleged disqualifying interest of a member, in regard to the subject matter being considered, is general or of a minor character.
7. _____: _____. The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case.
8. **Municipal Corporations: Zoning.** A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Knudsen, Berkheimer, Endacott & Beam, for appellant.

Charles D. Humble, Lincoln City Attorney, and William G. Blake, for appellees.

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

BRODKEY, J.

Plaintiff-appellant, Copple, appeals to this court from the denial by the Lancaster County District Court of his petition for a permanent injunction, enjoining the defendants-appellees from using the Lincoln City-Lancaster County Comprehensive Regional Plan purportedly adopted on January 25, 1977, and from rezoning certain property for shopping center use. We affirm.

The plaintiff, Copple, is the owner of land located at the southwest corner of Old Cheney Road and 40th Street in Lincoln, Nebraska. Copple filed a petition with the Lincoln city council on September 15, 1976, to have his property rezoned from A-1, residential zoning district usage, to J-1, planned regional commercial district usage.

Also on file with the Lincoln city council is the petition of John F. O'Neill, one of the partners of Steve E. Cook, a Lincoln city councilman, to have land owned by the partnership and located at the northeast corner of 27th Street and proposed Pine Lake Road, in Lincoln, Nebraska, rezoned J-1, planned regional commercial district usage, from its present zoning classification of A-1, residential zoning district usage.

Both the Cook property and plaintiff's property are located in the same section of land but are a considerable distance apart. The owners are vying for

the designation of their respective properties as a regional multiuse center for the southern portion of Lincoln, Nebraska, suitable for shopping center development.

By November 15, 1976, the city council had voted to place both petitions for rezoning, Copple's and Cook's, on a pending status for further action after the comprehensive plan had been recommended to and adopted by both the Lincoln city council and Lancaster board of county commissioners.

On January 25, 1977, the city planning commission, pursuant to statute, submitted a proposed comprehensive plan to the Lincoln city council, and Lancaster board of county commissioners for adoption. The city council and board of county commissioners met separately, and each adopted the proposed comprehensive plan on January 25, 1977. The comprehensive plan, as adopted, designated as a site for a regional multiuse center an area encompassing the Cook property. It was stipulated that the designation in the comprehensive plan of the Cook property as the site for a regional multiuse center would be considered by city councilmen Denny, Baker, Bailey, Jeambey, and Sikyta as a favorable factor in their final decision of whether to approve Cook's petition for rezoning.

Copple makes essentially three assignments of error on the part of the District Court in denying his request for a permanent injunction to prevent the defendants, City of Lincoln and the city council members, from using the comprehensive plan as adopted on January 25, 1977, and from rezoning Cook's property to J-1, planned regional commercial district usage. Plaintiff's first assignment of error is that the Lancaster County board of commissioners made its decision to adopt the comprehensive plan on January 25, 1977, in violation of Nebraska's open meeting laws. Plaintiff's second assignment of error is that the Lincoln city council acted arbitrar-

ily and capriciously in adopting the comprehensive plan designating Cook's property as the site for a regional multiuse center. His third assignment of error is that the comprehensive plan should be found to be void on public policy grounds because of councilman Cook's alleged conflict of interest and his continued participation and voting in the preparation and adoption of the plan.

Plaintiff's first assignment of error concerns itself with the actions of the Lancaster County board of commissioners on January 25, 1977, when the plan was adopted by the county board. The record discloses that the city council and county board were gathered to discuss, and possibly adopt, the proposed plan. Robert Colin, one of the three Lancaster County commissioners, moved during the meeting of the county board that "approval of the comprehensive plan be delayed for ninety days until a further study could be made of the shopping center issue." The motion carried by a vote of two to one. Commissioner Colin then moved that the county board recess and reconvene after the city council had a chance to act upon the actions taken by the county board. The city council convened, adopted the comprehensive plan, and recessed, at which time the county board reconvened. A motion was then made to have the county board adopt the proposed comprehensive plan, but the motion failed. Thereafter, a motion to recess again for 10 minutes was made and passed. The county board then moved from the city council chambers, where the county board was meeting, to an adjoining office. Present at that time were the planning commission director, a representative of the consulting firm, a Lancaster County deputy county attorney, the three county board commissioners, a representative of the news media, and a number of other people who were already in the office or who came in with the county board. The door to the office remained open at all

times and no one was excluded or asked to leave the room. No votes of any kind were taken during the recess. The deputy county attorney advised the county board that they had no jurisdiction over the shopping center issue, as it was within the City of Lincoln's 3-mile limit. When the county board thereafter reconvened its meeting in the city council chambers, commissioner Hamilton made a statement regarding the shopping center, and then voted in favor of the motion to adopt the proposed plan. The comprehensive plan was adopted by a two to one vote.

Plaintiff's contention is that the meeting during the recess was a violation of Nebraska's open meeting laws, sections 84-1408 to 84-1414, R. R. S. 1943. Section 84-1411 (1) reads as follows: "Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice, or a statement that the agenda, which shall be kept continually current, shall be available for public inspection at the principal office of the public body during normal business hours. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting." Copple argues that the recess of the county board was a meeting which was in violation of section 84-1411 (1); and thus voided the county board's subsequent two to one vote to adopt the proposed comprehensive plan, taken when the meeting reconvened, by virtue of section 84-1414 (1), R. R. S. 1943, which reads as follows: "Any motion, resolution, rule, regulation, ordinance or formal action of a public body made or taken in violation of any of the provisions of sections 79-327, 84-1408, 84-1413, and 85-104 shall be declared

void by the district court. A suit to void any final action shall be commenced within one year of the action." We deem that argument to be without merit.

It is clear from the evidence that no vote was taken upon "any motion, resolution, rule, regulation, ordinance or formal action" which would be void under section 84-1414 (1), R. R. S. 1943, and that no violation of the Nebraska open meeting laws took place during the recess.

An underlying assumption inherent in plaintiff's first assignment of error is that the legal adoption of the plan by the county board was necessary, in conjunction with the adoption of the plan by the city council, before the City could use the plan. We need not reach that issue in view of our conclusion that there was no violation of the open meeting laws by the Lancaster County board of commissioners.

Plaintiff's second assignment of error is that the Lincoln city council acted arbitrarily and capriciously by adopting the comprehensive plan, which designates the location of Cook's property as the site for a regional multiuse center.

In the case of City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828 (1949), we stated that: "[C]ourts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to the public safety, health, morals, or the general welfare."

The statute dealing with comprehensive plans for cities, in effect during the development and adoption of Lincoln's comprehensive plan, was section 15-1102, R. R. S. 1943. That section in part provides that, "The *general plan* for the improvement and development of the city of the primary class shall be known

as the comprehensive plan." (Emphasis supplied.) This court in Kelley v. John, 162 Neb. 319, 75 N. W. 2d 713 (1956), ruled that a city ordinance adopting a comprehensive plan was a legislative act, and not an administrative act. We are of the opinion that the Lincoln city council, in adopting the comprehensive plan, acted legislatively. The comprehensive plan, as adopted by the City of Lincoln, itself recognizes it is only to serve as a general guide in the development of Lincoln and Lancaster County. While the comprehensive plan specifically refers to the location of Cook's property as a site for a regional multi-use shopping center, it does not necessarily follow that Cook's property will, in fact, be developed as the regional shopping center. The Lincoln City-Lancaster County Comprehensive Regional Plan states: "It should be noted that while six multi-use centers are *proposed*, all of the outlying centers are considered subservient to Lincoln Center — the commercial focus of the region. The conclusion is clearly outlined in the adopted goals and policies and supports the concept of resource conservation. As a result, the staging and size of outlying regional centers has been developed to assure continued dominance of the downtown. Moreover, it is the policy and [sic] the City of Lincoln and County of Lancaster to control the disposition of regional shopping center locations and sizes through regulatory controls. Should the *proposed recommendations* for such centers appear to underserve local needs while having no impact upon the downtown, the recommended size limits and staging might be altered. Conversely, should the development of the *proposed centers* result in adverse impacts upon the downtown further restrictive measures should be instituted." (Emphasis supplied.)

In an effort to meet his burden of proof that the adoption of the comprehensive plan by the Lincoln city council was "arbitrary, unreasonable and with-

out substantial relation to the public safety, health, morals, or the general welfare," plaintiff called several expert witnesses who testified solely as to the location of the regional shopping center in south Lincoln and the need for opening Pine Lake Road if Cook's property was to be the site for the center.

Evidence in the record discloses a great deal of time and money was expended in the development of the proposed comprehensive plan. During its development plaintiff's experts prepared and presented an analysis to the planning commission regarding the relative merits of the two properties being considered for designation as the site for the south regional shopping center.

The defendants' brief fairly summarizes, we believe, the evidence before us as follows: "The considerations which went into the designation of the potential shopping center site not only involved the economic feasibility of a number of proposals, but also included economic impact on existing commercial areas, impact upon existing and planned residential areas, and impact upon utilities, drainage and transportation * * *. While economic information was gleaned through a national consultant and updated when necessary, the City of Lincoln analyzed the situation in light of the goals of avoiding community splitting, avoiding the adverse effects a shopping center could have on already existing surrounding land use patterns in neighborhoods, diverting excess traffic from potentially overloaded streets, preserving existing shopping areas, and achieving proper timing.

"In short, the planners for the City of Lincoln developed a comprehensive plan as a total unit, based upon overall planning policies and objectives. This thorough approach to planning can hardly be labeled as arbitrary and capricious planning."

The District Court properly found that plaintiff failed to establish that the City of Lincoln acted arbi-

trarily or capriciously in adopting the comprehensive plan.

Plaintiff's third assignment of error is that city councilman Cook participated in the development of the proposed comprehensive plan and voted to adopt it, when he had a conflict of interest because of his having an ownership interest in property designated in the plan as a site for a regional shopping center.

Defendants and the trial court rely upon Angle v. Chicago, 151 U. S. 1, 14 S. Ct. 240, 38 L. Ed. 55 (1894), and Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla., 1959), for the proposition that under the doctrine of separation of powers, courts should not inquire into the motives of legislators whenever an adopted ordinance is legislative in character. However, as pointed out by plaintiff, the Florida District Court of Appeals stated in City of Miami Beach v. Schauer, 104 So. 2d 129 (Fla. App., 1958), which was the case affirmed in Schauer v. City of Miami Beach, *supra,* that, "disqualification of a member of the city council would have to be provided for by legislation. * * * In the absence of some such provision, applicable to the city council of the City of Miami Beach, the vote in question must stand." Subsequently, the Florida District Court of Appeals in Fossey v. Dade County, 123 So. 2d 755 (1969), distinguished its prior holding in City of Miami Beach v. Schauer, *supra.* Fossey v. Dade County, *supra,* involved a county commissioner, Fossey, who sought to reverse a declaratory decree by a lower court that he was not qualified to vote upon a resolution which would substantially increase the value of some land which he owned. The county operated under a home rule charter, one section of which provided in part that "[a]ny county official or employee of the county who has a financial interest, direct or indirect, in any action by the Board shall make known that interest and shall refrain from vot-

ing upon or otherwise participating in such transaction." The court in Fossey continued: "We have not overlooked City of Miami Beach v. Schauer, * * *. The Schauer decision is not contrary to the holding in the instant case, because in the Schauer case there was no statute or charter provision precluding the councilman from voting. The question of the right of County Commissioner Fossey to vote on the proposition involved in the instant case was simplified by the presence of § 4.03 (E) of the county's home rule charter, as a result of which it became necessary only to determine whether the charter provision was applicable in this instance, that is, whether Commissioner Fossey 'has a special financial interest, direct or indirect, *in any action by the Board.*' " (Emphasis supplied by the court.) See, also, Coffin v. City of Lee's Summit, 357 S. W. 2d 211 (Mo. Ct. App., 1962).

At all times material to this case, the City of Lincoln had in effect ordinances dealing with conflicts of interest on the part of city officials. The provisions of the Lincoln Municipal Code in effect during the period when the comprehensive plan was developed and adopted were sections 2.08.010 to 2.08.030 and sections 2.09.010 to 2.09.050, which we quote, in pertinent part, below: "2.08.010 *Interest to be declared — Member not to participate.* If any councilman, the mayor, or any employee of the city has a significant financial interest, direct or indirect, or by reason of ownership of stock in any contract or other business dealings with the city, or in any action of the city government relating to the public or private development of land, or if any member of any city board or commission has a significant financial interest, direct or indirect, or by reason of ownership of stock, in any matter before the body on which he serves, he shall declare that interest and shall refrain from voting upon or otherwise participating in the making of the contract or the taking of

the action in which he has a financial interest. (Ord. 6899 § 1; April 13, 1959). 2.08.020 *Form of declaration.* If any person described in section 2.08.010 hereof has any interest as specified in said section, he shall declare his interest by filing a sworn statement with the city clerk which statement should contain the following: (a) The position held with the city by such person; and (b) The nature of his interest. (Ord. 6899 § 2; April 13, 1959). 2.08.030 *Penalty for concealing interest.* Any officer or employee designated in section 2.08.010 hereof or in Article VII, Section 3 of the City Charter, who willfully conceals his interest or willfully conceals the requirements of Article VII, Section 3 of said chapter, or who violates the provisions of this chapter shall forfeit his office or position and shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be fined in any sum not exceeding $100 or shall be imprisoned in the city jail for not to exceed six months, and shall stand committed to the city jail until such fine and costs of prosecution are paid. (Ord. 6899 § 3; April 13, 1959). 2.09.010 *Title.* This chapter may be known, referred to, and cited as the code of ethics of the City of Lincoln. (Ord. 9145 § 1; January 3, 1967). 2.09.020 *Declaration of Policy.* The public judges its government by the way public officials and employees conduct themselves in the posts to which they are elected or appointed. The people have a right to expect that every public official and employee will conduct himself in a manner that will tend to preserve public confidence in and respect for the government he represents. Such confidence and respect can best be promoted if every public official and employee, whether paid or unpaid, and whether elected or appointed, will uniformly: (a) Treat all citizens with courtesy, impartiality, fairness, and equality under the law; and (b) Avoid both actual and potential conflicts between their private self-interest and the public interest. To help public of-

ficials and employees achieve these goals is one of the objectives of this code. The other objective is based on the proposition that no man can serve two masters, nor should he attempt to do so. Therefore, this code provides for the prohibition of such type of service. The provisions of chapter 2.09 are intended to be in addition to the requirements contained in chapter 2.08 (Ord. 9145 § 2; January 3, 1967). 2.09.030 *Definitions.* The terms used in this code are hereby defined as follows: (a) Official or employee. Any person elected or appointed to, or employed or retained by, any public office or public body of the city, whether paid or unpaid and whether part-time or full time. (b) Public body. Any agency, board, body, commission, committee, department or office of the City of Lincoln. (c) Financial interest. Any interest which shall yield directly or indirectly a monetary or other material benefit (other than the duly authorized salary or compensation for his services to the city) to the official or employee or to any person employing or retaining the services of the official or employee. (d) Personal interest. Any interest arising from blood or marriage relationships or from close business or political association whether or not any financial interest is involved. (e) Person. Any person, firm, association, group, partnership, or corporation, or any combination thereof. (Ord. 9145 § 3; January 3, 1967). 2.09.040 *Fair and equal treatment.* * * * 2.09.050. *Conflict of interest.* Financial or personal interest. No official or employee, either on his own behalf or on behalf of any other person, shall have any financial or personal interest in any business or transaction with the City of Lincoln, unless he shall first make full public disclosure of the nature and extent of such interest. Disclosure and disqualification. Whenever the performance of his official duties shall require any official or employee to deliberate and vote on any matter involving his financial or personal interest,

he shall publicly disclose the existence of such interest and disqualify himself from participating in the deliberations as well as in the voting. * * *." We note, in passing, that certain deletions and changes were made in the above ordinances in 1978, but consideration is given in this opinion only to such ordinances as were in effect at times material to this litigation, and which were introduced into evidence at the trial.

We must first determine whether Cook violated the provisions of the Lincoln Municipal Code prohibiting conflicts of interest. Cook testified at trial that he made an oral declaration of a conflict of interest at a city council meeting shortly after acquiring an interest in the property in February of 1976. On July 30, 1976, the day the rezoning petition for Cook's property was filed with the city council, Cook held a news conference and declared his conflict of interest due to his partial ownership in the property. On September 10, 1976, at a special meeting of the planning commission, consultants, city council, and county board, Cook declared a conflict of interest when a motion was made to indicate to the consultants the size of the projected shopping centers. Again, at a city council meeting on October 18, 1976, Cook filed and read a written statement into the record of his conflict of interest. The city council then voted to accept Cook's statement of conflict of interest. Also, at the October 25, 1976, city council meeting Cook declared a conflict of interest and did not participate when his and the plaintiff's petitions were placed on "pending," to be held in abeyance until a comprehensive plan was adopted. Cook again declared a conflict of interest at the November 15, 1977, city council meeting when plaintiff's petition for rezoning was also placed on pending. Thereafter, at a special meeting of the planning commission, city council, county board, and the consultant on December 7, 1976, Cook declared a con-

flict of interest and abstained from voting in regard to shopping centers. Again, at the December 9, 1976, special meeting of the planning commission, city council, and county board, Cook abstained from voting on the status of Old Cheney Road, declared a conflict of interest on the issue of the locations for shopping centers, abstained from voting, because of a conflict of interest, on the issue of the development of Pine Lake Road and further disqualified himself from voting on the recommendation of the planning commission staff to increase the residential density development in south Lincoln due to a conflict of interest. Also, on January 24, 1977, Cook filed an affidavit with the city clerk declaring his conflict of interest on the issue of the regional multiuse shopping centers in the comprehensive plan. At the January 25, 1977, city council meeting, during discussion of the proposed comprehensive plan, city councilman Robinson moved that the plan be amended to substitute Copple's property for Cook's property as the designated site for the south regional multiuse shopping center. Cook declared a conflict of interest and left the podium to sit in the audience during the discussion and vote on Robinson's motion.

The plaintiff nevertheless argues that Cook participated in the development of the transportation system, the utilities, and the residential densities included in the plan, all of which affect the viability of a shopping center located on his property. Cook testified, however, that he did not participate in the deliberations or vote on these matters if they specifically dealt with his property. We are unable to find evidence in the minutes of the meetings in the record which shows that Cook participated in these matters when they dealt with the area encompassed by the proposed south shopping center.

At the January 25, 1977, city council meeting, planning director Brogden submitted amendments to correct the residential densities in nine different

areas of Lincoln in the proposed comprehensive plan. One of these corrections increased the density of dwellings around Cook's property from 6 to 10 units per acre, to 11 to 14 units per acre. Cook voted in favor of this amendment which also corrected eight other areas in Lincoln.

We have found no evidence in the record which indicates that Cook participated in the discussion of whether or not Pine Lake Road should be constructed between 56th Street and 14th Street in Lincoln, although at one meeting he did argue for the inclusion of a Northeast Radial in the plan to provide better access to the fairgrounds.

At the December 9, 1976, special meeting of the planning commission and others, Cook abstained from voting. The planning director stated the consultants pushed for Pine Lake Road to divert traffic from Old Cheney Road, as it divided south Lincoln, and that, "this was part of the decision to accept the shopping center at the location shown in the Plan," the location shown in the plan being Cook's property. The consultants also indicated the decision to have Pine Lake Road as a four lane facility was to reduce traffic on Old Cheney Road, not to accommodate a shopping center. An opinion was expressed at this meeting "that Pine Lake Road would logically become a major traffic carrier to the south, regardless of the actions today, and that by making the designation today, sufficient right-of-way could be provided for future use."

Plaintiff states in his brief that Cook "lobbied Mr. Nims, a Planning Commissioner, to adopt the more extensive [transportation] plan prior to the Planning Commission meeting" on July 26, 1976. A review of Nims' testimony does not sustain plaintiff's contention that any such lobbying occurred. Plaintiff also states in his brief that at the July 26, 1976, meeting of the City-County Common "Mr. Cook deliberated upon and *voted in favor* of a Council resolution on the

transportation element which resolution was clearly designed to influence the Planning Commission * * *." (Emphasis supplied.) The minutes of the meeting in evidence show that Cook voted *against* the resolution, though the resolution carried. It is true, the record reflects, that Cook participated in the development of the transportation system, utilities, and residential densities in the preparation of the plan; but the trial court as the trier of the facts, after hearing all the evidence, found that Cook's participation was minimal. A review of the record convinces us the trial court was correct in this finding, and we believe the record sustains the conclusion that there was a good faith effort on the part of Cook to comply with the Lincoln ordinances relative to disclosing a conflict of interest, and that he did substantially comply with them.

It is uncontroverted that Cook did vote at the January 25, 1977, city council meeting to adopt the proposed comprehensive plan. However, in Van Itallie v. Borough of Franklin Lakes, 28 N. J. 258, 146 A. 2d 111 (1958), the court held that a public official should not be disqualified from voting on a zoning ordinance if he had a remote, contingent, and speculative conflicting interest. The court also stated that: "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case."

We believe that Cook's interest in the development of his property is remote and speculative due to the land-use devices involved, including utility controls, subdivision controls, control of public highways, and the future staging of development and zoning.

As we stated in Stones v. Plattsmouth Airport Authority, 193 Neb. 552, 228 N. W. 2d 129 (1975): "A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. * * * *It is the zoning resolution which has*

the force of law. * * * A comprehensive plan is a guide to community development rather than an instrument of land-use control." (Emphasis supplied.) See, also, Holmgren v. City of Lincoln, 199 Neb. 178, 256 N. W. 2d 686 (1977); Iverson v. Zoning Board of Howard County, 22 Md. App. 265, 322 A. 2d 569 (1974).

We agree that Cook's participation was minimal and that his interest was not an immediate and direct pecuniary interest. Under these facts and circumstances we find that Cook's conflict of interest, if any, was not sufficient to disqualify his vote to adopt the comprehensive plan at the January 25, 1977, city council meeting.

We also point out, in passing, that both Copple's and Cook's applications for rezoning their respective properties are still pending, awaiting future action by the city council, which body need not necessarily follow the comprehensive plan, and which may possibly decide, after a hearing and further consideration of the matter, to establish a south shopping center at a different location.

For the reasons set forth above the judgment of the District Court is hereby affirmed.

AFFIRMED.

BRODKEY, J., concurring.

The majority opinion in this case represents only a part of the opinion as originally drafted. Obviously, I concur in the part of the original opinion that has been adopted by the majority of the court as the opinion in this case. However, I believe that much more must be said with reference to certain aspects of the case not now referred to in the opinion.

The Lincoln city council, at its January 25, 1977, meeting voted *unanimously* to adopt the proposed comprehensive plan. Even if we were to assume, arguendo, that Cook's vote was disqualified because of a conflict of interest, I do not believe it would necessitate a reversal of this case. We would, how-

ever, be faced with a question of first impression in this state, which is whether a disqualifying vote will void the city council's proceedings where that vote is not necessary to pass on the issue. On this point there is a division of authority.

New York, New Jersey, and Iowa have all held that the vote of a municipal officer, who is disqualified to vote because of a conflict in interest, renders the proceedings void or voidable, although his vote was not necessary to pass the issue. Baker v. Marley, 8 N. Y. 2d 365, 208 N. Y. S. 2d 449, 170 N. E. 2d 900 (1960); Aldom v. Borough of Roseland, 42 N. J. Super. 495, 127 A. 2d 190 (1956); Wilson v. Iowa City, 165 N. W. 2d 813 (Iowa, 1969).

The rationale of this rule is enunciated in the case of Piggott v. Borough of Hopewell, 22 N. J. Super. 106, 91 A. 2d 667 (1952), where the court stated: "[T]he concurrence of an interested member in the action taken by the body taints it with illegality. * * * The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable. * * * This is the general rule. * * * It is supported by a twofold reason, viz.: First, the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. * * * It being impossible to determine whether the virus of self-interest affected the result, it must needs be assumed that it dominated the body's deliberations, and that the judgment was its product."

The states which have held that the vote of a disqualified municipal officer does not vitiate the proceedings where his vote was unnecessary to pass the issue have rejected this argument on the basis that the "illegal" vote does not affect the "legal" votes, particularly when there are multiple votes, only one of which is illegal. Singewald v. Minneapolis Gas Company, 274 Minn. 556, 142 N. W. 2d 739 (1966);

Eways v. Reading Parking Authority, 385 Pa. 592, 124 A. 2d 92 (1956); Marshall v. Ellwood City Borough, 180 Pa. 348, 41 A. 994 (1899).

The most recent case to which my attention has been directed is Anderson v. City of Parsons, 209 Kan. 337, 496 P. 2d 1333 (1972). In that case the Supreme Court of Kansas held that two city officials who owned property within an urban renewal area, but not within the specific project, and who voted for the project, did not invalidate the majority vote where their interest was general or of a minor character. See, also, Beale v. City of Santa Barbara, 32 Cal. App. 235, 162 P. 657 (1917); Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 254 (1903), affm'd on rehearing, 132 Mich. 152, 95 N. W. 416 (1903).

I believe the above line of cases represents the better authority and that the rule should be that where a required majority exists without the vote of a disqualified council member, his presence and vote will not invalidate the result.

In the instant case, there were six other city council members, all of whom voted to adopt the proposed comprehensive plan submitted to them by the planning commission at the January 25, 1977, city council meeting. The other six members were all fully apprised of Cook's interest in the designation of his property as a regional shopping center in the comprehensive plan. It appears that Cook on many occasions attempted to, and did, make his interest fully known to the other city council members.

It is clear that since the inception of the plan, about the year 1970, an enormous amount of time, energy, careful thought, and taxpayer funds were put into the development of the comprehensive plan before it was submitted to the city council for adoption. The designation in the comprehensive plan of Cook's property for a proposed regional shopping center site was just one element in the total compre-

hensive plan for the development of Lincoln and Lancaster County to the year 2000. At the January 25, 1977, council meeting, Cook abstained from voting or participating in the discussion on councilman Robinson's motion to substitute plaintiff's property for Cook's property in the plan as the site for a regional shopping center. I believe that even if Cook's vote were to be considered invalid because of a conflict of interest, the plan, as adopted, should not be adjudged invalid nor voided. To do so would needlessly deprive the citizens of the City of Lincoln and Lancaster County of the undoubted benefits of the comprehensive plan brought to fruition after years of labor on the part of their public officials, and experts employed by them. This would be a needless and unwarranted waste of resources, and would result in further delay and expense, were we to hold that a disqualified vote invalidates the entire comprehensive plan. This, I submit, should not be done in this or any similar situations arising in the future.

BISHOP BUFFETS, INC., APPELLANT AND CROSS-APPELLEE, v. WESTROADS, INC., APPELLEE AND CROSS-APPELLANT.

274 N. W. 2d 530

Filed January 24, 1979. No. 41685.

1. **Contracts: Parties: Intent.** In the construction of the terms of an agreement, effect must be given, if possible, to all portions of the contract in order to determine and effectuate the intention of the parties.
2. **Contracts: Leases: Taxes: Words and Phrases.** Real estate taxes will not be deemed to be a cost of "operating and maintaining common areas" within the meaning of a shopping center lease clause where a separate clause specifically addresses the payment of taxes.
3. **Contracts: Leases.** The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself.

4. **Burden of Proof.** The burden of proof is ordinarily on the party who would suffer if no evidence at all were introduced.
5. **Supreme Court: Appeal and Error.** The Supreme Court may take note of plain errors not assigned.
6. **Contracts.** Contracts are to be construed according to the usual meaning of the words used.
7. **Leases: Parties: Intent: Words and Phrases.** The addition of interior walls does not constitute "expansion or enlargement" of a shopping center unless it is otherwise clear that the parties intended such a construction under the terms of their lease.
8. **Words and Phrases.** A common use of the word "other" is as meaning one of two or more of a class. Thus, the general phrase "or other property of the tenant" places a limitation on a list of more specific items which precede it.
9. **Contracts.** Where the language of an instrument is susceptible of two or more meanings, an interpretation evincing an underlying rational purpose will be favored.
10. _____. Ambiguities in a contract should be construed most strongly against its author.
11. **Contracts: Parties.** If the language used in a contract drafted by one of the parties is susceptible of more than one meaning, it should be given the construction which the other party would be fairly justified in giving it.

Appeal from the District Court for Douglas County: JOHN E. MURPHY and JAMES A. BUCKLEY, Judges. Affirmed in part, and in part reversed and remanded.

Leo Eisenstatt and J. Patrick Green of Eisenstatt, Higgins, Kinnamon, Okun & Stern, P.C., for appellant.

John K. Boyer and Denzel R. Busick of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

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

WHITE, J.

Plaintiff below and appellant in this court, Bishop Buffets, Inc., filed suit against Westroads, Inc., in the form of a declaratory judgment action to construe four separate clauses of the lease between

appellee Westroads, Inc., as lessor and Bishop Buffets, Inc., as lessee of a building and grounds for the operation of a cafeteria at the Westroads Shopping Center in Omaha, Douglas County, Nebraska. During trial, the parties reached a settlement on the construction of one of the paragraphs of the lease. As to the other three provisions in the lease, the trial court found generally in favor of the appellant on paragraph Eighth of the lease and in favor of the appellee in its construction of paragraph Twenty-ninth (A) and Twenty-ninth (B) of the lease. Plaintiff appeals and defendant cross-appeals. It should first be noted that where no factual issues are involved, no special deference is owed to the trial court and we are free to determine as a matter of law the meaning of a contractual provision. See Don J. McMurray Co. v. Wiesman, 199 Neb. 494, 260 N. W. 2d 196. We shall deal with the provisions of the lease individually.

The first provision in controversy is the following part of paragraph Eighth. "Landlord shall operate and maintain common areas and common facilities of the shopping center. Tenant shall pay upon demand in addition to the rent a proportionate share of costs of *operating and maintaining* common areas and common facilities. Common areas and common facilities include without limitation all parking areas, access roads, sidewalks, malls, restrooms, landscaped space and any other space used in common or available for use by the Tenant, the Tenant's customers, employees, agents, servants or other invitees of the Tenant." (Emphasis supplied.)

The question is whether the real estate taxes which are attributable to the shopping center's common areas are, within the meaning of paragraph Eighth, costs of "operating and maintaining" the common areas. Westroads contends that they are: Bishop contends that they are not.

The trial court resolved the issue in favor of

Bishop, noting that the lease provides in paragraph Twenty-ninth that: "All special assessments and all regular consolidated real estate taxes * * * are to be paid by the Owner with the following exceptions: * * *." The import of the exceptions (A) and (B) listed thereunder are also in dispute and will be considered later in this opinion. Sufficient for the purpose of this discussion is that they do not refer to taxes attributable to the common area. The meaning of paragraph Twenty-ninth is obvious, and as obvious as plain language can make it, that it is the obligation of the owner to pay taxes except as specified in that paragraph. In the words of the trial court: "It seems clear, therefore, that no special assessments nor regular consolidated real estate taxes are to be included, or ought to have been included, in the computation of common area expenses to be paid by Bishops." Counsel for the appellee and cross-appellant introduced the testimony of accountants and cited numerous cases concerning the definition of "operating expenses" and counsel for appellant and cross-appellee cited cases arriving at a different definition, each in support of their proposition that taxes are or are not included within the ordinary definition of the term. It is unnecessary for us to pass on that phrase since by the clear, open, and plain meaning of paragraph Eighth when read with paragraph Twenty-ninth, it was the intention of the parties to limit the obligation of the tenant to pay that proportionate share of taxes that is specified in the exceptions of paragraph Twenty-ninth. In the construction of the terms of an agreement, effect must be given, if possible, to all portions of the contract in order to determine and effectuate the intention of the parties. See, section 76-205, R. R. S. 1943; Westbrook v. Masonic Manor, 185 Neb. 660, 178 N. W. 2d 280.

During trial, Westroads demonstrated that Bishop had, for some time after its tenancy had begun, paid

bills for its share of common-area expenses under paragraph Eighth. The bills included an item for real estate taxes on the common area. Westroads argues that the parties thereby placed a practical construction on paragraph Eighth similar to that which they argue for here, and that this practical construction is controlling. Authority is cited for the proposition that where the parties have adopted a particular construction by their performance, that construction will generally be adopted by the courts. However, a review of that authority indicates that the rule is one to aid in the determination of the intent of the parties where that intent is not otherwise clearly expressed in the document. As discussed above, no such ambiguity exists here. The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself. See Sky Harbor Air Service v. Airport Authority, 174 Neb. 243, 117 N. W. 2d 383. See, also James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273.

The trial court was correct in its construction of paragraph Eighth.

Paragraph Twenty-ninth of the lease, set out above, provides that the landlord shall pay all real estate taxes with two exceptions set out in paragraphs Twenty-ninth (A) and Twenty-ninth (B). It is the meaning and scope of those exceptions which are in dispute and which are considered in the remainder of this opinion.

Paragraph Twenty-ninth (A) provides that: "Increases over and above the regular consolidated real estate tax levied for the third year after opening due and payable the following year resulting from increased mill levy or from an increased assessed value by reason of a general reapportionment or any cause other than the expansion or enlargement of the shopping center shall be charged to the Tenant on a pro-rata basis of floor area demised herewith as

against the total rentable area in the building. Said additional taxes, if any, shall be paid to the Owner not later than three (3) days prior to the delinquent date of such taxes."

The trial court held that Bishop should reimburse Westroads according to the proportionate formula for any increase in taxes unless it could show that the increase was due to expansion or enlargement. Bishop alleges that this assignment of the burden of proof constitutes error on the part of the trial court. We cannot agree. The burden of proof is ordinarily on the party who would suffer if no evidence at all were introduced. See, Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645; Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531.

In the general course of business, Westroads will receive its general assessment for taxes. Under paragraph Twenty-ninth (A), it will bill its tenant for a proportionate share of any increase in those taxes. Bishop may, of course, dispute that bill, and, if it can show that some portion of the increase is due to expansion or enlargement, avoid payment. The imposition of the burden of proof upon one party or the other is often a matter of common sense. Bishop contends that proof by Westroads that no portion of an increased assessment is attributable to expansion is a condition precedent to any obligation under Twenty-ninth (A). It is true that the Westroads Center was undergoing rapid expansion during the early years of this lease but acceptance of Bishop's condition precedent argument would, in effect, create a presumption that every increase in assessment, year after year, was due to expansion or enlargement. Such a presumption does not comport with reality.

While we thus agree with the trial court's allocation of the burden of proof on the issue of "expansion or enlargement," we cannot agree with its definition of those terms. Our disagreement is with the

determination that "expansion or enlargement" includes not only the creation of new floor space outside the original confines of the building, but also any substantial construction performed within those confines in order to make additional rental space available. This determination was not assigned as error by Westroads, but, as already mentioned, construction of the lease is a question of law which we are as free to answer as was the trial court. In addition, Supreme Court Rule of Practice 8 a 2 (3) permits the court to notice a plain error not assigned.

The exception within the exception of Twenty-ninth (A) is for expansion or enlargement *of the center*, not of rentable space. Enlarge means to make larger, to increase in capacity, dimensions, or extent. See De Angelis v. Laino, 252 N. Y. S. 871, 141 Misc. 518. A building is enlarged, extended, reconstructed, or structurally altered within prohibition of zoning resolutions relating to nonconforming uses only where there is a change or substitution in a substantial particular in the structure of the building itself or in one of its parts or by the addition of another structure to it so there is an effective conversion of an existing building into a different structure. See 440 East 102nd Corporation v. Murdock, 285 N. Y. 298, 34 N. E. 2d 329. We are not satisfied that the addition of interior walls without substantially altering or changing the structure is an enlargement or expansion within the meaning of this provision of the lease and the court was in error in so holding. It should be noted that under the trial court's construction, the tenant's obligations under paragraph Twenty-ninth (A) may be reduced not only by the decrease in its proportionate share of rentable space which the "expansion" necessarily engenders, but also by the additional cost of improvements to create additional rentable space under the trial court's construction of the term "expansion or enlargement." It is unlikely that the

parties intended this double reduction. Under our construction, Bishop receives only the first reduction.

Finally, we consider paragraph Twenty-ninth (B). "In the event that taxing authorities shall at any time during the term of this lease assess leasehold improvements, store fixtures, lighting fixtures, interior partitions, that heating, cooling or ventilating equipment located within the demised premises or other property of the Tenant against the real estate along with land and basic building, the taxes thus assessed shall be repaid by the Tenant to the Owner not later than three (3) days prior to the delinquent date thereof."

The question is whether the phrase "or other property of the Tenant" is merely one of a series of items on which the tenant must pay taxes or whether it is, as Bishop argues, a general phrase which describes the category to which specific items must conform. Stated differently, is paragraph Twenty-ninth (B) properly limited to property "of the tenant?" The trial court ruled in favor of the appellee. We disagree.

Our opinion is influenced more by the everyday, plain meaning of the words used than by judicial precedent, but the decision in Coleman v. United States, 37 F. Supp. 273, is sufficient to confirm that opinion. There, the question was whether a tax on "gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles" would reach casing-head gasoline used to melt snow and ice. The Court of Claims held that it did not, noting that: "A common use of the word 'other' is as meaning one of two or more of a class. If the construction contended for by the defendant had been intended by Congress, we think this part of the statute would have read, 'and any liquid the chief use of which is as a fuel,' etc., leaving out the word 'other' which connects the fuels described in

the last class with the two first mentioned."

Westroads seeks to distinguish Coleman v. United States, *supra*, by noting use of the conjunction "and" as opposed to the "or" found in paragraph Twenty-ninth (B). We fail to see how the effect, discussed in Coleman, of the word "other" could be erased by a change in the conjunction which precedes it. Contracts are to be construed according to the usual meaning of the words used. See Liggett v. Bertwell, 111 Neb. 843, 198 N. W. 154. Without some compelling reason for doing so, this court cannot accept the strained interpretation advanced by Westroads. Still, the provision, when viewed within the context of other provisions of the lease, does admit of some ambiguity. If the paragraph was intended to reach only property of the tenant, why enumerate items such as heating equipment, which was clearly property of the owner, within the paragraph? Because of this ambiguity, we are justified in looking beyond the language of the lease.

The correctness of our interpretation, according to the plain meaning of the words used, is confirmed by a look at the possible rationale for the insertion of a paragraph like Twenty-ninth (B). Both parties have attempted to supply this rationale. Westroads contends that its interpretation of Twenty-ninth (B) would require the tenant to pay the taxes on those items of property which uniquely benefit the tenant. The first problem with this contention is that "benefit" in any commercial transaction is a two-sided coin. This is a long term (25 years) lease. Westroads had ample opportunity to increase the lease price and thus its benefit to cover the cost (including anticipated taxes) of negotiated improvements beginning with the concrete floor and going right down to the last lighting fixture, and there is no reason to believe they did not do so. Second, Westroads' interpretation results in the inclusion of a disorderly conglomeration of items inconsistent with its

"benefit" theory. For example, why would the drafter include an item like heating equipment while excluding an item like plumbing equipment? Is the latter any less for the benefit of the tenant than the former? The parties to an agreement are, of course, free to include within such a clause any collection of items they choose and there is no requirement that the collection "make sense" to parties not present at the negotiations. However, where it is not clear from the language of the instrument that such a collection was indeed intended, an interpretation evincing a more rational purpose will naturally be favored.

A rational purpose can be discerned in paragraph Twenty-ninth (B) if it is construed to include, as appellant argues, only property "of the tenant." That purpose is the shifting of unanticipated taxes to the tenant "since the ideal shopping center lease will be as close to a net lease as possible." Kranzdorf, Problems of the Developer, 1965 U. Ill. L. F., 173. Paragraph Twenty-ninth appears to be a common "tax-stop" clause designed to deal with these unanticipated taxes. Since paragraph Twenty-ninth (A), discussed above, shifts the cost of increased tax rates or assessed valuations, the purpose of Twenty-ninth (B) appears to be to protect the landlord against the risk that the tenant's personalty or trade fixtures will be taxed to the landlord. Under paragraph Twenty-ninth, the landlord agrees to pay all taxes except those specifically agreed upon. This is merely a codification of the general rule. See 49 Am. Jur. 2d, Landlord and Tenant, § 354, p. 365. Most of the specifically enumerated items, e.g., lighting fixtures, interior partitions, and heating, cooling, or ventilating equipment would be physically attached to the real estate. Such items, if they are the property of the owner, become part of the real estate when they are fixed to it. See Runner v. Pierson, 144 Neb. 847, 14 N. W. 2d 847. It is only

when they are the property of a tenant, and hence trade fixtures, that they do not become part of the real estate upon being affixed to the property. See United States v. Lambert, 362 F. Supp. 609 (Dist. Neb., 1973). Nonetheless, "Many municipalities include personal property within the demised premises in real estate tax assessments. Accordingly, the lease should provide that in such event the tenant will be responsible for the entire tax upon such personal property of the tenant." See Kranzdorf, Problems of the Developer, 1965 U. Ill. L. F., 173. In other words, the landlord needs protection against having to pay taxes on things which are not his.

Westroads is quick to point out the already mentioned inconsistency in the appellant's interpretation, namely that it was known from the beginning that some of the enumerated items, e.g., heating and cooling, would be property of the owner. The explanation may be in the fact, revealed in testimony, that paragraph Twenty-ninth (B) was taken from a lease originally designed for another shopping center. Under that lease, all of the enumerated items may indeed have been property of the tenant. It is, however, sufficient to point out that the lease was drawn by Westroads. Ambiguities in a contract should be construed most strongly against its author. If the language used in a contract drafted by one of the parties is susceptible of more than one meaning, it should be given the construction which the other party would be fairly justified in giving it. See Don Nelsen Constr. Co. v. Landen, 198 Neb. 533, 253 N. W. 2d 849. Thus, Nebraska law would require us to reverse in this situation even if the tenant's interpretation of the disputed provision were only "as good as" that of the landlord. We feel it is better.

We find that Westroads is entitled to reimbursement under paragraph Twenty-ninth (B) only if property of the tenant was assessed in the land-

lord's general tax statement. As the tenant introduced evidence that the tenant's personal property, including trade fixtures, were separately assessed and taxed, the burden of establishing, in effect, a double taxation, should be on Westroads.

The decision of the trial court is affirmed in part, and in part reversed and remanded.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

KEITH B. JOHNSON, APPELLANT, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.

KATHERINE A. HARTMAN, APPELLANT, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.

274 N. W. 2d 536

Filed January 24, 1979. Nos. 41707, 41708.

Administrative Law: Appeal and Error. In a proceeding to review an order of the State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.

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

Robert C. Doyle of Walsh, Walentine & Miles, for appellants Johnson and Hartman.

Paul L. Douglas, Attorney General, and Robert H. Petersen, Special Assistant Attorney General, for appellee.

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

SPENCER, C. J., PRO TEM.

Appellants, Keith B. Johnson, a real estate salesman, and Katherine A. Hartman, a real estate broker, were censured by the State Real Estate Commission. The District Court affirmed the actions of the commission and appellants prosecute these appeals. Appellants allege the District Court erred in finding Johnson had submitted false documents to a loan company in violation of Commission Rule 6 (3) (b) and Hartman had demonstrated incompetence as a real estate broker. We affirm.

Appellant Johnson is vice president of Westwood Homes, Inc. Appellant Hartman is branch manager for C. G. Smith Realty Co. The two companies share office space and Smith is the exclusive sales agent for Westwood Homes.

On July 30, 1976, Westwood Homes, Inc., entered into a purchase agreement with one of its employees, Peggy L. Culver, and her husband, whereby the Culvers purchased a home to be constructed by Westwood. The purchase agreement, which was prepared under the direction of Keith B. Johnson and signed by the Culvers, acknowledged the receipt of $2,000 as follows: "Received from Peggy Culver the sum of $2,000.00 ($ Two Thousand Dollars) to apply on the purchase price of the above described property on the terms and conditions stated above. It is further agreed and understood that, in case of any legal defects in the title which cannot be cured within a reasonable time after filing with us a written notice of such defect, the money hereby paid is to be refunded. In the event of the refusal or failure of the buyer to consummate the purchase, said deposit shall be retained as liquidated damages for failure to carry out said contract of sale as herein agreed to. This receipt is given and offer to purchase taken, subject to approval and written acceptance by the owner on or before three (3) days from the above date. In the event that the offer is

not so accepted, the money deposited shall be refunded." The agreement was accepted on behalf of Westwood Homes, Inc. by Keith B. Johnson, vice president.

The purchase agreement bears an impression made by a stamp, with the following language: "Earnest deposit is hereby received by C. G. Smith Realty Co., agent for Westwood Homes, Inc. to be deposited in Westwood Homes, Inc. account."

Hartman, who was the branch manager for Smith, had supervision of all salesmen licensed under Smith, even though some of them actually worked for Westwood. Part of Hartman's work as branch manager was to maintain files on all of Westwood's sales. She was familiar with the Culver deal and helped in the closing.

In November 1976, a trust account examiner of the State Real Estate Commission examined the trust account of C. G. Smith, a licensed real estate broker. In connection with this examination he found the purchase agreement described above, showing an earnest deposit of $2,000. The examiner could not find any record of the $2,000 earnest deposit having been paid.

Johnson testified that the home to be constructed would not be completed until the fall or possibly December. Mrs. Culver knew she was in line for a bonus and prior to executing the purchase agreement had approached Johnson to see if Westwood would sell her a new home and apply the bonus to be received toward the downpayment. This was agreeable to Johnson. The purchase price of the new home was $37,500, the standard price for which the same house would be sold to the public.

Appellant Johnson suggested that the Culvers make application for a mortgage loan through Commercial Federal Savings & Loan Association and made arrangements for them to see Frank Vogt, a duly authorized loan officer of Commercial. He told

Vogt of the proposed transaction whereby the downpayment would be forthcoming from the bonus.

On or about July 30, 1976, Vogt received a copy of the purchase agreement along with a letter dated July 30, 1976, stating: "Dear Mr. Vogt, This is to confirm that Westwood Homes has elected to pay Mrs. Culver a bonus of $2,500.00 in December of 1976. Of course this bonus is dependent upon her continued and satisfactory employment with our company. If I may be of further assistance please let me know. Sincerely, Keith B. Johnson [sgd.] Keith B. Johnson, Vice President, Westwood Homes, Inc."

On August 12, 1976, the Culvers made a loan application at Commercial through Vogt. The application set forth a purchase price of $37,500, and stated there was a $2,000 downpayment. Attached was a financial statement signed by the Culvers which showed $2,000 as having been paid to Westwood Homes, which amount was included in the net worth shown on the financial statement.

The loan application, purchase agreement, and the July 30, 1976, letter with reference to the bonus were part of the loan package submitted for approval to the Commercial loan committee and to the Mortgage Guarantee Insurance Corporation, which corporation would insure the loan.

The purchase agreement was kept in the files of C. G. Smith Realty Co. under the control of the appellant Hartman. When Hartman was questioned by the trust account examiner she informed him that the $2,000 earnest deposit had not been paid.

While the record would indicate that the loan officer knew of the arrangement, the papers forwarded to the loan company and to the Mortgage Guarantee Insurance Corporation would not disclose this fact. Actually, it would give the impression that Peggy Culver was to receive $2,500 in December, and the reasonable inference would be this was in addition to the assets shown by her on the finan-

cial statement forwarded with the loan application.

Rule 6 (3) (b) reads as follows: "Actions demonstrating unworthiness shall include but not be limited to the following: (b) Representing to any lender, guaranteeing agency, or any other interested party, either verbally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon."

Appellants knew or should have known that it was a federal crime to make a false statement to a federal savings and loan association as provided for in 18 U. S. C. A. 1014: "Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * a Federal Savings and Loan Association * * * upon any application, * * * purchase agreement, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Johnson prepared the papers. Hartman as the manager of Smith handled the Westwood sales and was responsible for the actions of those Westwood employees who held real estate licenses. The letter to the loan company did not explain the fact that the earnest deposit had not actually been paid. Hartman should have required a copy of a full disclosure to be attached to the purchase agreement, explaining in detail the transaction. Further, the purchase agreement should not have contained the stamp of C. G. Smith Realty Co. acknowledging receipt of the earnest deposit and stating it had been deposited in the Westwood Homes, Inc. account.

In a proceeding to review an order of the State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or un-

reasonable. Haller v. State ex rel. State Real Estate Commission, 198 Neb. 437, 253 N. W. 2d 280 (1977).

We find the evidence adduced was sufficient to find that both appellants knowingly violated the rules of the commission in showing that a $2,000 earnest deposit had been received, when in fact both parties knew that no deposit had been made and that the deposit actually was contingent upon Peggy Culver receiving a bonus in December.

The action of the State Real Estate Commission in these cases is supported by substantial evidence justifying the order made. It was made within the scope of its authority and was not arbitrary, capricious, or unreasonable.

The judgment of the District Court affirming the action of the State Real Estate Commission was correct and is affirmed.

AFFIRMED.

IN RE APPLICATION OF FRANKLIN D. REIS ET AL., FOR AUTHORITY TO RECEIVE TELEPHONE SERVICE FROM THE HASTINGS OR JUNIATA EXCHANGE OF THE LINCOLN TELEPHONE AND TELEGRAPH COMPANY.

FRANKLIN D. REIS ET AL., APPELLEES, V. THE GLENWOOD TELEPHONE MEMBERSHIP CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

274 N. W. 2d 539

Filed January 24, 1979. No. 41775.

1. **Public Service Commission: Statutes: Words and Phrases.** In granting an application to obtain telephone service from an adjacent service area under the provisions of sections 75-612 through 75-615, R. R. S. 1943, the Nebraska Public Service Commission may include in the service territory change an applicant whose service is reasonably adequate when inclusion is necessary to avoid a duplication of facilities within the meaning of section 75-613

(2), R. R. S. 1943, and when service to other applicants in that territory is inadequate.

2. _____: _____: _____. An easily correctible defect in service is not alone sufficient to support a finding of no "reasonably adequate" service within the meaning of section 75-613 (1), R. R. S. 1943.

3. _____: _____: _____. In determining the economic soundness of the proposed revision as required by section 75-613 (2), R. R. S. 1943, the Nebraska Public Service Commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims, and the general effect of economic erosion and waste, as well as other matters which may be material and relevant to the issue of economic soundness.

Appeal from the Nebraska Public Service Commission. Remanded with directions.

William G. Cambridge, for appellant.

Conway and Connolly, for appellees.

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

CLINTON, J.

This appeal arises from an application by three rural subscribers of The Glenwood Telephone Membership Corporation, Franklin and Ruby Reis, David and Susan Fredricks, and Ryal and Virginia Reis, under the provisions of sections 75-612 through 75-615, R. R. S. 1943, to obtain telephone service from either the Hastings or Juniata exchange of the Lincoln Telephone and Telegraph Company and to have applicants' part of the service territory of Glenwood added to the service territory of LT&T. Glenwood protested the change and the application; and the commission, after notice to interested parties including LT&T, held a hearing as required by section 75-612, R. R. S. 1943. After the hearing the commission made findings and granted the application.

Glenwood then appealed to this court. We remand for further proceedings.

Section 75-613, R. R. S. 1943, provides that the commission may grant such an application "if the evidence establishes all of the following:

"(1) That such applicant or applicants are not receiving, and will not within a reasonable time receive, reasonably adequate exchange telephone service from the company furnishing such service in the exchange service area in which the applicant or applicants reside or operate;

"(2) The revision of the exchange service area or areas required to grant the application will not create a duplication of facilities, is economically sound and will not impair the capability of the telephone company or companies affected to serve the remaining subscribers in any affected exchanges;

"(3) The community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved should include all the territory in its service area as revised by the commission's order; and

"(4) The applicant or applicants are willing and will be required to pay such construction and other costs and rates as are fair and equitable and will reimburse the affected company for any necessary loss of investment in existing property as determined by the Public Service Commission."

Among the findings of the commission are the following: "From a purely physical standpoint, the service of the Roseland exchange of the Glenwood Telephone Membership Corporation is unquestionably adequate. However, from the Applicants' standpoint, Roseland exchange service is inadequate since their community of interest is Hastings.

"The evidence establishes that the applicants are the only subscribers of Glenwood served by their telephone line in the immediate area. With the granting of this application, this line would no longer

be needed to serve other subscribers and no duplication of facilities would result. In view of the testimony that the applicants will compensate Glenwood for its loss of investment, we conclude that the revision of exchange service areas is economically sound and will not impair the capability of the telephone companies involved to serve the subscribers in their respective exchanges.

"The applicants' close ties with the town of Hastings and persons residing in the Hastings exchange of the Lincoln Telephone and Telegraph Company convince us that the community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved will (sic) include all the territory in its service area as revised by this order. See, Schoen v. American Communication Co., Inc., 189 Neb. 78 (1972).

"The evidence establishes that the investment in the line serving the applicants is $2,980.67. The line is in new condition and therefore no depreciation will be deducted from the investment. Neither will any cost of removal be added, since the line will not be physically removed." The commission made an order accordingly.

The protestant Glenwood, on this appeal, asserts that the findings, insofar as they pertain to conditions (1) through (4) of section 75-613, R. R. S. 1943, are not supported by substantial evidence. It also contends that the commission failed to properly define and apply the various phrases of section 75-613, R. R. S. 1943, the precise meanings of which are not immediately evident from the words of subdivisions (1) through (4) of the statute, and that accordingly the order of the commission is arbitrary and unreasonable.

Sections 75-612 through 75-615, R. R. S. 1943, were first enacted in 1969 and this court has had occasion to consider these statutes only twice. Schoen v.

American Communication Co., Inc., 189 Neb. 78, 199 N. W. 2d 716; Hartman v. Glenwood Telephone Membership Corp., 197 Neb. 359, 249 N. W. 2d 468. In Schoen we said: "We think the statute introduces a new concept. An applicant may prevail without proving inadequacy of service or unfairness of rates in the tradition of public utility law. The concept that such relief furthers the public interest is new but not startling. . . . Such phrases as 'reasonably adequate service,' 'duplication of facilities,' 'public interest,' and 'community of interest in the general territory' acquire a new meaning limited to the context of §§ 75-613 and 75-614, R. R. S. 1943. Definition must evolve, case by case.

"The small independent companies worry that affirmance here will signal a trend toward erosion of their service areas. The argument is wide of the mark. We decline to conjecture future legislation or action of the commission as well as the impact of the technological revolution in communications."

In Schoen, the facts were that the applicant had never received service from American Communication Co., Inc., in whose service area the applicant resided. He desired to be served by LT&T. LT&T already had toll lines running past Schoen's rural residence. In order to service Schoen, all that would be required was the placing of circuitry on the existing poles from LT&T's nearest customer to Schoen's residence, a distance of 1 1/2 miles. Schoen's principal interest was in being able to call Fairbury, Nebraska, without paying toll charges. American's toll charges were not unreasonable. In the words of the court: "Indeed he admitted the reasonableness of the rate. From his viewpoint and to him alone the charge would be exorbitant." American's evidence was that the loss of one potential station (customer) would not affect the company adversely. The opinion made no mention of whether American suffered any investment loss nor did it

recite what the applicant would be required to pay for new construction.

In Hartman, the applicant resided in the Glenwood service area, having recently moved there from another farm where he was served by LT&T. The applicant was not a subscriber to Glenwood service at the new farm and did not intend to be served by Glenwood. However, a Glenwood line and drop were adjacent to the new residence and available to the applicant. This line had served the applicant's predecessor, who had been a Glenwood customer. In Hartman, the evidence indicated that Glenwood's loss of investment was $173.73. Glenwood was required to remove 2/10 of a mile of line and LT&T to extend its line 4/10 of a mile to serve Hartman. The cost of such extension is not mentioned in the opinion. Hartman desired LT&T service so that he could call Guide Rock, Nebraska, without paying toll charges. Applicant still maintained his former farm residence, and he used the LT&T phone there to make calls to Guide Rock. The applicant intended to drop that service if the application was granted.

On appeal by Glenwood, we affirmed the commission's determination that the applicant's "community of interest" was in Guide Rock and hence Hartman's service was not reasonably adequate. Glenwood's objection to the application in Hartman was based upon the claim that there were perhaps 20 to 30 other customers in a similar situation who would want to be released if the Hartman application was granted. The commission and this court gave no weight to that contention. On the facts recited, we also held that no duplication of service resulted.

The effect of our opinion in Schoen seems simply to be that we would define the terms of section 75-613, R. R. S. 1943, as we were confronted with the necessity of doing so and on a case-by-case basis;

that, under the facts of that case, no definition was necessary; that we would wait to see what the commission does in future cases and what the Legislature might do by way of making changes in the law; and we would not anticipate technological developments which might have a bearing in determining adequacy of service and economic soundness. Hartman seems to add that the removal of the lines of one company and replacing them with the lines of another does not result in duplication of facilities and that the concepts of inadequate service and community of interests are related considerations.

We now turn to an examination of the evidence in the case before us. The evidence here shows Glenwood has approximately 2,200 customers served by several different exchanges, including the Roseland exchange which serves the applicants. At present, Glenwood's service to the applicants is by buried underground cable and each applicant has a one-party line. Glenwood's basic rate for such service is $7.50 per month. An extension phone costs $1 per month. Franklin Reis and David Fredricks subscribe to what is described as optional calling service for which a $4 per month charge is made. This service permits the customer to make 60 minutes per month of toll calls, within a radius of 25 miles, without any additional charge during all the hours of the day except 8 a.m. to 12 noon, Monday through Friday.

LT&T cannot presently provide the applicants with one-party service. The service to be furnished would be multiparty, or four to eight customers per line. LT&T's service would permit the applicants to call Hastings, Nebraska, toll free. LT&T's basic charges for multiparty service are $7.95 per month plus tax. An extension phone costs an additional $1.25.

The complaints of Franklin Reis and David Fredricks concerning Glenwood's service are the

following: They make most of their calls to Hastings, Nebraska, and to do so must pay toll charges.

The evidence indicates that the telephone bill of Franklin Reis, including the basic charges, optional calling, and the excess of toll charges is presently about $18 to $20 per month. Mrs. Franklin Reis has an additional complaint. She is a freelance court reporter. Some of her customers have been unable to call her after Glenwood's recent change to one-party service because the Reis telephone number has been changed, and the taped response which a caller hears when calling the old number is that it is no longer in service. The caller is then asked to consult the directory or ask the operator for assistance. Because of the fact that the Franklin Reises have an Ayr, Nebraska, mailing address, but are connected to the Roseland exchange, customers cannot find the Reis number in the Ayr portion of the directory. Witnesses for LT&T and Glenwood testified that LT&T furnishes the directory service for Glenwood, based upon an alphabetical listing of customers furnished by Glenwood to LT&T. Difficulties such as that described by Mrs. Reis should not occur if the caller asked the operator for assistance rather than merely consulting the directory.

Ryal Reis does not reside at the location where his affected telephone is located. His Glenwood telephone is located on a pole in the feed yard. His number is unlisted and he uses the telephone only to make emergency calls, perhaps three or four times a month. The Ryal Reis feed yard is located between the Franklin Reis' and the David Fredricks' residences. If Glenwood were to continue to serve Ryal Reis, then Glenwood's underground line would remain in place and in use except for about 1/4 of a mile from the Ryal Reis feed yard to the Franklin Reis residence.

An inference can be drawn from the evidence that five other subscribers of Glenwood could reason-

ably make the same claims of community of interest as are made by Franklin Reis and David Fredricks and could be as readily served by LT&T as can the applicants.

The evidence on the issue of the economic soundness of the revision shows the following. The grant of the application in this case would make about 1 1/4 miles of Glenwood's underground cable useless in that only some small attachments could be salvaged and their value would be negligible. The commission found that the applicants, as a condition of being granted service, would be required to reimburse Glenwood for the previously mentioned investment loss of $2,980.67. In order to serve the applicants, LT&T would build either 1 1/2 or 1 3/4 miles of line, depending upon whether the applicants were to be served by the Hastings exchange or the Juniata exchange, an undetermined matter. The evidence does not disclose what the construction of the new line and installation of the phone service would cost; however, it does indicate that underground cable costs about $600 per mile in place. Other items of cost are not shown. Normally, LT&T extends their line for 1/2 mile without charge and the customer pays for the remainder. In addition, the customer is required to sign a maintenance contract to pay for some of the maintenance of the new line for a term of years. These charges are not shown by the evidence. The applicants testified that they are willing to reimburse Glenwood for the loss of investment as determined by the commission and agree to pay such construction and other charges as LT&T may impose for new construction to serve them.

All of Glenwood's assets are mortgaged to the United States in the principal amount of $3,754,553. Of that amount, $2,673,000 represents a recent addition to indebtedness for the purpose of making improvements, including the buried cable and the one-party service to the applicants and other customers.

These improvements are still in the process of being made. The interest on the loan is 2 percent. The Nebraska Public Service Commission authorized the borrowing and approved appropriate rates based upon a projected gross annual revenue of $416,208, projected assumed expenses, including debt service of $410,618, and a projected net income of $5,590 when the improvements are completed. These projections were founded upon an estimate of 2,455 subscribers. As noted, Glenwood had only 2,200 subscribers at the time of hearing. Until the projected number of customers is reached, there is a projected deficit of about $43,000 annually. Although the above figures are projections, there is no contradicting evidence. Glenwood's investment per customer, including central plant, is $1,649.

With the foregoing background, we turn to a consideration of the assignments of error made by Glenwood, treating them in relation to conditions (1) through (4) of section 75-613, R. R. S. 1943.

In both Schoen and Hartman, the applicants' need for local rather than toll service to a particular community was treated as satisfying the requirement of lack of reasonably adequate exchange service and the territorial community of interest requirements of the statute. The evidence in this case supports similar conclusions insofar as Franklin Reis and David Fredricks are concerned. The evidence here, however, clearly does not support the same finding as far as Ryal Reis is concerned. It is perfectly clear that he joined in the applications merely to accommodate the other applicants and to eliminate the problems of duplication of facilities which would exist if Glenwood were to continue to serve him while the other applicants were served by LT&T. In that situation there would have been a duplication of facilities within the meaning of the statute. We hold that the commission may include in the service territory change an applicant

whose service is reasonably adequate when inclusion is necessary to avoid a duplication of facilities.

In this case, Mrs. Franklin Reis has the additional complaint which we have earlier described concerning inadequate directory service. What consideration, if any, the commission gave to this item we have no way of knowing, for no specific finding with reference thereto has been made. It appears clearly from the evidence, however, that this was a defect which could be easily cured by an addition to the taped response which would tell the caller that if, in consulting the directory, the party being called cannot be found, then operator assistance should be requested. As noted, LT&T was furnished by Glenwood with an alphabetical list of customers which would enable the operator to find the number irrespective of differences in the mailing address and the name of the exchange. We hold that such an easily correctible defect in service is not alone sufficient to support a finding of no "reasonably adequate" service within the meaning of section 75-613 (1), R. R. S. 1943.

The findings of the commission in connection with certain terms of the second condition, namely, economic soundness and impairment of the capability of the telephone company affected to serve the remaining subscribers, require discussion. We refrained in the two previous cases from attempting any definition of these terms for the reason that the facts in those cases did not require or really permit a considered definition. Economic impact in each case was negligible. No customer who was being served was being lost by the protestant company. No substantial capital outlays were involved. It was not there possible to draw any conclusion that ability to service debt would be impaired, nor that revenue decline would be so appreciable that ultimately other customers of the protestant would have to

later bear rate increases to make up for the losses.

It is plain enough that, when a public utility loses customers, its income is reduced and, if that reduction is significant enough, then at some time the deficiency must be made up by rate increases to remaining customers. It is also clear that when a public utility must abandon property and another utility must build additional lines or plant to serve the customer, the usual effect is that one suffers a loss of rate base and the other an increase in rate base, both of which will have some impact on return of the affected companies the next time rates are to be determined.

It cannot be said in this case that Glenwood's fear that gradual erosion of its service territory and customers will affect its ability to service its present debt without substantial increases in rates is unfounded. This is particularly true where, as we have noted, other subscribers may be able to make the same claims as the present applicants. The problem of gradual erosion is a question which the commission must face in ruling on this or some future application.

It is plain from the commission findings that in determining the issue of economic soundness it equated that concept with reimbursement for loss of investment. The commission said: "In view of the testimony that the applicants will compensate Glenwood for its loss of investment, we conclude that the revision of exchange service areas is economically sound . . . ." This finding is an apparent perversion of the meaning of the term as used in condition (2), for condition (4) mandates that in any event applicants be willing and required to reimburse the affected company for loss of investment. The language of the statute cannot possibly be read to mean that if the applicants are willing to reimburse, then the revision of service areas is economically sound.

We hold that in determining economic soundness the commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims and the general effect of gradual erosion, as well as other matters which may be material and relevant to the issue of economic soundness.

The cause is remanded for further consideration in light of the principles we have announced. The commission should, of course, afford the parties, including LT&T, the opportunity to produce further evidence regarding condition (2) of section 75-613, R. R. S. 1943.

REMANDED WITH DIRECTIONS.

BEATRICE LUCILE WHITE, APPELLEE, V. WARREN D. WHITE, APPELLANT.

274 N. W. 2d 546

Filed January 24, 1979. No. 41796.

1. **Divorce: Parent and Child: Judgments.** A decree 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 requiring modifications in the best interests of the children.
2. **Divorce: Parent and Child: Property Settlement Agreements: Judgments.** Where the trial court specifically rejects the child support provisions of a property settlement agreement and reserves determination of the amount of child support, its subsequent order pursuant to that reservation is an initial determination, and not a modification of the original decree.
3. **Divorce: Parent and Child.** In determining the amount of child support, all attendant circumstances including the status, situation, and character of the parties must be considered.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Charles A. Fisher and Charles F. Fisher, for appellant.

Michael T. Varn, for appellee.

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

WHITE, J.

The parties were divorced on September 15, 1976. At the time of the original divorce the court approved a settlement agreement between the parties, specifically disapproving, in the following language, a provision in the property settlement agreement which provided that the appellant Warren D. White was not required to pay child support: "* * * the Court specifically disapproves of the provision regarding child support, but finds that no child support shall be awarded at the present time and that the Court will entertain an application at a later time to fix child support after notice to the Respondent." The trial court made no findings regarding the ability of the appellant to pay child support, but took into consideration at that time the straitened financial circumstances of the parties. On July 26, 1977, the appellee herein filed a "Petition to Modify Decree" and requested child support from the appellant. The child, Jason, was not the natural son of the appellant but had been adopted by him. At the hearing, evidence was introduced by appellee that because of necessary surgery, her current income was $207 per month together with $100 per month alimony paid by the appellant. The appellant's income was approximately $520 per month. He had remarried and his present wife had an income of $600 per month. The appellant introduced evidence that he was indebted to his parents in the amount of approx-

imately $3,000 and that he was unable to pay any child support. The trial court concluded the appellant should pay the sum of $65 per month. The appellant appeals.

The appellant correctly points out that a decree 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 requiring modifications in the best interests of the children. See Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542. Appellant contends the court could not have found a material change of circumstances in this case. In fact, the court could have found a substantial change in circumstances, as the evidence recited above indicates. However, it is sufficient to point out that in this case the court made no determination of child support in the initial decree, other than its rejection of a provision exonerating the appellant from child support obligations. It specifically reserved until a later date the determination of whether, and how much, child support should be paid. In other words, this is an initial determination of the amount of child support, and change in circumstances is not a relevant consideration.

"In determining the amount of child support the status, situation, and character of the parties, and all attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be noted." Breiner v. Breiner, 195 Neb. 143, 236 N. W. 2d 846. An examination of the record indicates a difference in the relative earning power and capacity of the parties. The award of child support is not an abuse of discretion.

The judgment of the trial court is affirmed. Appellee is awarded an attorney's fee in this court of $150.

AFFIRMED.

WENTZ HEATING & AIR CONDITIONING CO., EMPLOYER-APPELLANT, V. KENNETH D. KIENE, CLAIMANT-APPELLEE, AND GERALD E. CHIZEK, COMMISSIONER OF LABOR OF THE STATE OF NEBRASKA, APPELLEE.

274 N. W. 2d 547

Filed January 24, 1979. No. 42079.

1. **Labor and Labor Relations: Collective Bargaining: Statutes.** A union workman's refusal of a job offer because of a union rule prohibiting such acceptance as a result of the workman's status on a union out-of-work list created solely by union action, is a failure without good cause to accept suitable work within the meaning and purview of the Nebraska unemployment compensation statute, section 48-628, R. R. S. 1943.
2. ____: ____: ____. The provisions of section 48-628 (c) (2) (iii), R. R. S. 1943, refer to conditions attached to a job offer by an employer and not to other conditions unilaterally imposed upon the employment process by a labor union.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

William D. Sutter of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Gerald E. Chizek, Commissioner of Labor, James R. Jones, and John W. Wynkoop, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

RIST, District Judge.

This is an appeal from the action of the Nebraska Department of Labor Appeal Tribunal, affirmed by the District Court for Lancaster County, Nebraska, finding appellee, Kenneth D. Kiene, eligible for unemployment compensation benefits.

Appellee Kiene is a sheet metal worker, a member of Sheet Metal Workers International Association, Local 541, and was employed by the appellant,

Wentz Heating & Air Conditioning Co., (hereinafter called Wentz), prior to January 14, 1977. In 1975, appellee's union entered into a collective bargaining agreement with the Sheet Metal & Air Conditioning Contractors' National Association (SMACNA, Lincoln Chapter, Inc.). Wentz is a member of SMACNA. The agreement was in effect at the times material herein.

On January 14, 1977, Kiene was laid off by Wentz and shortly thereafter applied for and received unemployment compensation benefits which were charged to Wentz' experience account with the Commissioner of Labor.

On June 23, 1977, Wentz desired to reemploy Kiene and made a written offer of such employment to both Kiene and his union. Kiene, after consultation with the union, advised Wentz that he was 27th on the union's out-of-work list and would not be available for work until his name came up on that list. This was confirmed by the union who sent another union member having priority on the list to accept the job offer from Wentz and Wentz hired this member.

Wentz then protested the continued payment of unemployment compensation benefits to Kiene. The protest was denied by the Nebraska Department of Labor Appeal Tribunal which found Kiene eligible for such continued benefits. This determination was affirmed by the District Court.

Appellant appealed to this court. The Commissioner of Labor, State of Nebraska, is also an appellee and appeared in support of the trial court's decision.

This matter is considered on appeal pursuant to section 48-640, R. R. S. 1943.

The applicable statute involved in the determination of this case is section 48-628, R. R. S. 1943, which provides in part: "An individual shall be disqualified for benefits: * * * (c) For any week of unem-

ployment in which he has failed, without good cause, * * * to accept suitable work when offered him, * * * no work shall be deemed suitable and benefits shall not be denied * * * to any otherwise eligible individual for refusing to accept new work under any of the following conditions: * * * (iii) if, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

The basic issue to be decided is whether Kiene could refuse to accept the employment offer from Wentz because of the union work list rule and still be eligible for unemployment compensation benefits.

We first examine the collective bargaining agreement and the evidence with respect to it to determine whether Wentz agreed to or took any action with respect to the work list practice of the union such as might estop or prohibit it from challenging the continued payment of benefits. The only provision of the agreement having any bearing on this issue is Article IV which provides: "The Union agrees to furnish upon request by the Employer, duly qualified journeyman and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement."

No provisions appear in the agreement with respect to the manner in which the union is to select the workers. In particular, there is no provision for the use by the union of a work list in determining which workers are to be furnished to the employer. The evidence reflects this is the first time in at least 11 years that an employer who requested a specific worker was refused that request because of a union work list. It does reflect the testimony of the union representative that the union had had a work list for some years, but no evidence that Wentz had any knowledge of it or had agreed or acquiesced in its

use in the selection of workers. Moreover, the uncontradicted testimony of the president of Wentz was that traditionally it had been able to hire the specific workers it requested. We find nothing in either the collective bargaining agreement or in the acts and conduct of the employer and the union to justify a finding that the union's work list rule was the hiring practice agreed to by both parties, especially with respect to an employer's request for a specific worker. There is nothing in either the agreement or the conduct of the employer and the union which would estop or prohibit the employer from raising the question of Kiene's right to subsequent unemployment benefits.

We next consider whether the provisions of section 48-628, R. R. S. 1943, cited in part above, would, on the evidence, disqualify Kiene from benefits or whether there was a statutory justification for the refusal of the job offer.

It is appellee's position that if Kiene had accepted the work offer from Wentz, it would have violated the rules of his union and have an adverse impact upon his union membership. It is asserted he comes within the spirit if not the letter of the statutory proviso that work is not suitable if as a condition of it he would have to resign from or refrain from joining any bona fide labor organization.

The record is silent as to what sanctions, if any, the union would have imposed upon Kiene had he accepted the offer of employment, and there is no factual basis for saying that he would have had to resign from the union or otherwise lose his union membership.

Assuming, however, that Kiene would lose his union membership if he accepted the job offer, it is our conclusion his refusal would still bar him from receiving unemployment compensation benefits. In reaching this conclusion it must be remembered that we are not here involved with Kiene's right to

union membership. There is no question but what he has that right. We are concerned only with his right to unemployment compensation benefits.

We construe the limitations of section 48-628 (c) (2) (iii), R. R. S. 1943, to refer to conditions attached to the job offer by the employer and not to possible consequences arising by virtue of union obligations and restrictions assumed by Kiene when he chose to become a union member and existing separate and apart from any action or agreement by the employer.

Here the possibility of union sanction or loss of membership would exist as a result of union rules adopted solely by it and not by any action or restriction imposed by the employer. The right to unemployment compensation is defined and conditioned by statute and no party to the employment process may unilaterally attach other and different conditions to it. We conclude therefore that Kiene's refusal of the job offer does not bring him within the statutory exceptions and that he refused suitable work without good cause, thereby disqualifying him from unemployment compensation benefits.

This is a case of first impression in Nebraska, and while there is a division of authority in other jurisdictions with respect to the effect of union rules, we believe the more logical view, and it appears to be the majority view, is as we have stated it above.

In those jurisdictions which have passed upon issues of similar import we note the following reasoning with approval: In a case where a union member refused employment because to do so would violate a union rule and subject him to sanctions, and was therefore denied unemployment compensation under a statute substantially similar to that of Nebraska, the Ohio court held: "the interpretation of [the claimant worker] would make the operative effect of a refusal to work depend entirely upon the whim or caprice of an organization to which the applicant for unemployment compensation might belong * * *

Under such an interpretation, the right of the applicant for unemployment compensation would not be fixed or determined by the provisions of the statute but by rules adopted by organizations in which the applicant has membership. Such interpretation of the statute, and as a consequence its administration in conformity to such interpretation, is clearly untenable." Chambers v. Owens-A.-K. Co., 146 Ohio St. 559, 67 N. E. 2d 439.

The Pennsylvania court in like circumstances held: "We think it pertinent to say here that we are in no way interfering with the practice and procedure of collective bargaining or with a worker's full freedom of association with his fellows in a labor or other lawful organization. Such considerations have no place here. We are called upon to decide merely whether or not under the facts presented claimant is eligible for compensation under the Unemployment Compensation Law. * * * it would be an absurdity to say that it was the intent to give an unemployed person 'good cause' to refuse acceptance of 'suitable work', and, therefore, to make him eligible for compensation, because of some contract he voluntarily entered into outside of his employment which, in his opinion, may prove more advantageous to him financially. * * * Claimant entered into membership in his union *of his own volition* because he felt that his best financial interests would be served thereby. His union had adopted by-laws [prohibiting its members from accepting work under certain circumstances] under penalty of fine, suspension or expulsion. If claimant desires to retain his membership, he is bound by those by-laws, for as between himself and the union such by-laws are not unreasonable, * * * However, when such union member is unemployed because he refuses to accept [work in violation of the bylaws] he is not *involuntarily* unemployed but rather out of work through his own choosing. * * * retention of

[union] membership therein is not a surrender to circumstances of the kind and quality which will turn voluntary unemployment into involuntary unemployment. It would do great violence to the clear and unequivocal wording of the statute to hold that a labor or any other organization can control payments of unemployment benefits to its members by merely forbidding them to work * * * with certain persons, or at certain places, or under certain conditions. * * *." Barclay White Co. v. Unemp. Comp. Bd., 356 Pa. 43, 50 A. 2d 336.

In a similar vein the Delaware Court held: "The question here is: Did the Legislature intend the Commission and the Court to give effect to union regulations in determining whether an individual has forfeited his right to receive benefits? * * * it is clear that the Legislature had no thought of strengthening or weakening the power of unions. Its purpose was to protect *all* workmen involuntarily unemployed. Membership in a union gives an individual no greater rights under the Act than he otherwise has. Likewise a group of individuals cannot secure higher privileges merely by adopting a rule which binds themselves to a certain course of conduct. We cannot agree with a theory which would have the effect of substituting a union rule for a statutory requirement." (Emphasis supplied.) Bigger v. Unemp. Comp. Comm., 43 Del. 553, 53 A. 2d 761.

In Florida, that court held: "Respondents contend that the union has the judicially recognized right to adopt rules and regulations governing its members and the denial of unemployment compensation [where work was refused because of those rules] interferes with that right. We do not dispute the union's right to adopt legal rules or impose sanctions upon its members for violations of its rules. It, of course, has the right to adopt but it is not required to adopt a rule that will have the effect of denying to a member benefits to

which he would otherwise be entitled to receive under the law. When the union does so, it is the union and not the prospective employer or the State * * * which declares the work to be unsuitable and thereby forecloses the member's right to unemployment compensation if he chooses not to accept the union sanctions." Auchter Co. v. Florida Dept. of Com., Indus. Rel. Com'n, 304 So. 2d 487 (Fla. App.).

Finally, we note the obvious unfairness that would result if appellee's position were sustained. First, it would mean that a union laborer would have preferred status over a nonunion laborer because the latter would have to accept the job offer or be denied unemployment compensation while the former could refuse the offer and yet receive such benefits. Second, it would mean that the employer, as in this case, would have to hire and pay a new employee and also be charged for unemployment benefits to the worker to whom he had offered the job and who refused it. We are satisfied the Legislature did not intend either result under the statute.

We believe the trial court was in error in suggesting this situation is solely between the employer and the union because they have a collective bargaining agreement. This case involves the rights and limitations to unemployment compensation which are not a part of any agreement between the employer and the union but are created and defined by the statute. The case must be decided in that context.

Accordingly, we find under the applicable law that there is no substantial evidence to sustain the trial court's decision finding appellee Kiene qualified to receive unemployment compensation benefits after June 23, 1977, and that the evidence substantially shows Kiene, without good cause, refused an offer of suitable work on or about said date which disqualifies him from receiving unemployment compensation thereafter.

We therefore reverse the judgment of the trial court and remand the cause with directions that the Nebraska Department of Labor Appeal Tribunal determine the amount of unemployment compensation received by appellee Kiene subsequent to June 23, 1977, which by the terms of this opinion he was not entitled to receive, and that he be ordered to repay the same to the Commissioner of Labor, State of Nebraska, with appropriate credit to appellant's unemployment compensation experience account with said commissioner.

Costs herein are taxed to the Commissioner of Labor.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD ROBINSON, APPELLANT.

274 N. W. 2d 553

Filed January 24, 1979. No. 42115.

1. **Criminal Law: Statutes: Due Process.** In a penal statute it is not necessary that it be written as to be beyond the mere possibility of more than one construction. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden.
2. _____: _____: _____. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence.
3. **Criminal Law: Constitutional Law.** In neither the Constitution of the United States nor the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses.
4. **Criminal Law: Evidence.** In determining if two charges constitute the same offense, the test to be applied is whether each charge requires proof of additional facts or evidence.
5. _____: _____. The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings.

6. **Criminal Law: Trial: Evidence: Verdicts.** This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.
7. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Robert M. Brenner, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

BLUE, District Judge.

On September 23, 1976, in the State of Wyoming, David Parker was shot with a shotgun, which resulted in his death within a short time. After the shooting, the defendant, Richard Robinson, stated, "I just wanted to get the body away from the house, and away from my mind." The defendant loaded the body into the trunk of an automobile and drove the car until the gas gauge showed empty. He then drove off into a ditch, got out, and rode back home with his wife in another car. The automobile with the body of Parker was left at a point just east of the Wyoming-Nebraska state line. The defendant was charged with murder by Wyoming authorities, but was found not guilty on April 22, 1977.

On September 2, 1977, in Scotts Bluff County, Nebraska, defendant, Richard Robinson, was charged with a violation of section 28-1033, R. R. S. 1943, in that he did, "unlawfully and feloniously throw away or abandon a dead human body in a place other than a regular place for burial and without the issuance of a proper death certificate." He was also charged

with being an habitual criminal. Preliminary pretrial motions were filed and overruled. A jury was waived, and the habitual criminal charge was dismissed by the State. A trial was had on stipulated evidence, and the defendant was found guilty. A motion for new trial was overruled, and the defendant was sentenced to a term of 2 years in the Nebraska Penal and Correctional Complex.

The defendant has appealed and contends, among other things, that section 28-1033, R. R. S. 1943, is so overbroad, vague, and indefinite as to violate the defendant's due process of law rights under both the Nebraska and United States Constitutions.

Section 28-1033, R. R. S. 1943, reads in its entirety as follows: "It shall be unlawful for any person or persons to throw away or abandon any dead human body, or any portion thereof, in any place other than a regular place for burial and under a proper death certificate issued under either section 71-182 or 71-605."

The terms the defendant complains of are "to throw away or abandon," "dead human body or any portion thereof," "regular place for burial," and "proper death certificate" issued under section 71-182 or 71-605. This court has said many times that it is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569 (1969); State v. Saltzman, 194 Neb. 525, 233 N. W. 2d 914 (1975); State v. Nance, 197 Neb. 257, 248 N. W. 2d 339 (1976). In the Lewis case defendant contended that the use of the terms "forcibly resist," "use," "deadly," "dangerous," and "weapon" resulted in the statute being unconstitutional under

the "void for vagueness doctrine." This court held in that case the meaning of these terms was not in doubt.

It is apparent here, as in State v. Lewis, *supra*, that the terms which are challenged for vagueness are words of common usage and ordinarily such words need not be defined in the statute. State v. Holland, 183 Neb. 485, 161 N. W. 2d 862 (1968), and State v. Lewis, *supra*. As Chief Justice White stated in State v. Lewis, *supra,* "It might be said that they are words in common context that descend to the level of an irreducible minimum of definition."

Defendant cites State v. Adkins, 196 Neb. 76, 241 N. W. 2d 655 (1976), and other cases in which this court has found that legislation was void for vagueness. A reading of these cases readily shows that the statutory language in these cases cited by the defendant is quite different from the statutory language of section 28-1033, R. R. S. 1943.

We do not find the statute to be vague or indefinite. Even if there was some question about it, what we said in State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359 (1977), and in State v. Briner, 198 Neb. 766, 255 N. W. 2d 422 (1977), would be appropriate. "The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden." The statute here is sufficiently clear that a person of ordinary intelligence has fair notice of exactly what is forbidden. The actions of the defendant were clearly prohibited under any reasonable construction of the statute. Although hypothetical factual situations might be imagined where the application of the statute might raise constitutional issues, such imaginary factual situations do not help the defendant, nor make the statute unconstitutional.

Defendant also contends that his prosecution for abandoning the dead body of David Parker placed the defendant in double jeopardy, in that he has previously been acquitted in Wyoming for the murder of David Parker.

This court has held that a distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611 (1951); State v. Goodloe, 197 Neb. 632, 250 N. W. 2d 606 (1977).

In State v. Pope, 192 Neb. 755, 224 N. W. 2d 521 (1974), this court held that double jeopardy did not bar prosecution for two offenses, possession of heroin and possession of cocaine, because the same evidence would not have satisfied the requirements to convict for both offenses.

In the present case it is obvious that the same evidence would not convict for both murder and for abandoning a dead body.

The defendant cites Ashe v. Swenson, 397 U. S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), in support of his contention that the doctrine of equitable estoppel applies to the second prosecution. That case involved an armed robbery of six poker players. The petitioner was charged with the robbery of one of the participants in the poker game, but was acquitted on that charge. Subsequently, the State brought the petitioner to trial on the charge of robbery of one of the other participants and he was convicted. The United States Supreme Court reversed the conviction, applying the doctrine of collateral estoppel to the second prosecution. As stated by the majority

in the Ashe case: "The question is not whether (the State) could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." Thus, it is clear to us that Ashe v. Swenson, *supra,* is not controlling in this case.

The defendant was not placed in double jeopardy by the prosecution in Nebraska.

The defendant also contends that his testimony in Wyoming should have been suppressed in the Nebraska proceedings as self-incriminatory in violation of the Nebraska Constitution and the United States Constitution.

The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. Harrison v. United States, 392 U. S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968). The Supreme Court stated: "In this case we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." The Court of Appeals for the Eighth Circuit has applied this rule to a criminal proceeding. United States v. Cecil, 457 F. 2d 1178 (1972). At a state trial against others who lived with him, Cecil testified in support of a defense motion to suppress evidence seized in a search of the

house. The court ruled that the testimony was given voluntarily in an effort to help his friends and was therefore admissible against him in a trial resulting in his conviction for possessing a short-barreled shotgun.

In our case the defendant testified in the Wyoming trial because he was forming a defense for murder. He testified in order to help himself. Moreover, Mr. Robinson's testimony was given under the direction of counsel.

Nevertheless, the question is not whether the defendant made a knowing decision to testify but why? Harrison v. United States, *supra*. In Harrison, the defendant's conviction at his first trial was overturned because illegally obtained confessions had been introduced. On remand the prosecution read to the jury the defendant's testimony at the prior trial. The United States Supreme Court ruled that such testimony was the fruit of a poisonous tree because it had been given by the defendant to counter the effect of the evidence which was wrongfully allowed at the first trial. In the present case the record is devoid of any indication that the defendant testified in order to counter any illegal government action at the murder trial. Therefore, the only inference which can be drawn is that he testified because, with the advice of his counsel, he considered it to be in his own best interest to do so. Consequently, he is responsible for the results of such public statements, including their use as evidence in the instant case.

The evidence clearly established each element of the offense prohibited by section 28-1033, R. R. S. 1943. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Olson, 200 Neb. 341, 263 N. W. 2d 485 (1978); State v.

Sommers, 201 Neb. 809, 272 N. W. 2d 367 (1978).

There is no merit to defendant's claim of excessive sentence. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. McKenney, 198 Neb. 564, 254 N. W. 2d 81 (1977); State v. Kerns, 201 Neb. 617, 271 N. W. 2d 48.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS DALY, APPELLANT.

274 N. W. 2d 557

Filed January 24, 1979. No. 42129.

Criminal Law: Searches and Seizures: Probable Cause: Police Officers and Sheriffs: Motor Vehicles. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer.

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

Dennis L. Blewitt; Padley & Dudden, P.C. and David T. Schroeder, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

SPENCER, C. J., PRO TEM.

Defendant, Thomas Daly, prosecutes this appeal from his conviction for possession of marijuana. His sole assignment of error is the denial of his motion to suppress evidence seized from his motor vehicle. Essentially, the issue is whether the smell of

marijuana is sufficient to furnish probable cause for the warrantless search of a motor vehicle. We affirm.

At 8:55 p.m., on March 8, 1977, officer Byron R. Lane of the Nebraska State Patrol, while traveling west on Interstate Highway No. 80 approximately 1½ miles east of the Ogallala interchange, observed defendant's vehicle traveling eastbound on the interstate. Using a radar gun, the officer clocked the speed of defendant's vehicle at 60 miles per hour, or 5 miles over the maximum speed limit. Officer Lane made a U-turn, pursued the vehicle, and pulled it over to the side of the road.

Lane met defendant near the left rear of defendant's vehicle, a pickup with a fiberglass shell covering the rear portion. He asked to see the driver's license and registration certificate of the defendant, which he produced. Lane then walked to the front of the pickup, accompanied by defendant, to check whether it had a front license plate. Lane testified while walking alongside the pickup he detected a faint odor of raw marijuana which he believed was coming from the rear of the vehicle.

Lane directed defendant to take a seat in the patrol car. He issued a warning ticket for speeding and then asked defendant whether there was any marijuana in his vehicle. Defendant replied "No." Lane then requested permission to look inside the vehicle, which defendant refused. At that time Lane advised defendant he had smelled marijuana in the vehicle. They left the patrol car and walked to the rear of defendant's vehicle where Lane again advised defendant he could smell marijuana. He asked defendant to open the rear of the pickup. Defendant asked what the procedure was. At that time Lane placed defendant under arrest and gave him the Miranda warnings. Defendant then opened the rear of the pickup.

When the rear door of the pickup was opened,

Lane could smell a strong odor of marijuana. Inside he found several large boxes and a large plastic bag containing marijuana. The marijuana was in kilo form wrapped in cellophane and paper. The parties stipulated that 582 pounds of marijuana were removed from the vehicle.

Officer Lane has been a member of the Nebraska State Patrol since November 1974. During basic training and on-the-job training he had received instruction in drug recognition, including marijuana. He had also made approximately 50 prior arrests for possession of marijuana. All of these arrests followed stops for traffic violations and were made after the officer smelled marijuana.

As previously stated, the sole issue is whether the smell of marijuana standing alone is sufficient to furnish probable cause for the warrantless search of a motor vehicle. We have held that it is. See State v. Benson, 198 Neb. 14, 251 N. W. 2d 659 (1977), where we held: "Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer."

In State v. Benson, *supra,* we said: "The great majority of courts which have currently passed upon the issue have held that the smell of marijuana was alone sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to expertise. See, State v. Wood, 195 Neb. 353, 238 N. W. 2d 226; United States v. Soloman, 528 F. 2d 88 (9th Cir. 1975); People v. Cook, 13 Cal. 3rd 663, 119 Cal. Rptr. 500, 532 P. 2d 148 (1975); Gordon v. State, 259 Ark. 134, 529 S. W. 2d 330 (1976); United States v. Garza, 539 F. 2d 381 (5th Cir., 1976); United States v. Bowman, 487 F. 2d 1229 (10th Cir., 1973); State v. Bidegain, 88 N. M. 384, 540 P. 2d 864 (1975)."

In United States v. Rankin, 572 F. 2d 503 (1978),

the Fifth Circuit Court of Appeals said: "The trial court also was correct in denying defendant's motion to suppress the evidence obtained from the search of the automobile trunk. The initial stop was justified because this checkpoint is permanent, and the subsequent olfactory identification of the marijuana gave the agent probable cause to search the trunk. See, e.g., United States v. Vale, 5 Cir., 1977, 558 F. 2d 237." Certiorari was denied by the United States Supreme Court. See 47 Law Week 3361 (November 28, 1978).

To the list of cases cited above we add State v. Kretchmar, 201 Neb. 308, 267 N. W. 2d 740 (1978), wherein we stated: "Subsequent to the stop, by the use of his senses the trooper became aware of the presence of marijuana. A trained officer should have no difficulty in smelling 460 pounds of marijuana. At that time, under our law, the officer had probable cause to search the automobile for marijuana without the necessity of relying on consent."

In State v. Romonto, 190 Neb. 825, 212 N. W. 2d 641 (1973), we said: "An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. If contraband is seen or smelled, the officer is not required to close his eyes or nostrils, walk away, and leave the contraband where he sees or smells it. State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129. Probable cause may result from the use of any of the senses. State v. Connor, 189 Neb. 269, 202 N. W. 2d 172."

The stop in this case was a valid stop. The defendant was exceeding the speed limit. The officer had a right to be where he was, and when he detected the odor of marijuana there was probable cause for the arrest and search. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES BRADY, APPELLANT.

274 N. W. 2d 559

Filed January 24, 1979. No. 42162.

1. **Criminal Law: Constitutional Law: Probable Cause: Searches and Seizures.** Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.
2. **Criminal Law: Statutes: Motions, Rules, and Orders: Searches and Seizures: Time.** Section 29-822, R. R. S. 1943, provides that any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. However, the motion must be filed at least 10 days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown.
3. **Criminal Law: Waiver: Evidence: Searches and Seizures: Time.** A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial.
4. **Criminal Law: Judgments: Evidence: Appeal and Error.** This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.

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

T. Clement Gaughan, Lancaster County Public Defender, and George R. Sornberger, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

SPENCER, C. J., PRO TEM.

Defendant, James Brady, appeals his conviction

and sentence for the felony of petit larceny, second offense. The case was tried to the court after defendant waived a jury trial. Defendant raises two assignments of error: (1) The court erred in receiving evidence over objection which was procured pursuant to an illegal arrest; and (2) the evidence is insufficient to sustain the conviction. We affirm.

At approximately 5 p.m., on August 20, 1977, a Lincoln police officer, Thomas Wilson, was dispatched to the home of Lou Ann Loos to investigate a domestic disturbance between Mrs. Loos and her brother, the defendant. The defendant departed before the officer arrived. During the investigation Mrs. Loos told the officer the defendant had bragged to her a number of times that he had stolen several items. Two of the items mentioned were a porch swing and a beanbag chair. Mrs. Loos also told the officer where defendant was staying.

Subsequent to his conversation with Mrs. Loos, officer Wilson went to the address given to him by defendant's sister. He walked up to the front of the house and observed a porch swing and a beanbag chair lying on the floor of the screened-in front porch. He entered the porch and knocked on the front door. The door was opened by defendant and a Terry Milke. The officer told defendant he was there to investigate some larcenies, and asked him to step outside. The officer placed defendant under arrest for suspicion of larceny. He then seized the porch swing, the beanbag chair, a hammock, and several house plants.

At approximately 7 p.m., officer Wilson met with defendant alone in the interview room at police headquarters. He read the Miranda warnings to defendant, who stated he understood them. Defendant stated he would only answer those questions he wanted to answer. Officer Wilson then related to defendant what he had been told by Mrs. Loos. Defendant admitted he had stolen the items which had

been seized. The porch swing was subsequently identified by its rightful owner, who testified it had been stolen from her residence on July 14, 1977.

The basis for defendant's objection to the testimony of officer Wilson was that his confession was the result of an illegal arrest. Section 29-404.02, R. R. S. 1943, provides: "A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:

"(1) A felony; or

"(2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer."

In State v. Donald, 199 Neb. 70, 256 N. W. 2d 107 (1977), we held: "Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."

Officer Wilson was acting upon the information given to him by the defendant's sister, when he went to her home to investigate the domestic disturbance complaint involving her brother. Her knowledge of possible crimes was based upon information supplied to her by her brother, the defendant. Two of the items she specifically mentioned to the officer were the porch swing and a beanbag chair. When the officer arrived at the address furnished him to

visit with defendant, he observed the beanbag chair and the porch swing on the porch. The porch swing had not been hung up but was lying on the floor. This observation would tend to confirm the information given to him that the defendant had stolen a porch swing and a beanbag chair.

At that time the officer would not have had reason to suspect that other than a misdemeanor had occurred. It was the fact of a previous conviction which raised the misdemeanor to a felony. However, the officer had talked to the defendant about possible larcenies. If officer Wilson had not arrested defendant, but had gone back to the station to procure a warrant, it would have been possible for the defendant to have concealed the evidence which was then in plain sight on the porch near where the officer was interviewing the defendant.

Section 29-822, R. R. S. 1943, provides that any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. However, the motion must be filed at least 10 days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. No pretrial motion was made by the defendant to suppress evidence. This constitutes a waiver of objection to the evidence on the ground that it was seized in an unreasonable search. See State v. Donald, *supra*, in which we held: "A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial * * *."

Defendant did object to the introduction of the statements which he made admitting the theft of the property after he had been given the Miranda warnings. He is relying on Brown v. Illinois, 422 U. S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), which held that the Miranda warnings by themselves do not assure that statements given by an accused are of suf-

ficient free will as to purge the primary taint of an unlawful arrest. He contends the confession is involuntary because it was obtained by exploitation of an illegal arrest. In Brown, the United States Supreme Court stated: "The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances * * * and, particularly, the purpose and flagrancy of the official misconduct are all relevant."

Brown v. Illinois, *supra*, is not applicable herein. There was no flagrant official misconduct. The trial court could have found the arrest was not per se an illegal arrest. It was within the ambit of section 29-404.02, R. R. S. 1943, permitting a police officer to make an arrest without a warrant. The information received by the officer from a close relative of the defendant, when corroborated by the presence of the articles in plain sight on the porch of the home where defendant was staying, in such condition as to indicate that they had recently been placed there, would be sufficient to warrant a man of reasonable caution to believe that probable cause existed. Considering the fact the officer had explained the reason for his presence to the defendant, exigent circumstances existed to make the arrest without the necessity to leave the scene to secure an arrest warrant.

While the officer's testimony concerning statements made by defendant's sister are hearsay as to the defendant, they are admissible on the issue of probable cause. The articles found in defendant's possession were sufficiently identified as having been stolen. The defendant admitted, after having been fully apprised of his rights, that he alone had stolen the articles.

The verdict is sustained by sufficient evidence. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Olson, 200 Neb. 341, 263 N. W. 2d 485 (1978).

The judgment is affirmed.

AFFIRMED.

WHITE, J., concurring in result.

I concur in the result only. Defendant has waived any right to object to an alleged unlawful search and seizure by failing to file a motion to suppress at least 10 days before trial or at the time of the arraignment. Any statements by the majority relating to the admissibility of the seized evidence are unnecessary to a determination of this case.

MCCOWN and CLINTON, JJ., join in this concurrence.

DELOR ROYCE TILDEN, APPELLANT, V. DIANE SUE TILDEN, APPELLEE.

274 N. W. 2d 860

Filed January 30, 1979. No. 41714.

1. **Divorce: Parent and Child: Minors.** A decree for the payment of child support may be modified only when a subsequent change in circumstances requires such modification in the best interests of the children.
2. _____: _____: _____. The amount of child support ordered to be paid by a parent should be determined according to the status, situation, and character of the parties; the anticipated needs of the children; and the financial position and ability of both parents.
3. _____: _____: _____. The determination of an amount of child support should be reasonable according to the discretion of the court in view of the circumstances; there is no mathematical formula for the calculation of such amount.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with instructions.

Winkle & Brock, for appellant.

Robak & Geshell, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from an order of the District Court for Platte County, Nebraska, modifying the provisions of a divorce decree for the support of two minor children of Delor Royce Tilden, the appellant, and Diane Sue Tilden, the appellee. We reverse and remand the order.

In a suit for divorce, instituted by the appellant, a decree of absolute divorce was entered on February 4, 1972, with provisions for the custody and support of said children. On September 28, 1972, the court modified the previous decree granting custody to the appellee and fixing the amount of support to be paid by appellant at $100 per month for both children. In 1977, appellant filed a motion to secure added rights of visitation; appellee thereupon showed that appellant was $3,700 in arrears in child support payments and moved that he be cited for contempt. She further moved for a modification of the previous order increasing the amount of the child support. Following a hearing, the trial court made new provisions for visitation by appellant and ordered that the amount of child support be increased to $100 per month for each child. Appellant assigns error in that the judgment is not supported by the evidence. No other issues are presented on this appeal.

The bill of exceptions contains all of the testimony at the original trial and at each of the modification hearings. Neither party ever submitted a detailed family budget. In September 1972, the appellee had remarried; her husband had a monthly income of $600. At that time, the appellant had a monthly

income of $900 and was responsible for the support of four children by a previous marriage. The evidence did not show the amount of support he was actually paying. In June 1977, appellee had been again divorced and had remarried. Her present husband had an income of $1,100 per month and was supporting four children by a previous marriage in the family home. The appellant was earning $733.64 per month; his four children had been adopted by others and he had been relieved of responsibility for their support. At the time of the original decree, he had debts amounting to approximately $3,350; the evidence does not show whether this indebtedness still existed in addition to the arrears of child support. The appellee testified that the needs of the children were as follows: (1) Groceries for both, approximately $50 per month; (2) tuition for both, $150 per year; (3) clothing for two, $50 for an unstated period; (4) anticipated medical expenses for a tonsillectomy for the son, and frequent changes of glasses for the daughter, approximately $40 to $60 per month. Their needs in 1972 were not stated.

In order to show a basis for the modification of a previous order for the payment of child support, the evidence must show that there has been such a material change in circumstances that the best interests of the child require such a modification. Walters v. Walters, 177 Neb. 731, 131 N. W. 2d 166; Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542. The evidence summarized above is insufficient to show the circumstances as they existed in 1972, and the extent to which such circumstances had changed by 1977. It is entirely conjectural whether the best interests of the children required a change in the provisions for their support or whether the appellant could or should be required to pay a larger amount for such support.

In determining an amount of child support, either in the first instance or by modification, considera-

tion must be given to the status, situation, and character of the parties; the anticipated needs of the children; and the financial position and ability of both parents. Breiner v. Breiner, 195 Neb. 143, 236 N. W. 2d 846. The court should consider the circumstances and exercise its discretion reasonably in view thereof; there is no mathematical formula for the calculation of an appropriate amount of support. Hupke v. Hupke, 195 Neb. 363, 238 N. W. 2d 229. When the future needs of the children involve nonrecurring items or charges not susceptible of accurate advance estimation, such as some medical expenses, the trial court may, in its discretion, direct that such items be paid by a parent when and if they are incurred. Berigan v. Berigan, 194 Neb. 185, 231 N. W. 2d 131. The evidence in this record fails to show the necessary circumstances, particularly with reference to the situation of each of the parties. A trial court should not be required to speculate in fixing amounts of child support.

The modification order is reversed as to the provisions for the payment of child support and remanded with instructions to the trial court to allow both parties to offer evidence in addition to that introduced at previous hearings. The court will then determine whether a material change in circumstances, since the previous modification, and the best interests of the children require a further modification, and, if so, the amount thereof.

REVERSED AND REMANDED WITH INSTRUCTIONS.

CHRYSLER MOTORS CORPORATION, A CORPORATION, APPELLANT, V. THE NEBRASKA MOTOR VEHICLE INDUSTRY LICENSING BOARD; R. JAMES PEARSON, MEMBER AND CHAIRMAN; HERBERT G. ANDREWS; MARLIN O. ARMBRUSTER; FOREST F. COMBS; FRANCIS HANNA; ROBERT B. KRAMER, SR.; WALTER R. LOUIS; JULIUS NOVAK; DALE F. SAILORS; and DONALD DROUD, MEMBERS OF SAID BOARD; AND GILMAN MOTOR COMPANY, A CORPORATION, AND STATE OF NEBRASKA, APPELLEES.

274 N. W. 2d 862

Filed January 30, 1979. No. 41718.

1. **Administrative Law: Statutes: Appeal and Error.** In an appeal to this court from an order of the Nebraska Motor Vehicle Industry Licensing Board denying an application to terminate a dealers franchise agreement, under the provisions of section 84-918, R. R. S. 1943, we determine only whether the District Court and the board applied the proper criteria and if there was substantial evidence to support the findings and orders of the board.
2. **Administrative Law: Statutes.** Section 60-1429, R. R. S. 1943, provides that good cause to terminate a motor vehicle dealer franchise cannot be established on the sole fact that the franchisor desires further penetration of the market.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Denzel R. Busick of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellant.

James R. Hancock of Hancock & Shaver, for appellee Gilman Motor Co.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Plaintiff, Chrysler Motors Corporation, appeals from the order of the Nebraska Motor Vehicle Industry Licensing Board (board) denying plaintiff's application to terminate the Dodge dealer franchise of defendant, Gilman Motor Company, a corporation (Gilman), of Scottsbluff, Nebraska.

On December 12, 1975, plaintiff filed with the board an application to terminate Gilman's franchise alleging that Gilman had a continuous history of unsatisfactory sales performance, failed to maintain competitive facilities, failed to comply with its franchise agreements, and that the public (consumer) is harmed thereby. § 60-1424, R. R. S. 1943. After a full evidentiary hearing, the board on June 9, 1976, found no good cause had been shown and plaintiff's application was denied.

Pursuant to section 84-917, R. R. S. 1943, plaintiff appealed to the District Court for Lancaster County, Nebraska. Issues were joined, and upon hearing on the record, including the full transcript of the board hearing, the District Court affirmed the order of the board.

Plaintiff assigns as error: (1) The decision was not sustained by the evidence and it is contrary to law. (2) The board's decision was arbitrary and capricious. Other errors were assigned, but not argued. Our de novo review, section 84-918, R. R. S. 1943, is limited in this case to a determination of whether the District Court and the board applied the proper criteria and if there was substantial evidence to support the findings and orders of the board. The 20's, Inc. v. Nebraska Liquor Control Commission, 190 Neb. 761, 212 N. W. 2d 344.

In this proceeding to terminate the franchise of a motor vehicle dealer, pursuant to sections 60-1420 to 60-1435, R. R. S. 1943, the franchisor has the burden to prove both good cause for termination and that upon termination another franchise in the same linemake will become effective in the same community.

Gilman is a family owned business incorporated in 1964, having been an authorized dealer in Dodge autos and trucks in Scottsbluff, Nebraska, since 1931. Glen Gilman, the present corporate vice president and general manager, has been active in the business since 1949. In 1964 a 1-year Term Sales Agreement

was executed whereby Gilman's franchise was continued and Gilman agreed to make improvements in the physical plant, maintenance, and in sales performance. Full compliance was never reached, although this agreement was regularly renewed through 1969. In 1970 Chrysler and Gilman entered into a Direct Dealer Agreement for the sale of Dodge cars and trucks. In 1972 there was a similar Direct Dealer Agreement for the sale of Dodge Colt compact cars. Both of these contracts were in force at the time of these proceedings.

Plaintiff also manufactures a line of companion Chrysler and Plymouth cars. Scottsbluff does not now have a Chrysler-Plymouth agency. The last two attempts to establish such a line by a dealer in Scottsbluff failed. In 1975 Gilman requested the Chrysler-Plymouth line be combined with the Gilman Dodge agency. Chrysler refused. There is no competent, specific evidence in the record that plaintiff would provide another effective dealer franchise in Scottsbluff.

The present Gilman physical plant was built in stages beginning in 1947 at West 27th Street between Avenue D and E, in a busy commercial area, including a used car lot display area, showroom area, parts department, new car display area, and offices. In 1974 plaintiff requested Gilman to either build a new facility, or update its present buildings, preferably on the edge of Scottsbluff. Although Gilman had the financial capabilities to do so, it declined for the reason that the required additional investment was not warranted. There were no reliable estimates as to such cost, but the record suggests a minimum of $200,000 would be required. A part of the evidence includes photographs of the Gilman buildings, both exterior and interior, and photographs of six local, major competing auto retail facilities. The present Gilman facilities are both competitive and adequate.

Throughout the past 15 years, there was continual dissatisfaction on the part of plaintiff with both the physical appearance of the Gilman facility and the failure of Gilman to improve its gross sales by "penetrating the market." Gilman regularly agreed to improve the physical facilities by window washing, painting, redecorating, sweeping, and generally improving the physical appearance; however, Gilman never fully complied with plaintiff's standards and requirements. Gilman also agreed that it would increase its efforts in penetrating the market.

Included in the 1970 and 1972 agreements was the provision that Gilman would attain minimum sales responsibility (MSR) which was a substitute formula to their prior reference to "penetrating the market." Briefly MSR is the number of cars that a dealer was required to sell to equal the product acceptance in terms of sales obtained in the Chrysler-Denver zone area. The basic element for MSR is the number of new car registrations obtained from the county records as collected and prepared by the R. L. Polk Co., a national commercial company providing such statistics for manufacturers. There is conflict in the record as to the reliability of such data.

Plaintiff claims that the combined MSR for Gilman for the period 1971-75 shows progressive percentage decline as follows:

Year	MSR	Sales	Accomplishment
1971	124	103	83.1%
1972	147	116	78.9%
1973	198	125	63.1%
1974	224	141	62.9%
1975 (11 mo.)	180	91	50.6%

Gilman's evidence was that its share of the new cars sold and delivered in the Scottsbluff area is about the same during this period.

Section 60-1429, R. R. S. 1943, provides that good cause to terminate a franchise cannot be established

on the sole fact that the franchisor desires further penetration of the market.

Although the record shows that Gilman neglected physical appearances, it also shows: (1) Gilman Motor Company and its family owners enjoy a strong financial credit reputation in the Scottsbluff community. (2) It was competitive in the retail auto and truck sales market. (3) It maintained an above average inventory of parts and repairs and it gave priority to service and repairs of both autos sold by it and of such service to other customers. (4) The customer service was directed to encouraging repeat business and Gilman had a reputation for providing good service. (5) The Gilman employees were qualified to provide the respective services required of them. (6) Glen Gilman, as manager, devoted about 80 hours a week to the business affairs of Gilman. (7) The advertising program included a 60-second spot radio commercial each morning. Although Gilman's advertising program was not in strict compliance with Chrysler's standards, it was adequate. (8) Gilman had been a continuing successful stable representative of Chrysler as a Dodge dealer for 41 years. (9) Other Dodge dealers in the Denver zone also failed to meet their MSR requirements.

Plaintiff argues that American Motors Sales Corp. v. Perkins, 198 Neb. 97, 251 N. W. 2d 727, is dispositive in this case. That claim is without merit. In Perkins there was a total failure and refusal on the part of Perkins to meet even the minimal franchise requirements of a new car dealer as to facilities, inventory, supplies, and sales performance.

From a review of the entire record, we conclude that the issue of good cause was properly considered by the board as provided in section 60-1433, R. R. S. 1943, that the decision of the board was neither arbitrary nor capricious, and there is substantial competent material evidence to support its decision.

The order of the District Court was correct and is affirmed.

AFFIRMED.

EDWARD LOUIS MCCURRY, APPELLANT, V. LAUREN MARIE MCCURRY, APPELLEE.

274 N. W. 2d 865

Filed January 30, 1979. No. 41740.

1. **Divorce: Parent and Child: Minors.** 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.
2. **Divorce: Parent and Child: Minors: Appeal and Error.** The determination of the trial court with respect to awarding or changing the custody and support of minor children is subject to review but will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
3. **Divorce: Courts: Property: Appeal and Error.** A division of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Jarve L. Garrett, for appellant.

Vincent P. Sutera of Sutera & Sutera, for appellee.

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

MCCOWN, J.

This is a proceeding for dissolution of marriage. The District Court dissolved the marriage, granted custody of the three minor children to the wife, ordered the husband to pay child support, and made a property division. The husband has appealed.

The parties were first married in 1966, divorced in 1972, and remarried on June 18, 1973. At the time of the decree in this case, in the fall of 1977, the children

were 1 1/2, 10, and 11 years old. In the fall of 1976 the wife moved out of the family home, taking the infant girl with her and leaving the two older children with the husband.

The husband filed his petition in this case on January 25, 1977, seeking dissolution of the marriage and custody of the children. The wife, by answer and cross-petition, sought dissolution of the marriage, custody of the children, and support for herself and the children. On March 2, 1977, the District Court granted temporary custody of the two older children to the husband and custody of the infant daughter to the wife, and ordered the husband to pay temporary support for the wife and infant daughter. The monthly amount of temporary support was later reduced from $150 to $60 per month because the husband had been disabled and was unable to work.

The case was tried on August 29, 1977. At time of trial the husband was a 32-year-old construction worker. His take-home pay, when working, was $884 per month. His income had been reduced during 1977 because of an injury to his knee. He admitted that he was an alcoholic and that he still drank on occasion, although he had completed a rehabilitation course for alcoholics at a local institution. The wife testified that her husband had not been cured of alcoholism, still drinks, and would not be a proper person to have custody of the children. She testified to acts of violence against her and the children, some of which the husband admitted.

The wife was 28 years old at the time of trial and was employed by Northwestern Bell Telephone Company. She had a gross income of $710 per month. The testimony of the social worker appointed by the court to investigate the care of the children was that both the wife and the husband could adequately care for the children. The trial judge questioned the two older children in chambers. The girl preferred to live with her mother. The boy

preferred to live with his father.

The decree of the District Court dissolved the marriage and granted the wife custody of the three minor children, subject to reasonable visitation rights by the husband. The husband was ordered to pay child support of $50 per month per child until he was able to return to work, and $100 per month per child thereafter until each of the children reached the age of majority, married, or otherwise became emancipated, whichever occurred first. The decree also provided that the wife should have exclusive possession of the family home until such time as both of the two older children reach majority, die, or become emancipated, whichever combination of events occurred first. The wife was required to make the monthly mortgage payments on the house, and the court directed that upon sale of the home any net equity realized should be divided equally between the parties. The court also awarded the wife the household furnishings and fixtures in the family home and a Volkswagen automobile. Any other personal property was awarded to the party in possession. The husband has appealed.

The husband contends that he, rather than the wife, should have been awarded custody of the children or, at least, of the two older children. The rule is well established in this court that 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. Schinkel v. Schinkel, 199 Neb. 1, 255 N. W. 2d 851.

The determination of the trial court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Schmer v. Schmer, 197 Neb. 800, 251 N. W.

2d 167. The evidence in the case now before us supports the action of the trial court. The evidence is persuasive that the best interests of the children will be better served by awarding custody to the wife. There was no abuse of discretion here.

The husband also contends that the trial court erred in awarding the use of the family home to the wife, and also in awarding her various items of furniture and personal property. A division of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal. Schmer v. Schmer, *supra*. There was no abuse of discretion in the case now before us.

The judgment of the District Court was correct and is affirmed. The wife is awarded the sum of $250 for the services of her attorney in this court.

AFFIRMED.

THE OMAHA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE, V. CONTINENTAL WESTERN CORPORATION ET AL., APPELLEES, IMPLEADED WITH DAVE BENNETT, INC., A CORPORATION, AND M & S GRADING, INC., A CORPORATION, APPELLANTS.

274 N. W. 2d 867

Filed January 30, 1979. No. 41812.

1. **Property: Mechanic's Liens.** An architect who furnishes plans and specifications for an improvement on real estate is entitled to a mechanic's lien upon such real estate.
2. **Contracts: Mechanic's Liens: Time: Limitations of Actions.** Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statutes for that purpose.
3. **Mechanic's Liens.** The mechanic's lien statutes require a liberal construction so as to effectuate their objects, and they should enforce the equitable principle that everyone who, by his labor and materials, contributes to the enhancement of the property of another should be compensated.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Jon S. Reid of Kennedy, Holland, DeLacy & Svoboda, for appellant Dave Bennett, Inc.

James E. Lang of Marer, Venteicher, Strasheim, Seidler, Laughlin, Lazer & Murray, P.C., for appellant M & S Grading, Inc.

Zwieback, Brady, Kasher, Festersen & Pavel, P.C., and Gary M. Burton, for appellee Omaha National.

Hunter, Houlihan & Katz, for appellee First National of Council Bluffs.

Finlayson, McKie & Fisk and Louis M. Bruckner, for appellee Bank of Millard.

Heard before KRIVOSHA, C. J., BOSLAUGH, and BRODKEY, JJ., and RONIN and NORTON, District Judges.

RONIN, District Judge.

This is a real estate mortgage foreclosure action commenced by the appellee, The Omaha National Bank, by filing its petition to foreclose its mortgage upon two tracts of real estate in Sarpy County, Nebraska. The Continental Western Corporation (Continental) was the owner of the tract of land involved in this appeal. Both Continental and Antilles Corporation, the owner of the other tract, along with Dave Bennett, Inc., a corporation, (Bennett) and M & S Grading, Inc., a corporation (M & S) as mechanic's lien holders, were named defendants in the foreclosure action. Both Bennett and M & S answered appellee's petition and separately cross-petitioned for the foreclosure of their mechanic's liens which had been filed on the subject real estate.

After conferences and hearings in the District Court for Sarpy County, Nebraska, the parties en-

tered into a stipulation which was filed on December 13, 1976, and which became binding on all the parties. This stipulation resolved many of the issues, but left the remaining issues as to the validity and priority of the mechanic's liens of Bennett and M & S. Trial was held on March 15, 1977, and, after final submission of the issues, the court, on May 31, 1977, entered its memorandum opinion finding:

1. That the lien claim of Bennett was filed outside the statutory time limit and should be disallowed, and

2. That the contract of M & S was "too indefinite in its terms and requirements to be binding and is insufficient to support a mechanic's lien herein," and the lien claim should be disallowed.

On September 13, 1977, the District Court entered its decree of foreclosure which included the provisions of its memorandum opinion. Bennett and M & S filed motions for new trial, which were overruled. Appellants and cross-petitioners, Bennett and M & S, filed separate appeals from the decree of the District Court disallowing their separate mechanic's lien claims.

The facts relating to the Bennett mechanic's lien claim are these. On September 9, 1971, appellee, The Omaha National Bank, made a loan in the amount of $1,000,000 to the landowners, Continental and Antilles Corporation, evidenced by a promissory note secured by a mortgage executed by them on each of their tracts of farmland real estate. The documents were duly recorded on September 10, 1971, and that property is the subject of this foreclosure action. The intended use of the tract owned by Continental was for development of a residential subdivision with two 18-hole golf courses, known as the Coronado subdivision of Sarpy County, Nebraska.

Continental employed the engineering firm of Lamp, Rynearson (Lamp) to design and lay out the entire Coronado subdivision. In July 1972, Lamp contacted Bennett, whose primary business was to

design golf courses. Bennett started work as a subcontractor for Lamp in October 1972, under an oral agreement which was later reduced to writing on January 27, 1973. Bennett prepared complete preliminary plans for both golf courses and detailed construction specifications for the north golf course. The grading work with M & S started in June 1973, and the irrigation system work was inspected by Bennett until all construction work was finally stopped in December 1973, because Continental was unable to continue to make payments.

In March 1974, a new written contract was entered into between Bennett and Continental. This contract replaced the previous contract between Lamp and Bennett. All the construction work on Coronado had been performed under the Lamp contract. The only services performed by Bennett after execution of the new written contract with Continental were rendered in April 1974, amounting to $577.28, and a separate bill for services and expenses for a trip to Nebraska in June 1974, in the sum of $187.27. Bennett filed its mechanic's lien on September 17, 1974, in the sum of $17,970.55 on the Coronado subdivision based on the written contract with Continental of March, 1974.

The law in Nebraska is clear that an architect who furnishes plans and specifications for an improvement on real estate is entitled to a mechanic's lien upon such real estate. VonDorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800 (1894).

The time for filing a mechanic's lien cannot be extended by tacking two or more contracts together. In Henry & Coatsworth Co. v. Halter, 58 Neb. 685, 79 N. W. 616 (1899) our court stated: "Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statute for that purpose." See, also, La Puzza v. Prom Town House Motor Inn, Inc., 191

Neb. 687, 217 N. W. 2d 472 (1974); § 52-102, R. R. S. 1943. Bennett's mechanic's lien makes no reference to any contractual relationship with Lamp. All the services of Bennett, except the two billings for April and June of 1974, were rendered under the contract of January 23, 1973. No lien claim of Bennett for services under the Lamp subcontract was filed under that contract in accordance with the statutory requirements of section 52-102, R. R. S. 1943, and therefore it cannot be allowed on a lien claim based on the later separate and distinct written contract of March 1974, with Continental.

Services were performed by Bennett in June 1974, which were separately billed in the sum of $187.27 because Continental desired Bennett to consult with another subcontractor who had refused to continue working since payments were not made to him on his billings and Continental was in financial difficulties. This service was not related to the March 1974 contract and was not a proper item to be included in its mechanic's lien. The record is clear that there was no construction work of any kind on the Coronado project after December 1973. There is a presumption that where more than 60 days intervene between the performance of work items in a mechanic's lien account, the last item performed was furnished under a separate contract. See Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227 (1952). Our court held in Occidental Savings and Loan Assn. v. Cannon, 184 Neb. 659, 171 N. W. 2d 166 (1969) that: "The time for filing a lien cannot be delayed by performing minor labor or furnishing minor items of materials." The court finds that the separately billed item of $187.27 for services rendered by appellant Bennett did not sufficiently relate to the written agreement of March 1974, and that the trial court was correct in its finding that the entire lien claim of appellant Bennett was filed outside the statutory time limit and must be disallowed.

All the remaining parties have stipulated that appellee, The Omaha National Bank, is the first mortgage holder, including its later advancement of $87,800. The judgment of the District Court is also affirmed in determining that the remaining balance due appellee, The Omaha National Bank, has priority over all other liens of the parties in this action.

The facts relating to the mechanic's lien of M & S for grading of the Colorado subdivision are generally not in dispute. The sole and only issue is whether, under these undisputed facts, M & S has a valid mechanic's lien. The written stipulation filed on December 13, 1976, provides that Continental is indebted to M & S in the amount of $36,873.14 plus accrued interest in the amount of $18,208.22 to November 30, 1976, with interest accruing at the rate of $9.09 thereafter per day until paid, and that valid consideration was given. The two-page written memorandum contract between Continental and M & S was executed on June 2, 1973, and was received in evidence as exhibit 1 (B). Exhibit 1 (A) is the mechanic's lien filed by M & S on January 24, 1974, together with 20 pages attached thereto listing the dates and itemization of the grading work performed by M & S with the charges specified for each item. The record is undisputed that M & S commenced its grading work on Coronado on June 11, 1973, with the last work being performed on November 1, 1973. The mechanic's lien filed by M & S on January 24, 1974, is based on the written contract between the parties dated June 2, 1973.

The testimony of Clair Morgan, president of appellant M & S, is also undisputed that the entire Coronado subdivision was graded, which included all the lots and both golf courses. Exhibit 8 was received in evidence and is a partial release, dated April 2, 1974, of the mechanic's lien of M & S as to the Coronado subdivision except for lots 1 through 402, inclusive. Section 52-101, R. R. S. 1943, provides: "Any per-

son who shall perform any labor or furnish any material * * * (2) *for grading,* * * * *by virtue* of an open running account or a *contract* or *agreement, expressed or implied,* with the owner thereof or his agents, shall have a lien to secure the payment of the same upon * * * the lot of land upon which * * * the work is performed * * *." (Emphasis supplied.)

Our court in Peters v. Halligan, 182 Neb. 51, 152 N. W. 2d 103 (1967), expressly held that our Nebraska mechanic's lien statutes required a liberal construction so as to effectuate their objects, and that they should enforce the equitable principle that everyone who, by his labor and materials, contributes to the enhancement of the property of another should be compensated.

In Peters v. Halligan, *supra,* our court stated: "The statute does not require any particular degree of performance of a contract, but simply uses the term 'by virtue of a contract or agreement.' It is inferable from the language of the statute itself that a person is entitled to a lien for the reasonable value of the benefit confined upon the property * * *."

The aforesaid mechanic's lien statute does not require how definite or what terms the contract must contain. The record establishes that the parties themselves prepared the two-page written agreement of June 2, 1974, and entitled it as a "contract." The document, exhibit 1 (B), establishes there was a meeting of the minds of Continental and M & S, that M & S would perform the grading work in Coronado, and that the hourly rate for the various grading equipment was agreed upon. The written agreement further provided that the cost of the first 18-hole golf course grading expense would not exceed $90,000, that the hourly report of time spent by M & S would be provided Continental weekly, and that there would be monthly draws by M & S based on the listed cost schedule. Clair Morgan, president of M & S, explained in detail the terms of the written

contract. The amount of the debt owed M & S has never been disputed.

We find the written contract of June 2, 1973, between M & S and Continental is sufficiently definite to comply with the mechanic's lien statute, that the trial court was in error in disallowing the M & S mechanic's lien, and that its lien is valid and sufficient in all respects on lots 1 to 402, inclusive, Coronado's subdivision, Sarpy County, Nebraska, as of the time and amount set forth herein.

The judgment of the District Court is affirmed as to the appellant Dave Bennett, Inc., a corporation; the judgment is reversed as to the appellant M & S Grading, Inc., a corporation; and the cause remanded with directions to enter a judgment in accordance with this opinion.

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

CAROLYN M. FLEHARTY, APPELLEE, V. EDGAR C. FLEHARTY, APPELLANT.

274 N. W. 2d 871

Filed January 30, 1979. No. 41824.

1. **Divorce: Parent and Child: Minors: Infants.** The best interests of the children is the paramount consideration in determining issues of custody.
2. **Divorce: Parent and Child: Minors: Infants: Statutes.** No preference in awarding custody of children shall be given either parent on account of the sex of such parent, and there is no presumption that either parent is more fit than the other to have such custody. § 42-364, R. S. Supp., 1976.
3. **Divorce: Appeal and Error.** This court will give weight to the fact that the trial court saw and observed the witnesses and evaluated the parents as custodians. Its findings will not be reversed on appeal unless shown to be clearly against the weight of the evidence or the result of an abuse of discretion.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Ronald J. Palagi, for appellant.

William C. Stanek, for appellee.

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

KUNS, Retired District Judge.

This is an action for dissolution of marriage brought by Carolyn M. Fleharty, petitioner-appellee, against Edgar C. Fleharty, respondent-appellant, in the District Court for Burt County, Nebraska. The decree, in part, awarded the custody of two minor children of the parties to the appellee. Appellant assigns error against this provision. We affirm the judgment.

Appellant argues that the award of custody is not supported either by the evidence or the law. The record shows that the parties were married in Lima, Ohio, on March 5, 1965. Two children were born to the marriage, a daughter, Tracy G., on July 3, 1970, and a son, Eric Todd, on August 11, 1973. The family moved to Nebraska in 1974. Suit for dissolution was filed in 1977. During the pendency thereof, the appellee returned to Ohio with her children, occupying an apartment in Beaverdam, Ohio, near other members of her family. She was receiving ADC at the time of trial, but was hopeful of securing employment. She described at length both her living arrangements and the provisions she had planned and made for the care of the children. When pressed on cross-examination, about having illicit relations and living with another man, she explicitly and unequivocally denied the charge. The appellant testifed that, if custody were granted to him, he would live with the children in the previous family home and that he would secure help from his mother and friends in caring for the children while he was at work. He said he was going to have the children

baptized and would attend church regularly. He planned to make special arrangements for education and tutoring of the children and also for therapy of their speech defects. He conceded that in May 1977, he wrote a letter to his children telling them that their mother was sleeping with another man and giving a bad impression of her as a woman and a mother.

Appellant also called a private investigator and a clinical psychologist. The investigator testified about his observations of the appellee in July 1977, when he saw her in company with another man at her apartment and concluded that they were living together. The psychologist testified he had administered tests to the appellant and considered him to be above average in stability for the purpose of exercising custody of the children. He also expressed an opinion, based upon hearing the testimony at the trial, that he had some question about the ability of the appellee to provide love and care for the children and to educate them.

Our attention has been directed both to the statutory provisions found in section 42-364, R. S. Supp., 1976, and to numerous statements of the law found in previous decisions of this court. There is no question but that the best interests of the children constitute the paramount consideraton in determining issues of custody. § 42-364, R. S. Supp., 1976; Boroff v. Boroff, 197 Neb. 641, 250 N. W. 2d 613; Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682. Section 42-364, R. S. Supp., 1976, further provides that the court in awarding custody of children shall not give any preference to either parent based upon the sex of such parent and that there is no presumption that either parent is more fit than the other to have custody. A comprehensive statement of the factors involved in determining the issue of custody is found in Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111: "The judgment concerning the custody of

children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider. 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."

The only point upon which the evidence is in conflict is the attack upon the moral conduct of the appellee. The trial court resolved this conflict in favor of the appellee. Each party introduced favorable opinions as to their fitness to be awarded custody. They testified about their family life, the conditions under which the children had been raised, and their intentions and plans for the future. An adverse factor to the prayer of appellant for custody is found in his letter of May 1977, denigrating the appellee to the children. Even though written in good faith and with full belief in the truth of the statements made therein, its obvious purpose could only have been to alienate the children from the appellee and to impair, if not destroy, their respect and affection for her. Appellant seems not to have realized the possibility of permanent psychological damage to the children and failed to display the attitude and stability of character as a parent, which would incline a court to look favorably upon a request for custody. Any

repetition of conduct of this type might be a ground to restrict visitation.

The trial court had the opportunity to hear the witnesses and to weigh their testimony. From observing and hearing the parties, the court was able to evaluate their relative fitness to have custody of the children. From an examination of the entire record, it appears that the trial court observed both the statutory requirements and judicial standards in determining the issues. The assignment of error by appellant is without merit.

The judgment of the trial court is affirmed. The appellee is allowed an attorney's fee in this court of $250.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. WELSH III, APPELLANT.

275 N. W. 2d 54

Filed January 30, 1979. No. 42041.

1. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed upon appeal unless there appears to be an abuse of discretion.
2. **Criminal Law: Legislature: Death Penalty.** In adopting sections 29-2521.01 to 29-2522, R. S. Supp., 1978, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. That procedure is not called into play where the death penalty is not imposed.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Patrick W. Healey and Healey, Healey, Brown & Wieland, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH,

McCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

WHITE, J.

This is an appeal from a jury verdict of manslaughter. The defendant was charged and tried on one count of first degree murder of his wife, Christine C. Welsh, on June 1, 1977. Defendant assigns as error that the sentence was excessive and he should have been placed on probation. The trial court sentenced the defendant to a term of 10 years in the Nebraska Penal and Correctional Complex. In effect, the sentence was for a term of from 1 to 10 years.

The defendant at the time of the homicide was a Lincoln police officer and a Vietnam war veteran with numerous commendations and citations. The victim was a dispatcher in the Sheriff's Department of Lancaster County, Nebraska. For some time prior to the victim's death, the parties had marital difficulties. Divorce was contemplated, discussed, and mentioned to other parties. When the defendant arrived at his home on June 1, 1977, he confronted his wife with his suspicions of her interest in another man and, according to the defendant, the victim stated, immediately prior to the incident, that she was having an affair with another member of the Lancaster County Sheriff's Department. The evidence discloses that the victim died of multiple gunshot wounds from the defendant's privately owned pistol, which he was in the habit of carrying with him while he was off duty.

The punishment for the offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits. The guiding principle in this court is that a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. See State v. Atwater, 193 Neb. 669, 228 N. W. 2d 876.

During the course of the sentencing proceeding, the trial court expressed the opinion that the defendant had been given "an enormous break" by the jury when it returned a verdict of manslaughter instead of first degree murder. From that statement, the defendant concludes that the decision on sentencing was influenced by a disregard for the findings of the jury. We do not agree that the statement supports such a conclusion. The judge went on to say that: "* * * my sole reason in imposing imprisonment in this case, is because * * *, I think that a lesser sentence would serve to depreciate from the seriousness of the offense and hold the law in disrespect." The statement complained of, standing alone, does not indicate an abuse of discretion.

A related argument concerns section 29-2260 (3), R. R. S. 1943. That section lists 11 factors to be accorded weight in favor of probation. The defendant alleges that the trial court failed to consider those factors and thus abused its discretion. First, it should be noted that, according to that same section, those 11 factors serve as guidelines and do not control the discretion of the court. Second, although the judge did not specifically comment on each of the 11 factors, there is strong indication that they were indeed considered in his deliberations. He acknowledged that there was little likelihood that the defendant would ever again commit such a crime. He also acknowledged the favorable background and abilities of the defendant. However, those considerations were not enough to outweigh his opinion that a lesser sentence in this case would serve to "depreciate the seriousness of the offender's crime or promote disrespect for law" within the meaning of section 29-2260 (2), R. R. S. 1943. That being the case, he was required to reject the request for probation. Again, we are unable to find that his decision constituted an abuse of discretion.

Because of the unfortunate possibility that a former police officer might suffer physical abuse at the hands of fellow inmates at the penal complex in his own state, the trial court recommended that the defendant be transferred to serve his sentence in another jurisdiction. Defendant contends this would not protect him from such abuse since the inmates of the foreign institution are likely to discover his former occupation. The bottom line in such an argument amounts to a plea for special treatment because of the defendant's former status as a police officer. That plea must be rejected, for it would create the appearance of a privileged class and thus breed the disrespect for law sought to be avoided by section 29-2260 (2), R. R. S. 1943. Although the case of State v. Savin, 195 Neb. 501, 238 N. W. 2d 911, was different in many respects from the case at bar, what was said there is not inapplicable: "The equal protection argument is based on the theory the defendant was dealt with more harshly because he was a lawyer. The fact the defendant was a lawyer and callously abused the trust that had been placed in him justified a greater sentence than might have been imposed upon a person not occupying the professional status of the defendant. We find no merit in the contention the trial court should have disregarded the defendant's status and treated him as a person not schooled in the law and sworn to uphold it." The defendant here is a police officer sworn to uphold the law and to protect the public. The trial court is not in error in taking into account during sentencing his status and responsibilities and the profession previously engaged in by the defendant.

Finally, defendant asserts that it is our duty to compare the sentence imposed in this case with the sentence imposed in each and every other manslaughter case for the purpose of assuring that it is no greater than those other sentences. He cites L. B. 711, Laws 1978, now found at sections 29-2521.01 to

29-2522, R. S. Supp., 1978, as authority for that proposition. It is true that section 29-2521.03, R. S. Supp., 1978, states that this court upon appeal shall "determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances." However, to quote that sentence out of context is to mistake the intention of the Legislature.

A reading of the legislative history of L. B. 711, Laws 1978, and of the bill as a whole indicates conclusively that it was the intention of the introducer and the members of the Legislature to establish a system whereby the imposition of a death penalty in any given case would be compared to the failure to impose the death penalty in any other case in which first degree murder was charged.

The legislative findings which prompted adoption of the bill are found in section 29-2521.01, R. S. Supp., 1978: "(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;

"(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;

"(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law and offense which would not result in a death sentence in one portion of the state should not result in death in a different portion; * * *."

At the meeting of the Judiciary Committee held on July 24, 1978, the following exchange took place between Senator Chambers and Senator Stoney: "Senator Stoney: I was just wondering what could be accomplished if most of them (cases wherein the death sentence is imposed) are being appealed and reviewed by the Supreme Court anyway?

"Senator Chambers: But they are not reviewed to

be compared for the propriety of the sentence where the sentence is death. That is the only place where the comparison could occur.''

During the floor debates on March 8, 1978, Senator Chambers explained: '' ' * * * Once cases have been decided, they become the precedence (sic) on which future cases are decided. Once this study of these cases has been undertaken, it will not be necessary to go through them again and again. The Supreme Court as each case wherein death is imposed, when one of these cases comes before the Supreme Court, it can measure the circumstances of the case where death was imposed against these other cases which have already been studied by the court and a fair and equitable imposition, if such a thing is possible, of the death penalty will occur in this state. * * *.' '' Later on April 4, 1978, in floor debates, Senator Chambers said:

'' ' * * * It would compare all of the criminal homicides which have occurred and see if some type of uniformity can be arrived at in the imposition of the death penalty * * *.' ''

It is clear that the Legislature's purpose in adopting sections 29-2521.01 to 29-2522, R. S. Supp., 1978, was to insure that the death penalty not be imposed in an irrational or inconsistent manner. That purpose would not be served by giving it the construction sought by the appellant and we decline to do so.

Finding no abuse of discretion in the sentence, we affirm.

AFFIRMED.

MARILYN R. NEAMAN, APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY AND GERALD E. CHIZEK, COMMISSIONER, NEBRASKA DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT, APPELLEES.

275 N. W. 2d 57

Filed January 30, 1979. No. 42108.

Administrative Law: Appeal and Error. The Department of Labor Appeal Tribunal exercises quasi-judicial power as distinguished from legislative power. Consequently, the statutory provision for a trial de novo is valid.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Marilyn Neaman, pro se.

Ruth M. Moore, for appellee Northwestern Bell.

James R. Jones and John W. Wynkoop, for appellee Chizek.

Heard before SPENCER, Retired Justice, BOSLAUGH, CLINTON, and WHITE, JJ., and BARTU, District Judge.

SPENCER, Retired Justice.

Petitioner-appellant, Marilyn R. Neaman, appeals from a decision of the District Court affirming the decision of the Nebraska State Appeal Tribunal of the State of Nebraska Department of Labor, denying certain unemployment benefits. We affirm.

Neaman was employed by Northwestern Bell Telephone Company from January 2 to May 2, 1974, as an order clerk typist. She contends she left her employment because she felt her supervisor was harassing her and treating her in a manner which was biased and discriminatory.

The evidence disclosed that the company was initiating a new procedure and was attempting to train and give experience to employees, including the petitioner. Said employees were under the supervision of an employee-supervisor. Part of the training included the monitoring of each employee by the

supervisor so that additional guidance and training could be given on an individual basis to those employees needing it. The petitioner's error ratio was higher than the average of the other employees working under that supervisor. In the opinion of the supervisor, it was "extremely high." Neaman contends she was singled out and subjected to harassment by the supervisor and was required to have personal interviews with said supervisor. Neaman failed to report for work on May 2, 1974. Later in the day, when the supervisor and her supervisor contacted petitioner by phone, petitioner advised them she was terminating her employment.

The issue involved in this case is whether or not the petitioner voluntarily left her employment without good cause. Neaman alleges that the treatment accorded her by her superiors made her tense, uncomfortable, and frustrated. This she contends gave her good cause for terminating her employment.

The appeal to the District Court from the Nebraska State Appeal Tribunal is de novo upon the record. § 48-639, R. R. S. 1943. However, this section provides the parties may offer additional evidence under certain conditions. The record was introduced, and both parties adduced additional evidence in the District Court. The court, upon what was a trial de novo, determined that no just cause existed for the petitioner's voluntary termination of her employment. The court found the voluntary termination of the employment was the result of the high sensitivity of Neaman, sustained the finding of the State Appeal Tribunal, and dismissed the petition.

In Strauss v. Chizek, 201 Neb. 571, 270 N. W. 2d 917 (1978), we held the Department of Labor Appeal Tribunal exercises quasi-judicial power as distinguished from legislative power. Consequently, the statutory provision for a trial de novo is valid. Upon the record made in the District Court, on appeal we

find that Neaman wholly failed to sustain her claim by a preponderance of the evidence. The weight of the evidence is clearly otherwise. Her termination was of her own volition.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOYLE RUZICKA, APPELLANT.

274 N. W. 2d 873

Filed January 30, 1979. No. 42157.

1. **Criminal Law: Probable Cause: Searches and Seizures.** An odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant if the expertise of the officer is shown.
2. **Criminal Law: Evidence.** Evidence that material submitted for analysis was sent to a laboratory in a sealed envelope by registered mail and received at the laboratory in sealed condition where it was opened by the chemist performing the analysis is sufficient to establish a chain of custody.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

John P. Murphy and Ruff & Murphy, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

BOSLAUGH, J.

On separate informations the defendant was convicted of possession of methamphetamine and LSD, and possession of less than 1 pound of marijuana. He was sentenced to 1 year imprisonment on the first charge and 7 days in jail on the second charge, the sentences to run concurrently. He has appealed and contends that the trial court erred in failing to

sustain his motion to suppress, that certain exhibits were received in evidence without sufficient foundation evidence, and that the sentences imposed were excessive.

The evidence shows that on December 3, 1977, the defendant's truck was stopped by a state patrolman because the truck had a broken taillight. The patrolman asked the defendant for his driver's license. While the defendant was looking in the truck for his license, the patrolman noticed the odor of burned marijuana coming from the driver's compartment. The patrolman asked for permission to search the truck which was refused by the defendant. The patrolman then searched the truck and found two plastic bags containing marijuana, a packet of methamphetamine, and a packet containing LSD. Several other items relating to drug use were discovered in the search. The defendant was arrested and taken to the patrol office at McCook, Nebraska. The defendant was questioned at the patrol office and admitted that the items seized belonged to him.

The defendant contends that the search of the truck was illegal because the odor of burned marijuana coming from the driver's compartment of the truck was not sufficient to establish probable cause to search the truck.

In a number of cases we have held that the odor of marijuana coming from a vehicle is sufficient to furnish probable cause for a search of the vehicle. In State v. Daly, *ante* p. 217, 274 N. W. 2d 557, we reviewed the cases on this subject and held that an odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant if the expertise of the officer is shown. The evidence in this case showed that the officer was very familiar with the odor of marijuana and there is no claim that he lacked expertise.

We know of no reason why there should be a distinction between the odor of burned and unburned

marijuana in this type of situation. The evidence here established probable cause and the ruling on the motion to suppress was correct.

The defendant contends that evidence as to the chemical analysis of the materials seized was improperly admitted because the State failed to establish a chain of custody concerning the materials submitted for analysis. The evidence was that the materials were placed in a sealed envelope by a patrolman and sent by registered mail to the State Health Department Laboratory in Lincoln, Nebraska. The envelope was received by an employee of the laboratory and taken to the laboratory office where it was logged in by a secretary. A drug chemist employed by the laboratory then received the sealed envelope and made an analysis of the materials contained in the envelope. A report of the analysis was placed in the envelope and returned with the tested materials to the patrol office. The envelope, the receipt for the registered mail, and the report of the chemist were identified and received in evidence. This was sufficient foundation evidence to establish a chain of custody, and testimony as to the analysis of the materials was properly admitted.

The defendant, who is a resident of Kansas, is 24 years of age, married, and employed as a laborer on an oil rig. He also farms part of the year in Kansas. He has no criminal record other than traffic offenses and a conviction for felony possession of cannabis in Colorado in 1974. The defendant was on probation for the Colorado offense at the time of his arrest.

The presentence report indicates that the 1974 Colorado offense involved 18 bags of marijuana with some indication that the defendant and his codefendants intended to sell it. The Colorado probation order required the defendant to abstain from the use of narcotics.

The sentence which was imposed for the felony count was the minimum provided by statute. In view

of the defendant's previous offense and probation we are unable to say that the sentence imposed was excessive.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TARA ENTERPRISES, INC., AND ZACHARY PRODUCTIONS, LTD., APPELLANTS.

274 N. W. 2d 875

Filed January 30, 1979. No. 42161.

1. **Criminal Law: Searches and Seizures.** A warrant which authorizes a search for and seizure of films specifically named and described, and items of equipment or material aiding or used in the exhibition or dissemination of those films, is not a general warrant authorizing an exploratory search of the premises for evidence of any crime.
2. **Criminal Law: Searches and Seizures: Evidence.** Where items unspecified in the warrant are seized in a valid search, the fact that the unspecified items are not admissible in evidence does not require suppression of property seized in accordance with the warrant.
3. **Criminal Law: Constitutional Law: Searches and Seizures.** When materials are seized in violation of the First Amendment to the Constitution of the United States, the appropriate remedy is return of the seized property.
4. **Criminal Law: Juries.** A six-member jury provides an adequate and representative cross section of the community which is sufficient to determine and apply community standards in obscenity cases.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Convictions and sentences affirmed as to all counts except count IV which is reversed and cause dismissed.

J. Steven Beckett of Reno, O'Byrne & Kepley, and

Douglas L. Kluender of Healey, Healey, Brown, Wieland & Glynn, for appellants.

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

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

MCCOWN, J.

In three consolidated cases, the defendants, Tara Enterprises, Inc., and Zachary Productions, Ltd., were found guilty by a six-member jury on 21 counts of distributing, exhibiting, or promoting obscene material. Five counts involved magazines and sixteen counts involved films. The county court of Lancaster County imposed the maximum fine of $1,000 on each count. The District Court, on appeal, affirmed the judgment and sentence on each count.

Storefront premises in downtown Lincoln, Nebraska, are jointly occupied by the defendants who operate two businesses in the same building. A book store and coin-operated arcade called "Adult Book & Cinema" are owned and operated by the defendant, Tara Enterprises, Inc., and a minitheater designated "Cinema X" is owned and operated by the defendant, Zachary Productions, Ltd. Inside the entrance to the premises is a sign restricting admission to adults and requiring a 50-cent browser's fee. Magazines are displayed in racks in the main room of the storefront. The arcade area contains a number of individual viewing booths with coin-operated 8-millimeter projectors. The minitheater has approximately 36 theater-type seats, with a large screen on one wall where 16-millimeter movies are shown.

For a period of several weeks in March and April of 1977, various detectives of the Lincoln, Nebraska, police department entered the defendants' premises,

purchased several magazines, and viewed numerous films. An affidavit submitted in support of the issuance of a search warrant on April 20, 1977, identified nine films by title or by location in the numbered viewing booths, and described in detail the actions depicted in the films and their general and specific content. The affidavit requested a warrant authorizing search of the premises of the defendants for the named and described films and for "any other item or items which constitute evidence of the knowing, willfull (sic) and unlawful exhibition and dissemination of said films by persons or corporations, including papers, books, records, and any other data pertaining to and constituting evidence of ownership, management, financial interest, promotion, or control of the corporate entities hereinabove described or of the movie films hereinabove described, * * * including any equipment, fixtures, signs, displays, or other material promoting, advertising, aiding or used in the exhibition, diplay (sic), portrayal, or dissemination of said films, * * *."

The county court of Lancaster County issued a search warrant on April 20, 1977, authorizing the search of the defendants' premises for the items specifically described and set forth in the affidavit attached. The warrant was executed on April 20, 1977. The inventory of property seized, in addition to various papers and records, included two rolls of 16-millimeter films, which were named and described in the affidavit, and two 16-millimeter projectors; thirty-seven 8-millimeter films, which included eight films particularly named and described in the affidavit, and thirty-seven 8-millimeter projectors and thirty-eight coin boxes and coin mechanisms.

On April 25, 1977, an information was filed charging the defendant, Tara Enterprises, Inc., with nine counts of exhibiting obscene material, the films

described in the affidavit and seized under the warrant, and five counts of distributing obscene magazines, previously purchased by police and graphically described in an affidavit for issuance of summons.

On April 28, 1977, another affidavit was filed in support of the issuance of a search warrant. That affidavit described two 16-millimeter films in detail as to content, and specifically by title. On the same date the county court of Lancaster County issued a search warrant authorizing a search of the defendants' premises for the two specific motion pictures. Under this warrant officers seized the two named films and two take-up reels. On May 3, 1977, the defendants were charged on two counts of exhibiting the obscene material described in the affidavit and seized under this search warrant.

After further investigations another affidavit was filed in support of a search warrant on May 26, 1977. The affidavit explicitly described the content of six 8-millimeter films. Four of them were also described by title, and two untitled ones by their location in numbered exhibition booths in the arcade. The affidavit requested authorization to search for and seize the specifically described and allegedly obscene films, as well as "any other item or items which constitute evidence of unlawful possession and operation of mechanical amusement devices without first obtaining a license and permits therefore (sic) and paying the tax thereon * * * including photographs of said mechanical amusement devices in place and labels, signs, advertising material, or promotional material showing the occupation of said premises by corporations or individuals, the operation of said mechanical amusement devices by said corporations or individuals, and the ownership of mechanical amusement devices by corporations or individuals, * * *."

The District Court for Lancaster County issued a warrant on May 26, 1977, authorizing a search for

the items particularly described in the affidavit. The warrant was executed the same day. The inventory of property seized under this warrant included 40 films and 40 projectors. Five films described in the affidavit and seized under the warrant were the basis for the five counts of a third information filed on May 31, 1977, charging Tara Enterprises, Inc., with exhibiting obscene materials.

The three cases filed on April 25, May 3, and May 31, 1977, were consolidated for trial over defendants' objections. Prior to trial defendants filed motions to quash the search warrants, .suppress all evidence seized, and return all items. All 21 counts in the 3 cases involve films specifically identified by affidavit and seized under a search warrant specifically identifying them, or magazines purchased and later specifically identified by affidavit. No other material seized or purchased was offered in evidence, nor is there any evidence as to its disposition. The defendants' motions to suppress the evidence on the 21 counts involved were overruled.

Following trial to a six-member jury in the county court, the jury found the defendant, Zachary Productions, Ltd., guilty on two counts of exhibiting obscene material, and the defendant, Tara Enterprises, Inc., was found guilty on five counts of distributing obscene material and fourteen counts of exhibiting obscene material. The court sentenced the defendants to pay the maximum fine of $1,000 on each count.

Upon appeal to the District Court for Lancaster County, following oral argument and submission of briefs, the District Court affirmed the conviction and sentence on each count. The defendants' post-trial motion for judgment of acquittal or new trial on each count was overruled and this appeal followed.

Defendants' major assignments of error center around the contention that the search and seizure procedures involved in this case violated the defend-

ants' constitutional rights. Their basic position is that the language of the search warrants was so broad and general that it authorized a general search of the premises for evidence of any crime. They assert that the language of the warrants was interpreted too broadly, and that the officers executing the warrants exceeded the scope of the search and seizure authorized. They also argue that the films specifically described in the warrants cannot be separated from the other items seized, but are only part of a general invalid seizure. They contend, therefore, that the films specifically described and authorized to be seized under the warrants must be suppressed. At this point it should be noted that the 8-millimeter films were locked into individual coin-operated projectors at the time of the seizure. The defendants' arguments are ingenious, but the record does not support their conclusions.

The affidavits involved in this case named and described in detail specific films. Authorization for seizure of other items was limited to items constituting evidence of the unlawful exhibition and dissemination "of said films" or of "films hereinabove described." Authorization to seize equipment was also limited to equipment or material aiding or used in the exhibition or dissemination "of said films." If the officers interpreted the authorization of the warrants too broadly and seized items outside the scope authorized, that conduct should not require the suppression of items specifically authorized to be seized. The warrants here authorized a search for particular evidence of exhibiting or disseminating obscenity, and not a general exploratory rummaging for evidence of fruits of any and all crimes. The warrants were not general warrants, and the evidence sought to be suppressed in this case was specifically described in the warrants, and related to the specific crimes with which defendants were charged. See, In re Search Warrant, 572 F. 2d 321

(D. C. Cir., 1977); United States v. Jacobs, 513 F. 2d 564 (9th Cir., 1975); United States v. Wild, 422 F. 2d 34 (2d Cir., 1969).

The language of the court in United States v. Fernandez, 430 F. Supp. 794 (N. D. Cal., 1976) is appropriate. "(T)he clear rule of law is that, in the ordinary case, the seizure of some items beyond those specified in a search warrant does not result in the suppression of those items which were validly seized." Where items unspecified in the warrant are seized in a valid search, the fact that they are not admissible in evidence does not require suppression of property seized in accordance with the warrant. See, State v. Tidyman, 30 Or. App. 537, 568 P. 2d 666; People v. Greathouse, 173 Colo. 103, 476 P. 2d 259; People v. Young, 543 P. 2d 1302 (Colo. App.).

The defendants also contend that seizure of films not specifically described in the search warrants constituted an invalid prior restraint in violation of First Amendment rights. In United States v. Sherwin, 539 F. 2d 1 (9th Cir., 1976) the court noted in dictum: "When materials are seized in violation of the first amendment, the appropriate remedy is return of the seized property * * *." See, also, Heller v. New York, 413 U. S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745; United States v. Womack, 509 F. 2d 368 (D. C. Cir., 1974).

Defendants also contend that the affidavits for issuance of search warrants were insufficient to permit the court to "focus searchingly" on the issue of obscenity. That contention is unsupported by the record. The descriptions contained in the affidavits were detailed and graphic enough to permit the issuing magistrate to focus searchingly on the issue of obscenity and to establish probable cause to believe that the films described were obscene. Much less explicit descriptions have been held sufficient. See United States v. Christian, 549 F. 2d 1369 (10th Cir., 1977).

The defendants' contention that a twelve-person jury is required for the determination and application of community standards in obscenity cases has been foreclosed. See, Williams v. Florida, 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446; Ballew v. Georgia, 435 U. S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234. A six-member jury provides an adequate and representative cross section of the community which is sufficient to determine and apply community standards in obscenity cases.

The defendants' contention that expert testimony is necessary to establish the relevant community standard in an obscenity case, and that the Nebraska obscenity statutes are unconstitutional, are likewise without merit. See, Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; Hamling v. United States, 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590.

It is tacitly conceded that virtually all films and magazines furnishing the basis for the counts here might be found to be obscene by a representative jury under the terms of the Nebraska obscenity statutes. The defendants do contend, however, that the magazine which furnishes the basis for count IV does not depict or describe sexual conduct, nor is it obscene within the definitions of the Nebraska obscenity statutes. The content of this magazine does not fall within the definitions proscribed by the statutues, where dissemination is limited to adults. The conviction and sentence on count IV must, therefore, be reversed.

Defendants' contention that the fines imposed in these cases were excessive is also without merit. The rule is well established in this court that a sentence imposed within the limits prescribed by statute will not be disturbed on appeal in the absence of an abuse of discretion in the sentencing court. There was no abuse of discretion here.

The conviction and sentence on count IV is revers-

ed and the cause dismissed. The convictions and sentences on all the remaining 20 counts are affirmed. Costs taxed to the defendants.

CONVICTIONS AND SENTENCES AFFIRMED AS TO ALL COUNTS EXCEPT COUNT IV WHICH IS REVERSED AND CAUSE DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. JOSEPH JR., APPELLANT.

274 N. W. 2d 880

Filed January 30, 1979. No. 42178.

1. **Criminal Law: Prosecuting Attorneys: Indictments and Informations.** An agreement that charges will be dropped if an accused person passes a polygraph test is not binding unless it has been approved by the trial court.
2. **Criminal Law: Police Officers and Sheriffs.** The determination as to whether identification procedures conducted by the police were unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be made by a consideration of the totality of the circumstances.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

J. Joseph McQuillan, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

BOSLAUGH, J.

The defendant was found guilty of robbery, unlawful use of a firearm in the commission of a felony, and shooting with intent to kill, wound, or maim. He was sentenced to imprisonment on count I for 13 to 20 years, on count II for 3 to 5 years, and on count

III for 13 to 20 years. The sentences on counts I and III run concurrently. The sentence on count II runs consecutively to the other sentences.

The defendant has appealed to this court and his assignments of error relate to the sufficiency of the evidence, a polygraph examination consented to by the defendant, and the identification evidence.

The robbery occurred at a service station at 58th and Redick Streets in Omaha, Nebraska, at about 12:15 a.m., on October 16, 1977. The attendant at the station at the time of the robbery was Linda Larson. The defendant and a companion, Terri Cranon, entered the station office, ostensibly to use the telephone. The defendant, who was carrying a sawed-off shotgun, stationed himself in the back room. When the attendant entered the station office the defendant came out of the back room, pointed the gun at the attendant's head, and demanded the money. The attendant gave the defendant all the money she had. The defendant then demanded that the attendant open the safe while he counted to three. When the attendant was unable to open the safe by the count of three the defendant shot the attendant in the head, the shot entering her right eye and passing through the side of her head.

As the defendant and his companion were leaving the station office a customer, Maxine Gosier, and a companion were walking toward the station office. The defendant told Maxine there was no one in the office. Maxine entered the office and found the attendant lying on the floor.

During the police investigation following the robbery, the police showed a number of photographs to both the attendant and Maxine. Both the attendant and Maxine observed lineups on December 7, 1977, which included the defendant.

During the investigation of the robbery the defendant was arrested and questioned by the police and asked to take a polygraph examination. At the

hearing on his motion to dismiss the defendant testified in response to a leading question that the police had said they would let him go if he "passed" the test. The test was administered and the examiner concluded the defendant had answered the questions truthfully. The defendant was then discharged from custody. Later a complaint was filed charging the defendant with the crime and this prosecution followed.

The defendant contends it was a violation of due process to charge him with the crime after he had consented to a polygraph examination upon a representation that he would be discharged if he passed the test and he had passed the test successfully. The only evidence that the defendant would be discharged was the testimony of the defendant. The evidence of the State was that the police do not decide whether a defendant will be charged, but that the results of the test are forwarded to the county attorney who then determines whether charges will be filed.

An agreement that charges will be dropped if an accused person passes a polygraph test is not binding unless it has been approved by the trial court. State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504. The evidence of the State is that the police advised the defendant that the determination as to whether charges would be filed would be made by the county attorney. There is no claim the county attorney made any representation to the defendant as to whether charges would be dropped or that the trial court had approved such an agreement. Under these circumstances we find no error in the order of the trial court overruling the defendant's motion to dismiss.

During the investigation of the robbery the police showed a number of photographs to the attendant in an effort to identify the person who had committed the robbery. The attendant was unable to identify

any of the photographs as being a photograph of the robber although one photograph looked similar. At a lineup consisting of three persons on December 7, 1977, the attendant identified the defendant as the robber but stated she could not be positive. At the trial the attendant made a positive identification of the defendant.

Maxine Gosier, the witness who saw the defendant and his companion leave the station, was unable to identify the defendant from photographs shown to her by the police. At a two-person lineup on December 7, 1977, she stated that the defendant "did look a lot like the man that I saw;" but she was not sure that he was the same man. At the trial she made a positive identification of the defendant based upon her recollection of how he appeared at the scene of the robbery.

The defendant contends his motions to suppress the identification testimony of the attendant and Maxine Gosier should have been sustained because the lineups were conducted in a manner which was so unnecessarily suggestive and conducive to irreparable mistaken identification as to amount to a denial of due process of law. The determination as to whether the identification procedures were unnecessarily suggestive and conducive to a substanttial likelihood of irreparable mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures.

On both occasions the police stated they had a suspect in custody. This does not destroy the reliability of the lineup because it is implicit in a lineup that one or more of the persons being shown to the witness is a person whom the police believe may have committed the offense. See State v. Bolden, 196 Neb. 388, 243 N. W. 2d 162.

The lineup which was viewed by Maxine Gosier consisted of only two persons. Although the persons at both lineups were black and of similar height and

weight, one person wore a turban or a similar covering over his hair. This was unfortunate because hair was one of the features upon which the witnesses based their identification. However, upon a consideration of the totality of the circumstances we find no error in the ruling of the trial court that the identification procedures were not unnecessarily suggestive and conducive to a mistaken identification.

There is an additional fact in this case which tends to minimize the importance of the identification testimony of the attendant and Maxine Gosier. The defendant's companion at the time of the robbery, Terri Cranon, testified as a witness for the State under a grant of immunity. She testified in detail as to the planning of the robbery, what happened at the service station, and what she and the defendant did after they left the station. Her testimony, if believed, is conclusive as to the guilt of the defendant.

The evidence was clearly sufficient to sustain a finding of guilt beyond a reasonable doubt. The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., concurs in result.

THELMA LISTON, APPELLANT, V. REGINALD M. BRADSHAW III, APPELLEE.

275 N. W. 2d 59

Filed February 6, 1979. No. 41682.

1. **Motor Vehicles: Negligence: Words and Phrases.** Failure to stop before entering an intersection, as directed by a traffic signal or stop sign, is not, when standing alone, sufficient to constitute gross negligence.
2. **Motor Vehicles: Negligence: Words and Phrases: Statutes.** Several acts of negligence may, in combination, amount to gross negligence within the meaning of the automobile guest statute.

3. **Motor Vehicles: Negligence: Verdicts: Juries.** In an action based on gross negligence under the Nebraska guest statute, courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present.
4. _____: _____: _____: _____. However, if there is adequate proof of negligence, a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances.
5. _____: _____: _____: _____. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.
6. **Motor Vehicles: Negligence: Evidence: Words and Phrases.** In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury, the presence of imminent danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration.
7. **Motor Vehicles: Negligence: Words and Phrases: Statutes.** "Gross negligence" within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Dennis T. Chapman, for appellant.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

BRODKEY, J.

This case involves an action filed by Thelma Liston to recover damages for personal injuries sustained by her while riding as a guest passenger in an automobile driven by the defendant, Reginald M. Bradshaw III. Plaintiff brought her action against the defendant under the Nebraska guest statute, section 39-6,191, R. R. S. 1943, and her amended petition alleges gross negligence on the part of the defend-

ant. At the conclusion of the plaintiff's evidence at the trial of the matter, defendant moved for a dismissal of the amended petition, and the trial court sustained the motion to dismiss on the ground that the plaintiff had failed to sustain her burden of proof to establish gross negligence on the part of the defendant. Plaintiff has appealed that order to this court, and the issue on appeal is whether the plaintiff presented sufficient evidence to present a jury question as to the gross negligence of the defendant under the Nebraska guest statute.

In the instant case, the plaintiff claims that the defendant was negligent in three particulars, to wit: (1) That he drove his automobile into the intersection against a red light; (2) that he drove his automobile at that time at an unlawful and unreasonable rate of speed; and (3) that he failed to maintain a proper lookout. Plaintiff contends that, considered together, these three alleged acts of negligence on the part of the defendant constituted gross negligence and justified the submission of the case to the jury and the failure of the trial court to do so constituted reversible error. In resolving the question before us it will be helpful to summarize the evidence adduced by the plaintiff in her case-in-chief, prior to the dismissal of the action by the court. Plaintiff's evidence consisted of her own testimony and also the testimony of one other witness, Alfred C. Ludwig, Jr. Also introduced in evidence on her behalf were certain admissions against interest taken from the deposition of the defendant, Reginald M. Bradshaw III.

Most of the factual background before the occurrence of the accident itself is not in dispute and will be summarized at the outset in order to afford a better understanding of what transpired. The accident in question occurred in the early morning hours of July 7, 1973, at the intersection of St. Mary's Avenue and 28th Street in Omaha, Nebraska. As previ-

ously stated, plaintiff was riding as a guest passenger in defendant's automobile at that time. The accident occurred in the intersection involving the Bradshaw automobile which was traveling north, and an automobile driven by one Albert Brown, which was traveling in a westerly direction. The record establishes that the intersection at 28th Street and St. Mary's Avenue is controlled by traffic lights and that St. Mary's is a one-way westbound street, four lanes in width. The record also establishes that the speed limit on 28th Street at the time of the collision was 25 miles per hour. Earlier in the evening, both plaintiff and defendant had been at the Walking Cane Tavern and both had been drinking, although there is no claim or evidence in the record that either of the parties was intoxicated. The defendant, plaintiff, her sister, and her niece had left the tavern and were going to defendant's home for breakfast. It was arranged that plaintiff would ride with the defendant and the other parties would follow in another automobile. The defendant drove his car from a lot near the tavern, proceeded eastbound on Leavenworth, and then turned north at the intersection of Leavenworth and 28th Streets. He continued in this direction until the accident occurred.

Plaintiff's first witness was one Alfred C. Ludwig, Jr., who was an eyewitness to the accident. He was going west on St. Mary's Avenue at the time and observed the traffic lights at the intersection of 28th Street and St. Mary's Avenue when he was near the intersection; he estimated about one-quarter of a block away. The Brown automobile was in the lane to his right and about two car lengths ahead of him. Ludwig testified that as he approached the intersection the lights were green, and as they came to the intersection, the Bradshaw car darted in front of him from the south and hit the Brown automobile. On cross-examination, Ludwig testified there was a Catholic school and church on the southeast corner

of the intersection. He was asked if the view to the left was completely blocked, and he replied: "I don't know if it is completely blocked, but it's obstructed. I think there is a wall there or something." Ludwig testified he did not see the car coming from the south until it was actually in the intersection and collided with the Brown vehicle. Ludwig was not asked and did not testify relative to the speed of the Bradshaw automobile nor as to the manner in which it was being driven.

The plaintiff, Thelma Liston, then testified in her own behalf. She testified that as they drove north on 28th Street, approaching St. Mary's Avenue, she observed the car coming from the east, and "I just glanced out the window and I knew at the rate of speed he was coming he was going to hit our car." She stated at that time she warned Bradshaw the car wasn't going to stop, looked across at him, and noticed he was looking straight ahead. They were hit by the Brown car immediately thereafter. She testified she did not know the speed at which Bradshaw was traveling as he approached the intersection, but stated he did not slow down. On cross-examination, she testified she was a licensed driver and had been driving for many years. There was nothing about Bradshaw's driving when they left the tavern that caused her any concern. She stated: "He seemed to be driving all right to me, but I was watching for my sister." She did not notice anything about the speed at which Bradshaw was driving that caused her any concern. She admitted she did not see the car Mr. Brown was driving until Bradshaw and she were actually in the intersection. She was questioned at some length about the color of the traffic lights when Bradshaw drove into the intersection, and testified: "I honestly do not know what the -- color the lights were. I saw a yellow light. I don't know whether it was a stop light or what it was, whether it was some other yellow light.

I don't know whether it was just before impact or right after, but I did see a yellow light." She was then asked: "You never saw a red light at all, did you?" and she replied "No, I didn't." It should also be noted that the record reveals that prior to the filing of the action against defendant Bradshaw, plaintiff had filed an action against Brown; and in her petition in that action, had alleged that Brown had entered the intersection against the red light.

Other than the testimony of the two witnesses, as summarized above, the other evidence adduced for the plaintiff were admissions from defendant's deposition which, so far as they pertain to the question of liability, were as follows: " 'How fast would you say your car was going through this period of time approaching the intersection?' Answer: 'Twenty-five to thirty.' Question: 'Did you slow down as you approached the intersection?' Answer: 'No.' Question: 'Did you make any observations as to the cars to your right on St. Mary's Avenue as you approached the intersection?' Answer: 'There was a car stopped in the far right-hand lane over -- or north curb line.' * * * 'Do you remember what kind of car hit you?' Answer: 'At the time I didn't know. I know what kind of car it is now.' Question: 'Did you see that car at all prior to the impact?' Answer: 'If I did it was just before it hit me.' " The above is, we believe, a fair summary of all the testimony adduced by the plaintiff at the trial in support of her claim that the defendant was guilty of gross negligence. It appears the matter is in dispute as to whether the defendant or Brown had the green light when they drove into the intersection. Even resolving this factual dispute in favor of the plaintiff herein, we have held in Sacco v. Gau, 188 Neb. 808, 199 N. W. 2d 605 (1972), that a violation of a stoplight, standing alone, is not sufficient to prove gross negligence. Plaintiff contends, however, that in addition to the stoplight violation, there is also

evidence of excess speed on the part of the defendant, and of failure to keep a proper lookout. With respect to speed, it is true the speed limit in effect on 28th Street was 25 miles per hour, and defendant admitted he was traveling at a rate of from 25 to 30 miles per hour. There is no evidence to the contrary. We believe a possible violation of the speed limit of 5 miles per hour in the early morning hours, with no showing of heavy traffic on either street, would not, alone, amount to gross negligence, although possibly it might be considered evidence of ordinary negligence. With respect to plaintiff's claim that defendant failed to keep a proper lookout, her sole testimony in this regard is that after they had entered the intersection, she had looked at the defendant and noticed he was looking straight ahead. There is no evidence in the record as to what observations he made to the right prior to entering the intersection, as to whether his view to the right was obstructed by the church and school at the southeast corner of the intersection, nor as to the extent to which the view was obstructed, if any.

What we have here, it seems, are three alleged items of negligence, each of which might well be considered ordinary negligence, but which clearly, considered individually, would not amount to gross negligence. Plaintiff correctly points out, however, that several acts of negligence may, in combination, amount to gross negligence within the meaning of the automobile guest statute. Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20 (1959). The question is whether the evidence in the record supporting the claimed acts of negligence of the defendant is of sufficient magnitude to constitute gross negligence under our guest statute. The problem involved was well analyzed and discussed in an opinion by Johnsen, J., in Thompson v. Edler, 138 Neb. 179, 292 N. W. 236 (1940). In that case, Judge Johnsen stated: "It must be borne in mind, always, that no decision

on gross negligence can constitute an absolute precedent in any other case. Each case necessarily differs somewhat in its particular facts and circumstances, and in the composite which results from them. A dissection of the individual facts may, therefore, be misleading, because, in the attempted segregation, part of their real significance may become lost. While it may be regrettable that no perfect yardstick for measuring gross negligence has ever been devised, the numerous decisions, which the guest statutes have produced, seem rather clearly to demonstrate that this is as close as it is possible to come to a judicial solution. If the tapeline of past decisions seems at times to be somewhat inaccurately applied, and the processes of logic to be a bit variable in their result, this may be largely because the observer is looking at the facts in isolation and not in context. Here, both the bench and the profession must be on guard. *Courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. But, if there is adequate proof of negligence, a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.*" (Emphasis supplied.) In sustaining defendant's motion to dismiss, the trial court stated as follows: "Well, I have, during the one recess, glanced at two cases which indicate to me the proposition that has been advanced by the defendant here, that momentary negligence at an intersection does not constitute gross negligence, even though there is more than one act of negligence upon which evidence has been adduced. Taking it as a whole, it must rise to the proposition that it is something more than slight. I can cite you Sandrock v. Taylor, 185 Nebraska 106,

and Pavlicek v. Cacak, 155 Nebraska 454. Both of those cases involve collisions in which the evidence indicated separate violations, that is violations of law more than just one act in which the Court indicated that in most situations they did not rise to that degree of negligence which would require submitting the issue to a Jury." He then concluded that the evidence in the instant case did not amount to gross negligence, and therefore sustained the defendant's motion for dismissal.

In Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121 (1975), we stated: "In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury we have consistently held that the presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Zoimen v. Landsman, 192 Neb. 561, 223 N. W. 2d 49 (1974); Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483, (1964); Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622 (1941)." We agree with the trial judge that the negligence in this case was, at the most, momentary negligence, and that in this case there was no "persistence in negligence heedless of the consequences." While there may have been individual acts of negligence on the part of the defendant under the evidence in this case, we agree with the trial court that even conjunctively they did not amount to "gross negligence" within the meaning of the automobile guest statute, which has been defined as great and excessive negligence, or negligence in a very high degree, and indicates the absence of even slight care in the performance of a duty. See NJI No. 7.51.

The trial court was correct in affirming defendant's motion to dismiss plaintiff's petition, and its action must be affirmed.

AFFIRMED.

DAVID H. STAHMER ET AL., APPELLANTS, V. FRANK MARSH, STATE TREASURER, ET AL., APPELLEES, and SCHOOL DISTRICT NO. 9 OF BOONE COUNTY ET AL., INTERVENORS-APPELLEES, AND FLOYD BELIK ET AL., INTERVENORS-APPELLANTS.

275 N. W. 2d 64

Filed February 6, 1979. No. 41756.

1. **Parties: Standing.** Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
2. **Parties.** A plaintiff must have some remedial interest which the law of the forum can recognize and enforce.
3. _____. In order to maintain an action to enforce private rights the plaintiff must show that he will be benefited by the relief to be granted.
4. **Parties: Declaratory Judgments.** It is a fundamental requirement of the right to declaratory relief that there be a justiciable issue between the parties.
5. **Parties: Declaratory Judgments: Standing.** A requisite precedent condition for obtaining declaratory relief is that the parties seeking declaratory relief have a legally protectible interest or right in the controversy.
6. **Courts: Declaratory Judgments.** The granting of declaratory relief is discretionary with the trial court.

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

Appeal for Intervenors Belik Dismissed. Judgment Dismissing Petition of Plaintiffs Affirmed.

Wright & Simmons, for appellants.

J. Patrick Green of Eisenstatt, Higgins, Kinnamon, Okun & Stern, P.C., for appellees.

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

BOSLAUGH, J.

This is a suit for a declaratory judgment brought by David H. Stahmer, Barbara Stahmer, and Elec-

trical Development Company, Inc., who are residents and taxpayers of the city of Omaha, Nebraska, and the school district of Omaha, a Class V school district. They bring the action for the benefit of all persons in the Omaha school district who are similarly situated.

The defendants are the State Treasurer, the State Commissioner of Education, the Director of the Department of Administrative Services, the State Board of Education, the Superintendent of Public Instruction and the County Treasurer of Douglas County, Nebraska, the Douglas County Committee for the Reorganization of School Districts, the school district of Omaha, School District Nos. 11, 27, and 54 of Douglas County, the school district of Lincoln, and School District No. 94 of Dodge County, Nebraska.

Floyd Belik and Kathleen Belik, residents and taxpayers in School District No. 39 of Holt County, Nebraska, a Class I district, are intervenors. Additional intervenors are School District No. 9, a Class I district in Boone County, Nebraska, and other Class I school districts in Howard County, McPherson County, Wayne County, and Douglas County, and residents and taxpayers in the respective districts.

The petition of the plaintiffs sought a declaration that the classification of all Class I school districts was an unconstitutional classification. The petition further sought an apportionment of the assets of all Class I school districts among other Class II, III, IV, and V school districts. The petition of the intervenors Belik prayed for similar relief.

The case was heard upon demurrers to the petition of the plaintiffs filed by the State Treasurer, Commissioner of Education, Director of Administrative Services, State Board of Education, and School District No. 27 of Douglas County, Nebraska, and School District No. 9 of Boone County, Nebraska, and other intervenors, and demurrers to the petition of intervention of the intervenors Belik filed by School Dis-

trict No. 27 of Douglas County, Nebraska, and School District No. 9 of Boone County, Nebraska, and other intervenors.

On September 19, 1977, all demurrers were sustained except the demurrers of School District No. 9 and other intervenors. The plaintiffs were granted leave to plead further but the petition of intervention of the intervenors Belik was dismissed without prejudice. On October 11, 1977, the plaintiff's petition was dismissed with prejudice. On October 14, 1977, the petition of the intervenors Belik was dismissed with prejudice. Notices of appeal were filed by the plaintiffs and the intervenors Belik on October 21, 1977.

Since the petition of the intervenors Belik was dismissed without prejudice on September 19, 1977, their notice of appeal filed on October 21, 1977, was not filed within the time required by section 25-1912, R. R. S. 1943. Consequently, this court obtained no jurisdiction of the appeal of the intervenors Belik.

Under present statutes school districts in Nebraska are divided into six classifications. § 79-102, R. R. S. 1943. A Class I district is any school district that maintains only elementary grades under the direction of a single school board. Classes II through V are school districts which maintain both elementary and high school grades but are divided into separate classifications on the basis of population. A Class VI district is a school district that maintains only a high school.

The plaintiffs concede that population may be a proper basis for the classification of school districts, but they contend that there are no circumstances under which it might be reasonable to classify separately those school districts which maintain only elementary grades.

A discussion of some of the early history of school district legislation in Nebraska may be found in Gaddis v. School District, 92 Neb. 701, 139 N. W. 280.

Under the first act relating to common schools in the territory, adopted in 1855, the corporate power of the district was placed in the electors assembled in the school meeting. This is basically the form of organization provided for Class I districts. Later acts provided for the government of districts in cities and villages by boards of education. Thus, historically, the Class I districts have been for the most part rural districts with relatively small population which were not considered able to maintain a high school. The other districts were primarily urban districts in areas of greater population where it would not be practical to conduct the affairs of the district at a town meeting. While such a classification may not be perfect, the historical facts suggest that the classification which was adopted by the Legislature was reasonable.

One of the grounds alleged in the demurrers was that the plaintiffs lacked standing to sue. The trial court held that the plaintiffs were not entitled to declaratory relief because they had not alleged an injury personal to them which would be cured by the effect of the declaration.

Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. See 59 Am. Jur. 2d, Parties, § 26, p. 374. A plaintiff must have some remedial interest which the law of the forum can recognize and enforce. Dafoe v. Dafoe, 160 Neb. 145, 69 N. W. 2d 700; Davies v. De Lair, 148 Neb. 395, 27 N. W. 2d 628. In order to maintain an action to enforce private rights the plaintiff must show that he will be benefited by the relief to be granted.

It is a fundamental requirement of the right to declaratory relief that there be a justiciable issue between the parties. A requisite precedent condition for obtaining declaratory relief is that the par-

ties seeking declaratory relief have a legally protectible interest or right in the controversy. Berigan Bros. v. Growers Cattle Credit Corp., 182 Neb. 656, 156 N. W. 2d 794; Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N. W. 2d 464; Slosburg v. City of Omaha, 183 Neb. 839, 165 N. W. 2d 90.

The plaintiffs here have alleged that the taxpayers and residents in Class I districts are treated differently than the taxpayers and residents in other districts, including Class V districts. The fact that there are differences in the applicable laws between the districts does not establish that the plaintiffs have been discriminated against to their injury. But more importantly, the plaintiffs have not demonstrated how they would benefit from a declaration that one or more of the laws applicable to Class I districts is invalid. In short, the pleadings show they have no standing to bring the suit. We conclude the demurrers were properly sustained.

One further matter should be mentioned. We have held that the granting of declaratory relief is discretionary with the trial court. Svoboda v. Hahn, 196 Neb. 21, 241 N. W. 2d 499. There is no absolute mandate that compels the District Court to exercise its jurisdiction to grant such relief.

It is unnecessary to discuss the other contentions of the parties.

The appeal of the intervenors Belik is dismissed. The judgment of the District Court dismissing the petition of the plaintiffs is affirmed.

APPEAL OF INTERVENORS BELIK DISMISSED.
JUDGMENT DISMISSING PETITION
OF PLAINTIFFS AFFIRMED.

DENVER WOOD PRODUCTS COMPANY, A COLORADO CORPORATION, APPELLANT, V. KENNETH FRYE ET AL., APPELLEES.

275 N. W. 2d 67

Filed February 6, 1979. No. 41777.

1. **Statutes.** The general saving statute, section 49-301, R. R. S. 1943, relates to substantive and not procedural law.
2. **Limitations of Actions: Statutes.** A change in a statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date.
3. **Statutes.** The simultaneous repeal and reenactment of substantially the same statutory provisions is ordinarily construed to be an affirmation or continuance of the original provisions rather than a true repeal.
4. _____. Where a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect.
5. **Limitations of Actions: Statutes.** Laws prescribing the time within which particular rights may be enforced relate to remedies only and not substantive rights.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Judgment reversed with directions.

Jim L. Zimmerman of Atkins, Ferguson, Hahn & Zimmerman, for appellant.

Wright & Simmons and John A. Selzer, for appellees.

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

MCCOWN, J.

This is an action to foreclose a mechanic's lien. Following trial the District Court specifically found that the purported mechanic's lien was not timely filed and dismissed plaintiff's petition. The plaintiff has appealed.

The evidence in this case is essentially uncontradicted. On May 5, 1975, the defendants, Loyd Reisig and Ruth B. Reisig, entered into a written contract with Kenneth Frye, a contractor, who was to supply all labor and materials and build a house for the Reisigs. On May 30, 1975, Frye ordered various materials from the plaintiff to be used in the construction of the Reisig house. The total invoice price of the materials ordered was $3,927.80. The materials were delivered to Frye at the Reisig house site on June 10, 1975. On July 10, 1975, Frye's wife went to plaintiff's place of business, ordered, and picked up a door priced at $78.75. The door was taken to the Frye residence. Frye was building several houses at the time and the evidence does not establish which job the door was intended for. The door was not delivered to the site of the Reisig house until sometime after October 31, 1975.

The claim of mechanic's lien against the property was filed by the plaintiff on September 29, 1975, for the sum of $4,006.55. The claim included both the materials delivered to the site on June 10, 1975, and the door which, at that time, had not been delivered to the site.

On August 24, 1975, an amendment to section 52-102, R. R. S. 1943, (Laws 1975, L.B. 196), became effective. The only change in section 52-102, R. R. S. 1943, was to extend the time for filing a claim of mechanic's lien to 4 months from the date of furnishing labor or materials, instead of 3 months. The claim of lien in this case was filed more than 3 months after the materials were furnished on June 10, 1975, but less than 4 months thereafter.

The District Court found generally in favor of the defendants and specifically found that the purported mechanic's lien filed by the plaintiff was not timely filed and dismissed plaintiff's petition. The plaintiff has appealed.

Plaintiff contends that the amendment to section

52-102, R. R. S. 1943, was applicable in this case. The defendants contend that the amendment did not operate retroactively and that the time for filing the mechanic's lien here expired on September 10, 1975. Defendants also assert that the door involved in this case was not delivered to the site nor used in the building until many weeks after the claim of lien was filed on September 29, 1975.

The defendants rest their argument on section 49-301, R. R. S. 1943, which provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." Assuming that it is applicable, this court has consistently held that the general saving statute, section 49-301, R. R. S. 1943, relates to substantive and not procedural law. Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599.

A change in a statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. See Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc., 192 Neb. 431, 222 N. W. 2d 125.

The Supreme Court of the United States, in an early case, held that a statutory extension of time for creation and enforcement of mechanic's liens was not an alteration of a substantive right but was simply an alteration of procedure where the right to claim the lien had not yet expired under the old act at the time the new act became effective. The court determined that under such circumstances the extension of time under the new statute was not retroactive but was prospective in its operation. The court said: "[T]he mere enlargement of the time in which to commence the action, at least in a case

where the time had not yet arrived in which to file any statement of the plaintiff's claim for a lien, does not affect any right or remedy provided for in the old act." Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 17 S. Ct. 7, 41 L. Ed. 327.

The amendment of section 52-102, R. R. S. 1943, which became effective on August 24, 1975, did not alter or enlarge the right to claim a mechanic's lien, nor did it change or enlarge the remedy of foreclosure. It merely extended the time for filing a claim of lien. For all practical purposes it was identical to extending the time in a specific statute of limitations.

The simultaneous repeal and reenactment of substantially the same statutory provisions is ordinarily construed to be an affirmation or continuation of the original provisions rather than a true repeal. Where a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect. See 73 Am. Jur. 2d, Statutes, § 391, p. 509.

The general rule is that laws prescribing the time within which particular rights may be enforced relate to remedies only and not substantive rights. A person has no vested right in the running of a statute of limitations unless it has completely run and barred the action before the new limitation becomes effective. See 51 Am. Jur. 2d, Limitation of Actions, § 40, p. 622.

The case of Wisbey v. American Community Stores Corporation, 288 F. Supp. 728 (D. Neb., 1968), confirms that analysis. Judge Van Pelt, in applying an extended statute of limitations, quoted with approval from the case of Gahling v. Colabee S. S. Co., 37 F. Supp. 759 (E. D. Pa., 1941): "The amendatory statute did not create a new right nor revive a right that had been extinguished. The plaintiff had a right of action he could exercise any time before Oc-

tober 7, 1940. Before this right was extinguished Congress extended the time within which the plaintiff could exercise his existing right. This affects merely his remedy and not his right."

The amendment of section 52-102, R. R. S. 1943, effective on August 24, 1975, extending the time for filing a claim of mechanic's lien to 4 months from the date of furnishing the labor or materials was applicable to plaintiff's cause of action here, and the filing of plaintiff's lien claim on September 29, 1975, was valid and timely as to the materials furnished and delivered on June 10, 1975.

Plaintiff contends that the claim of lien filed on September 29, 1975, was also valid and timely as to a door priced at $78.75 and ordered by the contractor on July 10, 1975. The evidence establishes, however, that the door had not been furnished to the defendants Reisig nor delivered to the construction site by September 29, 1975, and whatever delivery might have been made later was not made by the plaintiff. While the plaintiff may have had a right to file a separate lien after the subsequent delivery of the door, it did not have a valid claim of mechanic's lien for the door prior to its delivery at the construction site.

The claim of lien in the sum of $3,927.80 for the materials delivered to the construction site on June 10, 1975, was timely filed and the plaintiff was entitled to foreclosure of that portion of its claim. That portion of the claim in the sum of $78.75 for the door was improper and should be disallowed.

The judgment of the District Court is reversed with directions to enter judgment in accordance with this opinion.

JUDGMENT REVERSED WITH DIRECTIONS.

HUDSON FOODS, INC., APPELLANT, V. L & B CORPORATION ET AL., APPELLEES.
IN RE ESTATE OF ROY FRANKLIN CLARK, DECEASED.
HUDSON FOODS, INC., APPELLANT, V. ESTATE OF ROY FRANKLIN CLARK, DECEASED, APPELLEE.

275 N. W. 2d 70

Filed February 6, 1979. Nos. 41788, 41786.

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 jury verdict and it will not be set aside on appeal unless clearly wrong.
2. _____: _____. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.

Appeals from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Michael G. Helms of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

John R. Douglas of Cassem, Tierney, Adams & Gotch, for appellees L & B Corporation et al.

Paul E. Watts and Gerald E. Moran, Robert C. Sigler, and Julianne M. Dunn, for appellee Estate of Roy Clark.

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

MCCOWN, J.

These negligence actions were brought by plaintiff against the defendants to recover for damages sustained by the plaintiff when a liquid ammonia pipe broke in a cold storage room of the warehouse premises leased by the plaintiff, Hudson Foods, Inc., from the defendant, L & B Corporation. The two cases were consolidated for trial and a jury was waived. The District Court found for the defendants and the plaintiff has appealed.

The plaintiff, Hudson Foods, Inc., at the times

material here, was the lessee of certain cold storage warehouse space owned by the defendant, L & B Corporation. The cold storage room involved was equipped with a single evaporator refrigeration unit located near the ceiling of the room. The unit had been purchased from Preston Refrigeration Company, and installed by Roy Franklin Clark, who also provided the pipe for the installation. The refrigeration equipment was installed in 1967 and had been in regular operation since.

On the morning of May 22, 1974, a leak was discovered in the pipe carrying liquid ammonia leading to the refrigeration unit in the space leased to the plaintiff. All witnesses subsequently agreed that the leak resulted from a fracture in the pipe. The ammonia and ammonia odor from the fractured pipe contaminated a quantity of meat and poultry stored in the room. Plaintiff's alleged loss, after salvage, was approximately $50,000. The lessor was responsible for providing and maintaining the cooling equipment on the premises.

The evidence established that the lessor made a daily and also a weekly inspection of the warehouse rooms and refrigeration units and completely serviced the units every 30 days. The evidence also established that it was not uncommon for ice to accumulate on pipes carrying liquid ammonia and the lessor periodically chipped the ice off when it became too thick.

The plaintiff relied on expert testimony to establish the cause of the break. One expert testified that the break in the pipe was the result of a fatigue fracture which, in his opinion, was caused by vibrations induced in the pipe from operation of the refrigeration unit, and by pipe supports which were not strong enough to hold the pipe firmly. The second expert testified that, in his opinion, the pipe fractured because it was overstressed and that the amount of ice surrounding the pipe added to the

stress. He also testified that a heavy-duty pipe should have been used rather than the regular pipe which was used. In his opinion the fracture could have been a cyclic loading fatigue, a vibratory fatigue, or it could have been a miniscule crack that opened at that time for reasons unknown. The third expert witness believed that the fracture in the pipe resulted from overstressing at the point where the pipe entered a bushing, and that it was caused by the weight of ice surrounding the pipe. This witness stated that the type of pipe used in this installation was the type normally used in cooling systems in the area. All three experts agreed that there was no test or inspection which the lessor could have performed which would indicate that the pipe was about to break.

Plaintiff filed one action against L & B Corporation and Preston Refrigeration Company. After discovery plaintiff later filed an action against the estate of Roy Franklin Clark. The cases were subsequently consolidated. The consolidated cases were tried to the court without a jury and are consolidated on this appeal.

Plaintiff alleges that the defendants negligently installed the refrigeration unit, negligently used pipe of insufficient strength to withstand stresses imposed, and were also negligent in failing to properly inspect and maintain the units. The District Court found in favor of all the defendants and dismissed plaintiff's action.

The plaintiff contends that the evidence is insufficient to support the judgment of the District Court. We disagree. The determination of whether or not the defendants were guilty of negligence which proximately caused the damage here was clearly a question of fact. The trial court determined those factual issues in favor of the defendants and the evidence is sufficient to support that determination.

Although the testimony was produced largely from

plaintiff's witnesses, they did not agree as to what caused the break in the pipe, and the evidence fails to establish any negligence on the part of the defendants which proximately caused the damage.

The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Hansen v. Circle Lake Development Corp., 199 Neb. 678, 260 N. W. 2d 609.

The evidence supports the judgment of the District Court.

AFFIRMED.

THE TRAVELERS INDEMNITY COMPANY, A CORPORATION, ASSIGNEE, APPELLANT, V. THE CENTER BANK, A CORPORATION, APPELLEE.

275 N. W. 2d 73

Filed February 6, 1979. No. 41811.

1. **Banks and Banking: Negotiable Instruments: Negligence.** Before a bank is liable in negligence to a maker for accepting a check from an agent or employee of the maker who has obtained the check from the maker by giving to the maker the name of the payee, not intending the payee to have any interest in the check, it must appear that the bank either was placed on such notice as would justify one in believing that further investigation was necessary or otherwise in some manner acted, in accepting the check, in a commercially unreasonable manner.
2. **Negligence.** One is not negligent in failing to perform an act which it did not in the first instance have a duty or obligation to perform.
3. **Negligence: Words and Phrases.** "Proximate cause," as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred.

4. **Negligence.** Even where conduct is negligent, it is still required that the conduct be a substantial factor in bringing about the harm. Causation in this sense inevitably involves the idea of responsibility, and it is not enough that the harm would not have occurred had the individual defendant not been negligent.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Daniel J. Duffy and Patrick B. Donahue of Cassem, Tierney, Adams & Gotch, for appellant.

Ronald H. Stave, Michael P. Cavel, and Lee H. Hamann of the Law Offices of Emil F. Sodoro, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, and BRODKEY, JJ., and RONIN and NORTON, District Judges.

KRIVOSHA, C. J.

This is an action based upon the alleged negligence of the appellee bank in failing to know or ascertain the identity and authority of its depositor establishing an account with it under a corporate name. In response to the appellant's first amended petition, the appellee filed a demurrer. The trial court sustained the demurrer and dismissed appellant's petition. Appellant thereafter appealed to this court. We affirm.

Appellant alleged in its first amended petition that it was the assignee of the Nebraska Consolidated Mills Company (Nebraska Consolidated). The petition alleged that in June of 1969 a certain checking account was established at the appellee bank by one William Piper in the name of C. C. Leasing Company. It was further alleged that at that time, said William Piper was an employee of Nebraska Consolidated and his duties included handling Nebraska Consolidated's leasing program in relation to the fixed asset area. The petition alleged, however, that Piper was not acting as an agent or employee of

Nebraska Consolidated in establishing said account.

Subsequently, it was alleged that the said Piper induced Nebraska Consolidated to issue certain checks made payable to a third party and further induced Nebraska Consolidated to deliver the same to Piper. Thereupon, without authority, Piper supplied the endorsements of the third party-payee (C. C. Leasing Co.) and deposited said checks in the defendant bank checking account opened by Piper in the name of C. C. Leasing Co. The petition further alleged that in turn he, Piper, transferred the money out of said account and used the funds for his own personal ventures, none of which were authorized by Nebraska Consolidated nor were for the benefit of Nebraska Consolidated.

Finally, the petition alleged that the appellee "by its negligence, proximately caused Nebraska Consolidated Mills Company to suffer the loss of said funds by its negligence hereinafter more fully set out: (A) Its failure to make reasonable and proper inquiry as to Piper's authority to make use of such checks of Nebraska Consolidated Mills Company; [and] (B) to make reasonable and proper inquiry of Piper's authority to act for the payee named on each of said checks."

Appellant acknowledges that under the provisions of section 3-405, U. C. C., the appellee bank is absolved of all liability for accepting the endorsement of Piper on the Nebraska Consolidated checks. Section 3-405, U. C. C., provides: "(1) An endorsement by any person in the name of a named payee is effective if * * * (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest."

Appellant maintains that although the above referred to provisions of the Uniform Commercial Code absolve the bank under normal conditions, nevertheless, the bank may still be liable to Nebras-

ka Consolidated for an action sounding in tort based upon the bank's negligence.

It is true that there are cases which may be found to the effect that the protection of section 3-405, U. C. C., does not overcome the negligence of a bank. Notwithstanding the provisions of section 3-405, U. C. C., a bank may nevertheless be liable to a drawer when it, the bank, has acted negligently. However, a reading of those cases discloses that before such negligence may arise there must be some showing that the bank was either placed on such notice as to require further investigation or acted in a manner which was commercially unreasonable. Employers' Liability Assurance Corp., Ltd., v. Hudson River Trust Co., 250 App. Div. 159, 294 N. Y. S. 698; Wright v. Bank of California, 276 Cal. App. 2d 485, 81 Cal. Rptr. 11; Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392; American Surety Co. v. Smith, Landeryou & Co., 141 Neb. 719, 4 N. W. 2d 889.

In the absence of such facts, a bank is not considered negligent in accepting deposits with forged endorsements where the agent or employee of the maker or drawer has supplied the maker or drawer with the name of the payee intending the latter to have no such interest.

The justification for such rule is set out in note four following section 3-405, U. C. C., as follows: "Paragraph (c) is new. It extends the rule of the original subsection 9 (3) to include the padded payroll cases, where the drawer's agent or employee prepares the check for signature or otherwise furnishes the signing officer with the name of the payee. The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of

his employees, or, if he is not, is at least in a better position to cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee."

Appellant alleges that Nebraska Consolidated suffered a loss by reason of the bank's negligence in failing to make reasonable and proper inquiry as to the Nebraska Consolidated agent's authority to make use of such checks. This is the very situation contemplated by section 3-405, U. C. C., and in the absence of any allegation that the bank either had actual notice or facts sufficient to put it on constructive notice, or in some manner acted in a commercially unreasonable manner, no duty arises which requires the bank to make further investigation. One cannot, therefore, be negligent in failing to perform an act which it did not in the first instance have a duty or obligation to perform. Braswell Motor Freight Lines, Inc. v. Bank of Salt Lake, 28 Utah 2d 347, 502 P. 2d 560; Prudential Ins. Co. v. Marine Nat. Exch. Bank of Milwaukee, 371 F. Supp. 1002 (E. D. Wis., 1974); Fair Park Nat. Bank v. Southwestern Inv. Co., 541 S. W. 2d 266 (Tex. Civ. App.). We must, therefore, accordingly hold an allegation that the appellee bank failed to make reasonable and proper inquiry as to the maker agent's authority to make use of such checks, without more, fails to allege the violation of any duty owed by the bank to the maker, and therefore cannot constitute an allegation of negligence.

Likewise, the appellant's second claim of negligence must also fail. Appellant alleges that the Center Bank by its negligence proximately caused Nebraska Consolidated to suffer a loss in that the bank negligently failed "To make reasonable and proper inquiry of Piper's authority to act for the *payee* named on each of said checks." (Emphasis supplied.) While it may be true that in an appropri-

ate case a bank may owe a duty to a payee to inquire as to one's authority to act on behalf of the payee, the claim made herein does not give rise to such duty. In essence the appellant here is claiming that by reason of the bank's failure to fulfill an alleged duty owed to the payee, the maker was caused to suffer a loss.

For there to be an action for negligence, the alleged act must be the proximate cause of the injury suffered. "Proximate cause," as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred. Warren v. Bostock, 170 Neb. 203, 102 N. W. 2d 55. Even where conduct is negligent, it is still required that the conduct be a substantial factor in bringing about the harm. Causation in this sense inevitably involves the idea of responsibility. It is not enough that the harm would not have occurred had the individual defendant not been negligent. Landmesser v. Ahlberg, 184 Neb. 182, 166 N. W. 2d 124.

In the case of Daniels v. Andersen, 195 Neb. 95, 237 N. W. 2d 397, we had occasion to review the basic requirements in establishing proximate cause. We there said the first requirement is that the negligence be such that " 'without which the injury would not have occurred,' commonly known as the 'but for' rule." While it is true that inquiry made by the appellee bank to the payee may have uncovered the fraud, certainly such failure to call did not create the mechanism by which the injury to Nebraska Consolidated first occurred. The injury came about by reason of Nebraska Consolidated's failure to employ an honest employee and to verify its own payables. Whatever may be said with regard to the bank's failure to call the payee can be said with equal force in connection with the maker's failure to ascertain the validity of the statement for which the checks were drawn.

The second basic requirement in establishing proximate cause is that the injury be the natural and probable result of the negligence. Daniels v. Andersen, *supra*. There is no allegation in the petition, nor are there any facts in the petition, from which it can be said that the injury was the natural and probable result of the negligence. It may well be that such an allegation could have been made. On that point we do not pass. Such an allegation, however, was not made. The mere claim that the bank failed to "make reasonable and proper inquiry" of the payee is not sufficient to allege any fact from which it can be concluded that the maker's loss was the "natural and probable result" of such failure. Again, without passing upon the matter, it may be said that the payee could have made such claim. Certainly that claim is not available to the maker.

The third requirement referred to in Daniels v. Andersen, *supra*, is not relevant for the purpose of examining the sufficiency of a petition and therefore need not be discussed. Nevertheless it is clear from the facts as alleged in the petition that the bank's failure to make inquiry of the payee, if such duty existed, did not proximately cause appellant's injury. That being the case, the appellant failed to allege facts upon which relief could be granted. The trial court therefore was correct in sustaining the demurrer. The judgment is affirmed.

AFFIRMED.

NORTHERN NATURAL GAS COMPANY, A CORPORATION, APPELLANT, V. BEECH AIRCRAFT CORPORATION, A CORPORATION, APPELLEE.

275 N. W. 2d 77

Filed February 6, 1979. No. 41843.

1. **Witnesses.** In an appropriate case an expert may render an opin-

ion without first disclosing the underlying data upon which the opinion is based.

2. _____. An expert can render an opinion in an appropriate case in response to a direct question and is not required to have a hypothetical question presented to him.
3. _____. Before an expert opinion can be rendered it must be shown that such an opinion is of a scientific, technical, or other specialized knowledge which would assist the trier of fact to understand the evidence or to determine a fact in issue, and that the witness qualifies as such expert by knowledge, skill, experience, training, or education.
4. **Courts: Witnesses.** A trial court may either on its own motion or in response to an objection require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion.
5. **Courts: Witnesses: Appeal and Error.** The action of the trial court, in either requesting an expert witness to disclose the underlying data or information upon which his opinion is based or refusing such a request, will not be disturbed on appeal in the absence of a showing that the trial court abused its discretion.
6. **Evidence: Witnesses.** If an expert witness desires to render an opinion without first disclosing the underlying data or information upon which the opinion is based, he must first establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render such an opinion; and likewise that experts within the specific field would rely upon the data or information relied upon by the testifying expert in rendering the opinion.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

John A. Rickerson of Rickerson & Welch, for appellant.

Karl F. Schmidt of Morrison, Hecker, Curtis, Kuder & Parrish and Robert G. Fraser of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

KRIVOSHA, C. J.

This is an action for damages based upon the appellant's theory that the appellee had negligently de-

signed and manufactured an aircraft as set out in the petition. At the close of the appellant's case the appellee moved for a directed verdict which was sustained by the trial court. The action was thereupon dismissed and appeal taken to this court. We concur with the action of the trial court in granting the motion and directing a verdict, and accordingly we affirm.

The appellant was the owner of a Beechcraft King Air aircraft which crashed near Kirksville, Missouri, on March 11, 1966. The accident occurred at approximately 12:14 p.m. Just prior to the accident the aircraft was cruising at 16,000 feet when the right engine flamed out and shortly afterwards the left engine flamed out. The pilot testified he used the restart procedure, but was unable to get either of the two engines started. The loss of power necessitated an emergency landing which totally destroyed the aircraft.

In its fourth amended petition appellant alleged that the appellee had negligently designed and manufactured the aircraft with regard to certain inlet guide vanes. Because of the allegedly faulty design, ice was caused to form which in turn blocked the entrance of air and caused the engines to stop.

At trial the appellant called several witnesses, including the pilot, who described the events which occurred from the time the plane took off on March 11, 1966, from Roanoke, Virginia, until the time of the crash near Kirksville, Missouri.

Without objection appellant offered in evidence exhibit 25 which consisted of surface weather observations taken by the National Weather Records Center on March 11, 1966, at Roanoke, Virginia; Bluefield, West Virginia; Huntington, West Virginia; Lexington, Kentucky; Louisville, Kentucky; Bloomington, Indiana; Matton, Illinois; Springfield, Illinois; Quincy, Illinois; Kirksville, Missouri; Terre Haute, Indiana, and Columbia, Missouri. No witness, how-

ever, up to that point, had testified as to the design of the aircraft or in any manner which tied the crash of the aircraft to the alleged defective design of the inlet guide vanes.

As a matter of fact, the pilot testified that just before the flame outs occurred he was flying at 16,000 feet in clear air and 7,000 to 8,000 feet above any clouds. He further testified there was no indication of icing conditions nor was there any visible moisture. In his opinion the weather was not a factor in the accident.

Appellant then called to the stand one W. Stewart Roberts who testified he was an engine failure investigating engineer. Through a series of questions the witness was qualified as a mechanical engineer with knowledge about engines. He did acknowledge he was not a meteorologist and had not taken any courses in meteorology. During an offer of proof, Roberts testified that in his senior year at M.I.T. he had majored in air conditioning and refrigeration from which he believed he had gained his knowledge concerning humidity.

Without objection, exhibits 34 and 35 were then offered and received in evidence. Exhibit 34 was a certified true copy of the records on file in the National Climatic Center, Asheville, North Carolina, taken on March 11, 1966, at 6 o'clock in the morning and 5 o'clock in the evening. The records consisted of a constant pressure chart for Columbia, Missouri, and a constant pressure chart which covered a wider area. The exhibit also contained dry bulb and dew point measurements taken at an altitude of 18,000 feet over Omaha, Nebraska; Topeka, Kansas; Columbia, Missouri; and Peoria, Illinois, at 6 o'clock in the morning and 6 o'clock in the evening on March 11, 1966. The closest point to the scene of the crash recorded by the exhibit was Columbia, Missouri, more than 100 miles from the crash scene. Likewise, the recordings were taken 6 hours before

or 6 hours after the crash and at an altitude of at least 2,000 feet higher than the altitude at which the plane was flying when the flame outs occurred. Exhibit 35 was never fully explained, but appears to be radar tracings for the United States taken on March 11, 1966. After several further questions concerning temperatures, the trial court declared a recess and a meeting was held on the record out of the presence of the jury in the trial court's chambers.

During that conference in chambers Mr. Rickerson, attorney for appellant, stated that Roberts intended to read the dry bulb and dew point readings from Omaha, Nebraska; Topeka, Kansas; Columbia, Missouri; and Peoria, Illinois, from exhibit 34. According to Mr. Rickerson, Roberts, using the data from Omaha, Topeka, Columbia, and Peoria on exhibit 34, would estimate the weather and temperature near Kirksville, Missouri, at an altitude of 16,000 feet at the time the engines quit at 12:14 p.m. From his estimates of the weather at the time and place the engines quit, Roberts would then testify there would be a relative differential between the dry bulb and the dew point of 4 degrees. He would further testify that when the air entered the engine through the air intake, it then went through the air screen and through the inlet guide vane assembly. Because of a change in velocity of the air, there would be a drop in temperature sufficient to go below the dew point and thus cause the moisture in the air to freeze on the inlet guide vanes, blocking them. This blockage would cause the stoppage of air flow to the engines, and stop the engines. There was no testimony that such a calculation could be made or that experts in the field of meteorology would use the information upon which the witness Roberts based his calculations. In addition, there was no evidence introduced as to whether it would be reasonable to render an opinion based upon those calculations.

The trial court then advised appellant's counsel that, in the court's opinion, the data sought to be introduced by appellant went far beyond data reasonably relied upon by experts in that particular field. Specifically, the trial court stated that the court had no question the witness was an aeronautics engineer who could testify to any data that an expert in that field reasonably relied upon. The trial court specifically advised appellant that if appellant's witness had any data that experts rely upon reasonably, he could use that data but, in the opinion of the trial court, to interpret cold fronts and readings of 5 hours before or after and 100 miles away from the scene of the accident was too speculative, and would not be admitted.

Following the conference in chambers but outside the presence of the jury, appellant, by way of an offer of proof, had Roberts testify about the matters of which he had earlier advised the court. Following the offer of proof the court advised appellant that the ruling would be the same and the offer would not be received.

Appellant then rested. Appellee moved for a directed verdict on the basis there was no evidence of causation introduced. The motion was sustained and the action dismissed.

Without question, under our Rules of Evidence in an appropriate case, an expert may render an opinion without first disclosing the underlying data upon which that opinion is based. § 27-705, R. R. S. 1943. It is further clear under our Rules of Evidence that such opinion may be rendered in response to a direct question and need not be based upon a hypothetical set of facts submitted to the expert.

That rule, however, does not in and of itself permit anyone to qualify as an expert upon his own declaration or to render any opinion he desires.

Before an expert opinion can be rendered, it must be shown that such opinion is of a scientific, techni-

cal, or other specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue, and that the witness qualifies as such expert by knowledge, skill, experience, training, or education. § 27-702, R. R. S. 1943. There is no exact standard for fixing the qualifications of an expert or skilled witness. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., 189 Neb. 247, 202 N. W. 2d 191. Such a witness will be deemed qualified if and only if he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value. Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601.

While under our Rules of Evidence the expert may not be required to disclose the underlying facts or data before rendering his opinion, the trial court on its own motion can require such disclosure. § 27-705, R. R. S. 1943. In this case the trial court made such a requirement, and upon hearing what the expert proposed to testify, concluded that neither the record nor the apparent qualifications of the expert would justify such an opinion. A trial court is given large discretion in determining whether or not the witness' qualification to state his opinion has been established, and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion. Whittington v. Nebraska Nat. Gas Co., 177 Neb. 264, 128 N. W. 2d 795; Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., *supra*.

If an expert witness is to be permitted to render an opinion without prior disclosure of the underlying facts or data upon which his opinion is based, then the expert must at least establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render an opinion. Moreover, when requested by the trial court, such expert should be required to produce sufficient evidence to establish that the un-

derlying facts or data are of such a nature that an expert in the particular field would use or would rely upon such facts to reach a conclusion. Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686; Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321.

A trial court may, either on its own motion or in response to an objection, require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion. Unless it is shown that there has been an abuse of discretion the action of the trial court, in either requesting such underlying data or information or refusing such request, will not on appeal be disturbed.

The record in this case is totally devoid of any evidence that an expert in weather would attempt to render an opinion such as that sought to be tendered by appellant's expert herein; or that the information relied upon by the expert was of such type that an expert on weather would rely upon such information in rendering an opinion. In the absence of such evidence we agree with the trial court that any opinion tendered by the expert in this case would be based on pure speculation and be solely without any basis or foundation. The action of the trial court in sustaining the objection to the opinion was in all respects correct.

Appellant then elected to offer no further evidence and to rest on the state of the records. At that point, the trial court had no alternative but to sustain the motion for a directed verdict and to dismiss the action. The trial court was correct and the judgment dismissing the action is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARD PRICE, APPELLANT.

275 N. W. 2d 82

Filed February 6, 1979. No. 42048.

1. **Criminal Law: Plea in Abatement: Trial: Evidence.** An error in overruling a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
2. **Criminal Law: Trial: Appeal and Error: Hearings.** There is no right to appeal to this court from a decision binding the defendant over for trial after a preliminary hearing.
3. **Criminal Law: Courts: Hearings.** A magistrate is not required to set out specific findings of fact after a preliminary hearing.
4. **Criminal Law: Constitutional Law: Police Officers and Sheriffs: Custody.** The requirement of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that a defendant be informed of his constitutional rights applies only to in-custody interrogations.
5. **Criminal Law: Constitutional Law.** The right of a defendant to remain silent is not overcome by a mere recitation of Fifth Amendment rights; but that rule is not violated where the subsequent statements are clearly shown to have been made voluntarily.
6. **Criminal Law: Trial: Witnesses: Prosecuting Attorneys.** The decision to allow endorsement of a new witness by the prosecutor is addressed to the sound discretion of the trial court.
7. _____: _____: _____: _____. Testimony presented by a prosecutor with a view toward subsequent impeachment does not come within the prohibition against the knowing use of perjured testimony.
8. **Criminal Law: Evidence.** Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded.
9. _____: _____. Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of the accused are not grounds for reversal.
10. **Criminal Law: Statutes: Witnesses: Evidence.** The foundational requirement of section 27-613, R. R. S. 1943, that a witness to be impeached be given an opportunity to explain or deny an apparently inconsistent statement, may be met either before or after the introduction of the impeaching evidence.
11. **Criminal Law: Instructions.** Nebraska Jury Instruction No. 14.52A pertaining to Miranda rights need not be given even if requested by the defendant.

Appeal from the District Court for Douglas

County: JOHN E. CLARK, Judge. Affirmed.

Daniel W. Ryberg, for appellant.

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

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

WHITE, J.

Defendant-appellant was charged with the murder of Tracie Tate, the daughter of defendant's wife Virginia.

The defendant was convicted by a jury of murder in the second degree and was sentenced to a term of life imprisonment in the Nebraska Penal and Correctional Complex. The defendant appeals and makes 13 assignments of error in this court. They generally relate to six separate categories: (1) The overruling of the plea in abatement challenging the sufficiency of the preliminary hearing; (2) the admission of five exculpatory statements made by the defendant; (3) the admission of a prior inconsistent statement of a witness and refusal of the trial court to permit the defendant to introduce evidence of a prior inconsistent statement of an impeaching witness; (4) error in refusal to dismiss the first degree murder charge or, in the alternative, to reduce the charge to second degree murder or manslaughter; (5) failure to give NJI No. 14.52A; and (6) claim that the sentence was excessive.

Tracie Lynne Tate was born on June 14, 1975, and was slightly over 2 years of age when she died on June 22, 1977. The defendant and the victim's mother, Virginia, lived at apartment 11, 4606 Redman Street, Omaha, Nebraska, on the third floor of a 2½ story brick apartment building at that address. The apartment building consisted of a level of semi-basement apartments, sometimes referred to as

garden apartments, with 2 full stories above the level of the garden apartments. The apartment exited onto a wooden porch landing encompassed by an iron railing. The first flight of steps from the apartment down consisted of 13 wooden stairs onto a concrete landing and then a separate flight of wooden steps consisting of 7 or 8 stairs. The evidence most favorable to the State established that Tracie's mother, Virginia, left the apartment at approximately 4 p.m., on June 22, 1977, with an individual by the name of Lee Carter to go to her mother's apartment and from there proceeded to the area of 24th and Lake Streets in Omaha, Nebraska. When Virginia left her apartment, Tracie was sleeping and was left in the care of the defendant. Virginia had gone to 24th and Lake Streets to sell prescription drugs which she had obtained that day. At approximately 8 p.m., that evening, Virginia telephoned to her apartment and spoke to the defendant after Clifford Jones, a friend of the defendant and Virginia, met her on the street and told her that she was to go home or to call home. Virginia testified that during the telephone conversation the defendant informed her Tracie had fallen down some stairs, that she had blood on her feet, that he was going to give her a bath, and that Virginia should come home at 1 a.m. Virginia testified she was not worried about Tracie because: "* * * the way he was talking, it was like she just fell and wasn't hurt." At 2:30 a.m., Virginia again called home and was informed by the defendant that "he couldn't get Tracie awake." Virginia arrived home shortly thereafter and found the defendant giving mouth-to-mouth resuscitation to Tracie. The rescue squad of the Omaha fire department was summoned. Fire Captain Stolinski found Tracie lying on a bed, examined her for vital signs, found none, and then took her to Immanuel Medical Center. She was accompanied by Virginia and the defendant. Tracie was pronounced dead shortly af-

ter arrival at the hospital by Dr. Dean McGee, the physician on duty in the emergency room at Immanuel Medical Center. He testified that when he examined Tracie at 3:19 a.m., she had been dead for some 5 to 7 hours. Tracie had no clothes on at the time he examined her. Dr. McGee testified that Tracie had blood present in the left ear canal, extensive contusions or bruising of her head, a large hematoma or blood clot swelling in the back of the head in the occiput area; two discolored areas about the ankles on the dorsum or top side of the feet which appeared to him to be eschar or healing type of scabbing that occurs following a burn; and multiple puncture-type wounds on the soles of both feet, around the pubic or vaginal area, and scattered over the buttocks. Tracie's body was then taken to the Douglas County morgue where Dr. Blaine Roffman, a specialist in pathology, performed an autopsy. Externally, Dr. Roffman found a purplish discoloration and swelling of the entire forehead which extended bilaterally to and beyond both ears. He found the same type of discoloration around both parts of the external openings of the nose along with a great deal of swelling in both lips. There were tears in the mucosis side of the lower lip or the inside portion of the lower lip, and discoloration around both eye areas. He observed a small amount of blood in the left ear canal. Dr. Roffman also observed pink discolored areas on the tops of both feet showing sloughing of the superficial layer of skin which represented to him defects which are similar to second degree burns, a superficial abrasion on the right heel, and a 1-centimeter abrasion on the inner aspect of the left heel. The vaginal canal was bloody and there was a tear in the vaginal canal which measured 11 millimeters, or approximately ½ inch, and another tear in the left inner fold of the labia which is adjacent to the clitoris. The anal canal was also bloody and showed several

small superficial tear lacerations. Dr. Roffman also observed many purplish pin-like marks on the buttocks, a slight scratch in the inner aspect of the right thigh, and little scratch abrasions on the left side of the neck. In the internal findings, Dr. Roffman's examination revealed hemorrhages on the right side of the thoracic cage at about the level of the eighth and ninth ribs. There was hemorrhage inside the muscle that surrounds these ribs. This, he observed, was superficial. He discovered the thymus gland, which is just underneath the chest cavity, showed some hemorrhage. An incision of the scalp was made and Dr. Roffman testified that the entire scalp was hemorrhagic and swollen showing a diverse pattern of recent hemorrhage. Hemorrhages were discovered in the right posterior occipital portion of the brain, i.e., the back lobe of the brain on the under surface, and on the left lateral lobe of the cerebellum. There was blood underneath the subarachnoid membrane which covers the brain proper. No cuts were observed on the skull itself. Over objection, Dr. Roffman was asked: "* * * based on your examination, do you have an opinion as to whether or not the skull was hit more than one time? A. Yes. Q. And what is that opinion? * * * I think there had been some several blows to cause these types of injuries. * * * Q. Am I correct in saying that there were indications of blows all around the head? * * * A. There had to be multiple blows in various portions of the head to cause all that diffuse hemorrhage on the scalp, also in connection with the swelling and discolorations around the eyes and around the lips and lacerations of the lips could not have been sustained by one action. * * * The age and the appearance of these wounds would be consistent with them all occurring within a short period of time." Dr. Roffman further testified that the tears and wounds in the vaginal area were inflicted shortly preceding death and the puncture

wounds in the vaginal and posterior region were of recent origin. The burn injuries on the feet were consistent with a pouring-type injury according to Dr. Roffman and not an immersion-type injury.

Dr. Roffman testified that the cause of death was cerebral edema and brain damage secondary to trauma to the head. "Q. Are the blows to the head, then, the primary cause? A. Yes." Dr. Roffman was then handed a photograph of the area of the outside of the defendant's apartment building. "Q. * * * If the testimony had been or the evidence had been to the effect that she (Tracie) had fallen from the second stair down a number of stairs, would that be consistent with your findings? * * * A. The injuries which I have described would be inconsistent with a fall down these stairs of six or seven, eight or nine, or ten or eleven. The injuries that I have described to you are not consistent with a fall down these stairs, in my opinion." Dr. Roffman testified that he based his opinion on the numerous blows that would have been needed to have sustained the injuries to Tracie's head and the absence of any significant abrasion to the nose or other surfaces of the body; and, that the findings of the lacerations in the mouth, the vagina, and the anus were not consistent with a fall. Finally, Dr. Roffman was asked whether or not the injuries to Tracie's head were consistent with blows from a hand. The answer was "Yes." The jury could have concluded from Dr. Roffman's testimony that Tracie Tate had been tortured, possibly sexually molested, and died as a result of a battering by blows to her head.

The defendant's first group of errors assigned relate to the denial of his plea in abatement. The defendant suggests that the evidence was not sufficient to bind him over for trial on a charge of first degree murder. We said in Kruger v. Brainard, 183 Neb. 455, 161 N. W. 2d 520, and in State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610, that the error, if any, in

the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. Defendant suggests that the holding in Kruger v. Brainard, *supra*, does not obtain under a first degree murder conviction where the defendant may be held without bail. The defendant in this case overlooks the fact that bail was set at $50,000 with the option of the defendant to post a 10 percent amount thereof so that the theoretical denial of his constitutional rights by being denied of his liberty with an inadequate preliminary hearing does not here obtain.

The defendant next complains he was denied his right of appeal or right of review of the hearing on probable cause. The defendant's contention may be answered easily by further reference to State v. Franklin, *supra*: "We know of no principle which would require this court to entertain a pretrial appeal of the trial court's review of the decision of the magistrate binding the defendant over after a preliminary hearing. It would appear that our statutory provisions for preliminary hearings and our rule of practice under which the trial court itself reviews the magistrate's determination are clearly sufficient to meet the constitutional mandates of the Fourth Amendment to the Constitution of the United States."

The defendant also complains and assigns as error that there were no specific findings of fact made by the trial court in the order denying the preliminary hearing. Defendant has not pointed out and we are not informed of any requirement that the findings of fact be specifically set out.

The next assignments of error relate to the admission in evidence of statements by the defendant given to police officers at Immanuel Medical Center, where Tracie Tate was taken, and at the apartment to which the officers and the defendant returned, at

the officers' request, after Tracie was pronounced dead in the hospital; and of two other statements taken at the police station by police officers after the defendant was under arrest. We shall deal with the statements in order.

Sergeant Thomas Gutchewsky arrived at Immanuel Medical Center at approximately 3:25 a.m., on June 23, 1977. He spoke with another officer who told him that Tracie Tate had died from a fall, that Tracie Tate was the daughter of Virginia, and that Ward Price was babysitting Tracie. He observed Tracie's body and testified that at that time he was suspicious, by reason of the bruises and burn marks, that the death was not accidental. He had conversation with the defendant. At that time Ward Price was not under arrest and was not in custody. Sergeant Gutchewsky asked the defendant what happened. The defendant stated that he was babysitting Tracie, that he took out the trash about 8:30 p.m., on June 22, and that he left the baby inside along with three of his acquaintances. While emptying the trash he saw the little girl come out and fall down 8 to 10 steps on the back stairway. He picked the baby up, took her inside, and bathed her. She was bleeding and crying. The entire conversation took approximately 5 minutes. Sergeant Gutchewsky and the defendant went to the scene. Sergeant Gutchewsky examined the stairs for blood, which would corroborate defendant's story, and finding none, placed the defendant Price under arrest. The arrest was made immediately after Ward Price said he wanted to go home; that they, the police, could call him later; and he then started to walk away.

Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, applies only to "in-custody" interrogation. Defendant's objection to the admission of the first statement is not well taken. Later decisions of the United States Supreme Court have caused some difficulty in drawing the line between custodial and

noncustodial investigation. See 23 Loyola L. Rev. 1057. It is sufficient to point out that, at this point, the investigation was at a very preliminary stage. The testimony of Sergeant Gutchewsky indicates he had not finally determined that a crime had been committed. The actions of the defendant reveal that he felt he was free to go. We thus disagree with the contention that the statements were made to Sergeant Gutchewsky while the defendant was in custody.

The second statement was made on June 23, at 6:30 a.m., in the Omaha police station. Officer K. G. Miller advised the defendant of his rights under Miranda v. Arizona, *supra*. This time the defendant Ward Price made a statement that Virginia left the apartment about 7:30 p.m. Four friends of the defendant dropped by to visit him at the apartment. All but one, Lee Carter, left prior to Tracie's injuries. According to this version, Lee went with the defendant to take some trash out and together they saw the baby fall down the steps. At some point, unspecified in time, he told Lee to go out and contact Virginia to inform her of the injury. The interview lasted approximately 1 hour 15 minutes.

The third statement was taken at approximately 7:45 p.m., on June 23. The defendant was interviewed by an Officer Gregory Thompson of the Omaha police department. The defendant was again advised of his rights and told essentially the same story as in the second interview, except that this time Lee Carter stayed in the house while Price took out the garbage. He also stated that Tracie's feet had been burned about a week prior to her death when Tracie's mother spilled cooking oil on them. The interview lasted approximately 1 hour 10 minutes.

The fourth statement began at 10:30 p.m., at the police station. Sergeant Michael Fleharty interviewed the defendant. Again the defendant's rights

were read to him and the defendant again waived them. He told essentially the same story except that now both the defendant Ward Price and Lee Carter were inside when Tracie walked out onto the back steps and fell. Sergeant Fleharty then confronted Ward Price with a contrary statement from Lee Carter whereupon Ward Price changed his story to say that Lee Carter agreed to watch the child while Price took out the garbage. In return, the defendant would give Carter some Valium. The baby fell during this time.

The fifth interview occurred on June 24, 1977, at 9:45 a.m. The defendant asked the jailer if he could again see Officer Miller who had conducted the second interview. Officer Miller again advised the defendant of his rights and the defendant waived them. The defendant then told Miller that he, Price, was not even present when the fall occurred. He claimed he had left the baby with Lee Carter and borrowed Lee's car to go purchase some cigarettes. Essentially, the defendant attacks the admission of statements two, three, four, and five into evidence by suggesting that when the defendant Ward Price walked away from the officer just prior to his arrest at the apartment, he had effectively terminated the interview and exercised his right to remain silent, and that an attempt to obtain a statement from the defendant within 2 hours after he had exercised that right is not overcome by a mere recitation of the Fifth Amendment rights. See Michigan v. Mosley, 423 U. S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313. The answer to this contention is simple. The showing made by the officer was sufficient for the court and the jury to find that the statements were voluntarily given after an understanding of the Miranda rights. The defendant does not deny that the statements were voluntary but alleges simply that his subsequent repeated waiver of the right to be silent was not effective. The State met the burden in each case

and the statements were properly admitted.

At a break in the trial, the prosecutor had occasion to speak with one Pamela King, a friend of Clifford Jones and the defendant. The substance of the conversation was that a week after the incident, Clifford E. Jones told Pamela King that he had seen Ward Price pour hot cooking oil on the baby. The statement of Clifford Jones in the possession of the prosecutor did not indicate this fact. The prosecutor informed the court and defense counsel of the conversation with Pamela King and requested the court's permission to endorse the name of Clifford Jones on the information. (He was a previously-named anticipated witness for the defense.) The prosecutor indicated that he intended to use Jones: "* * * it corroborates to some degree what all the evidence has been, that the injuries occurred at that residence * * * were at the time he told me (in his statement) 9:00 o'clock at night and, yes, I intend to call witnesses to impeach him, assuming that he denies it."

The defense objected on account of "lack of statutory notice, and based upon this new so called impeachment evidence it does come as a surprise." The court allowed the endorsement of Clifford Jones as a witness. Subsequently Jones denied making the statement to King.

Pamela King was called and the defendant requested, prior to her being asked to relate the conversation, for a cautionary instruction that the evidence was introduced solely to impeach the credibility of Jones. The court so instructed and the defendant does not here object to the form of the cautionary instruction.

Without objection, in response to the prosecutor's request, Pamela King testified as to the conversation of Clifford Jones: "A. Well, when he came over to the car, then he started telling us, he said, well, I was there, I was there when it happened, and every-

thing. And so we said, well, what happened, you know. He said that he had -- he was in the kitchen and he saw Ward take boiling hot oil. He said it was hot oil, it was boiling hot, he said, and he poured it all over Tracie's feet, and he said it just turned white, he said, just white, he said, and he ran and he put her in the tub, a tub of cold water, and he said he kept saying, man, call the police, take her to the hospital, do something, man. And he said that he went into the bathroom, Cliff went into the bathroom to see about her, to, you know, lift her out of the tub, and when he lifted her up, she said, oh, help, help, no. He said she started crying and moaning and squirming and everything. He said he put her back in the tub and he said Tracie would talk. As soon as Ward came in the room, she just got quiet.

"And Ward took her out of the tub, and he was supposed to have been, I guess, changing her diaper or something, and he went to lay her on the bed, and he said that Ward was feeling around Tracie's privacies and everything. He said he thought it was kind of strange the way he was doing it, you know, as if a man was going to be with a woman. He said, but, he said, it wasn't none of his business so he didn't say nothing. And so he said he had left and he said he came back and knocked on the door and Ward said who is it, who is it. He said it's me, you know. He said it took him a long time to come to the door, and then when he went in there, Ward had Tracie in the living room on the floor.

"He said, man, she won't wake up, she won't wake up. He said, man, you ought to call the police, take her to the hospital, something. He said, no, man, no. Virginia would be mad at me, Virginia would be mad at me, what am I going to do. And he picked her up, and she was all limp, and her head just kind of fell back, and he said he wouldn't call the police or nothing.

"And Cliff said that he left and he went down the

street later that evening, and he said he told Virginia, he said, Virginia, you better call home, you better do something because your baby, something is wrong, you know. And he just -- that is what he said Ward did."

An instruction limiting the jury's consideration to credibility was again given at the close of the evidence, and the defendant does not object to the form of the instruction.

The defendant had a copy of Clifford Jones' statement prior to trial. He did not request a continuance. The decision to allow Clifford Jones to be endorsed on the information was addressed to the discretion of the court and the court did not abuse this discretion. See Wilson v. State, 120 Neb. 468, 233 N. W. 461.

In this court, the defendant broadens his attack. He first contends that the prosecutor knowingly used perjured testimony (of Jones) thus violating the Fourteenth Amendment rights of the defendant and requiring a new trial. The contention approaches frivolity. The statement that "a prosecutor may not knowingly use perjured testimony" is shorthand for the rule that he may not knowingly use perjured testimony *for the purpose of obtaining a conviction.* See, for example, Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791. The direct conflict in the testimony does indeed suggest that the testimony of one or the other was false. But, unless some other rule was transgressed, it is not error to submit the testimony of both to the jury.

A second, more formidable argument is made by the defendant for the first time in this court. In State v. Isley, 195 Neb. 539, 239 N. W. 2d 262, this court affirmed the decision of the District Court rejecting an attempt by a defendant to introduce hearsay testimony under the guise of impeachment. It is the position of the defendant that a similar attempt, this time by the prosecutor, is apparent in the

introduction of the testimony of Pamela King.

The Rules of Evidence codified in sections 27-101 to 27-1103, R. R. S. 1943, are in large measure those proposed by this court's committee on practice and procedure which were in turn taken from the then newly proposed federal rules. However, some changes were made. Under proposed Rule 801 d (1) (A), evidence of a prior inconsistent statement of a witness, such as Jones' statement related by King, would have been admissible as substantive rather than just impeachment evidence. The Legislature rejected this change in existing law and continued to restrict, with certain exceptions not relevant here, such evidence to impeachment purposes. In doing so, it expressed its intention that convictions not rest on unsworn statements.

On the other hand, the Legislature's apparent purpose in adopting section 27-607, R. R. S. 1943, was to codify the abandonment by this court in State v. Fronning, 186 Neb. 463, 183 N. W. 2d 920, of the ancient and universally criticized rule that a party "vouches" for the credibility of his own witnesses and may not impeach them. There is no indication that it also intended to create an exception to the limitation, referred to in the previous paragraph, on the use of prior inconsistent statements. The completely unrestricted use of section 27-607, R. R. S. 1943, would create the temptation for a party to introduce "impeachment" testimony when none was actually needed, leaving his opponent to rely on a possibly ineffective cautionary instruction.

It is suggested in Graham, The Relationship Among Federal Rules of Evidence, 55 Tex. L. Rev. 573, that the requirements of "surprise" and "affirmative damage," originally developed as exceptions to the voucher rule, be reinstated - not as a return to the old rule but to prevent the introduction of prior inconsistent statements for substantive purposes under the guise of impeachment. This court

rejected those requirements when it rejected the voucher rule in State v. Fronning, *supra*, and their reinstatement here, for whatever reason, would likely engender unnecessary confusion. A balancing test is suggested in 3 Weinstein's Evidence, s. 607 (01), p. 40 (Cum. Supp. 1978). Under that test, evidence with dubious value for impeachment but a comparatively high prejudicial impact would be excluded under section 27-403, R. R. S. 1943. Had that test been applied here, it might have been determined that the State had little need to impeach Jones. He did say the defendant was administering mouth-to-mouth resuscitation to the victim, but the result of his testimony was hardly to exculpate the victim. In fact, Jones' testimony corroborated to some extent the time sequence presented by the State. The witness King was a friend and cousin of the victim's mother who had originally been under suspicion. Thus, the possibility of bias was present. It is a possibility then that the testimony of King should have been excluded.

But even accepting that possibility, we do not feel compelled to reverse. Both King and Jones were present for cross-examination so there was no violation of defendant's constitutional right to confrontation. See Nelson v. O'Neill, 402 U. S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222. Furthermore, no objection was made, other than that of surprise, to the testimony of Jones and King. Errors alleged here but not presented to the trial court do not ordinarily constitute grounds for reversal. See State v. Brown, 174 Neb. 387, 118 N. W. 2d 328. More importantly, though, the evidence of guilt, other than that complained of, is so substantial that we do not hesitate to say that the error, if any, was inconsequential. The defendant invites speculation that the jury could have found that the victim was injured in a fall down some stairs. But neither the defendant nor anyone else testified such a fall actually occurred. There

is, then, not one shred of evidence to contradict the circumstantial, but weighty, evidence that the victim died of injuries inflicted intentionally by the defendant. Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of the accused are not grounds for reversal. See State v. Hogan, 194 Neb. 207, 231 N. W. 2d 135.

The defense further asserts as error the trial court's refusal to allow him to call on Fannie Claxton to testify that in a conversation with Pamela King a week before the death, King asserted that Tracie's burns were caused by accidental immersion in hot water. The trial court was in error in finding that section 27-613, R. R. S. 1943, requires that the witness to be impeached be given an opportunity to explain or deny the apparent inconsistent statement prior to its introduction. That foundational requirement may be met either before *or* after the introduction of the impeaching evidence. See Fenner, Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the Nebraska Evidence Rules, 9 Creighton L. Rev. 559, at p. 599. Our decision as to the King testimony renders the question of impeachment of the impeaching evidence academic.

The defendant's assertion that the court erred in failing to dismiss the murder charge or reduce the charge to manslaughter is likewise without merit. The only evidence of the cause of death, evidence by the pathologist, suggests - indeed demands - the conclusion that Tracie was battered and tortured repeatedly. Unquestionably the defendant was present and, in fact, in charge of the victim. The only other person shown to have been near the victim was Clifford Jones, who saw the victim after the injuries were inflicted. The evidence was sufficient to justify the trial court to charge first degree murder to the jury.

The defendant next asserts that the trial court erred by refusing to submit NJI No. 14.52A to the jury (whether defendant was advised of his Miranda rights, as a prerequisite to a consideration of a confession or statement as evidence).

In State v. Scott, 200 Neb. 265, 263 N. W. 2d 659, we said: "We conclude that the trial court did not err in this case by refusing to give NJI No. 14.52A * * * particularly in view of the fact that defendant did not request it." We now hold that a trial court is not required to give NJI No. 14.52A even if requested.

The defendant contends that the sentence is excessive. It is not. The crime was shocking and indicative of a depraved mind. Any less sentence would depreciate the seriousness of the offense.

No error requiring reversal being found, the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAT L. CLASSEN, APPELLANT.

275 N. W. 2d 91

Filed February 6, 1979. No. 42167.

1. **Evidence: Statutes.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401, R. R. S. 1943.
2. **Evidence: Trial.** The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial.
3. **Criminal Law: Evidence.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
4. _____: _____. The test of the sufficiency of circumstantial

evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Affirmed.

Robert E. Sullivan of Haessler, Sullivan & Inbody, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge.

BLUE, District Judge.

Defendant, Pat L. Classen, was convicted by a jury of the crime of breaking and entering. A motion for new trial was filed and overruled. An appeal was taken to this court.

The evidence at the trial was that sometime between 6:30 p.m., on October 11, 1976, and 6:45 a.m., on October 12, 1976, a grain bin on the Gary Odvody farm near Malmo, Nebraska, was broken into and a quantity of soybeans was removed therefrom. Gary Odvody discovered the burglary and testified that a chain, which was on a gate of a fence protecting the grain bin, was cut and that a number of tools were missing.

There was testimony from several law enforcement officers that they had been conducting surveillance of defendant's pickup and of a pickup belonging to a Ricky L. Jones on the evening of October 11 and the morning of October 12, 1976. The officers lost contact with the vehicles. Defendant's vehicle was last seen at about 2 a.m., on October 12, at a spot 27 to 28 miles from the scene of the crime. The defendant's pickup was found abandoned on a county road in Cass County on October 14, 1976.

A state patrol investigator testified that bolt cutters found in the abandoned vehicle of defendant were the ones that cut the chain on the gate near the grain bin.

Certain tools were found in the pickup truck of Ricky L. Jones and were identified as coming from the Odvody farm.

A quantity of soybeans was found in defendant's truck along with remnants of Sico Craft paper which was similar to that which was inside the grain bin on the Odvody farm. Grain receipts for soybean sales on October 12, 1976, issued to defendant were admitted into evidence.

Ricky L. Jones testified that the defendant had been with him when Jones was caught and subsequently convicted of stealing soybeans in Otoe County, Nebraska, prior to October 12, 1976.

Defendant claims the District Court erred in admitting certain exhibits "since the State failed to show any connection between such evidence and the defendant." Specifically, he claims that exhibits 1 to 11 (tools discovered missing from the site of the burglary simultaneously with the discovery of the burglary); exhibit 12 (bolt cutters identified as those used to cut the chain on a fence which blocked entry to the site of the burglary); and exhibit 14 (soybeans and Sico Craft paper remnants found in the defendant's pickup) were inadmissible in that they were irrelevant evidence.

Section 27-401, R. R. S. 1943, states: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See, also, Rickertsen v. Carskadon, 169 Neb. 744, 100 N. W. 2d 852 (1960); Herman v. Midland Ag Service, Inc., 200 Neb. 356, 264 N. W. 2d 161 (1978).

We believe that the exhibits challenged in this ap-

peal fall within the foregoing statutory definition.

As to the bolt cutters, which defendant claims are irrelevant, the evidence is that the defendant's vehicle was observed in the general area of the crime the evening the crime was committed. The bolt cutters, according to the opinion of the expert witness, were used to cut the chain and the bolt cutters were found in defendant's pickup 2 days after the crime occurred.

The bolt cutters, together with the foregoing evidence, tended to make more probable the fact that the bolt cutters were used to cut the chain and further that it was Classen who used them for this purpose. Therefore, the bolt cutters were relevant.

Classen makes similar objections to the admissibility of soybeans and Sico Craft paper also found in his pickup truck, i.e., that there was no connection between those items and himself. We believe that this evidence was also relevant. First, as noted previously, the defendant was observed, on the evening of the crime in question, driving his pickup truck approximately 27 miles from the scene of the crime. Second, the morning following the crime, 100 to 200 bushels of soybeans were discovered to have been stolen. It was further observed that pieces of tar paper lining the grain bin floor had been torn away. A trail of beans between the tire tracks leading away from the bin was also observed. Only 2 days later, the defendant's pickup truck was impounded and not only were beans and fragments of Sico Craft paper observed in his truck, but a small hole in the bottom of the box towards the front was also observed. A forensic chemist testified at trial that he found nothing that would make the fragments of the Sico Craft paper found in Classen's pickup dissimilar to the samples of tar paper taken from the bin at the scene of the crime. On the day following the crime, there is evidence that Classen sold two loads (110 bushels) of soybeans to the Ben-

son Feed Mill at Ralston, Nebraska.

The defendant argues that the tools which were stolen from the site of the burglary, and later found in Ricky Jones' pickup truck, were inadmissible because no connection was made between the tools and the defendant. However, again the record is sufficient to establish the proper foundation for the admission of this evidence. Mr. Jones admitted in his testimony that he was charged with the same crime that was the subject matter of the defendant's trial and that, to this charge, he entered a plea of guilty to petit larceny. Mr. Jones further testified the defendant had requested to use Jones' pickup truck and on the morning following the occurrence of the crime in question, Jones found his pickup truck had been moved. Approximately 2 days following the occurrence of the crime, when the Jones pickup truck was impounded, authorities discovered in the vehicle not only the tools stolen from the scene of the crime, but also soybeans and scraps of Sico Craft paper. Mr. Jones testified at trial that he didn't believe the tools were in his pickup truck prior to the night his vehicle had been borrowed. The fact that the stolen tools, along with the soybeans and Sico Craft paper, were found in the pickup truck which Classen had asked to borrow, and which was used on the evening of the crime, certainly makes it more probable that it was Classen who used this vehicle to commit the crime in question. This is especially so when it is remembered that there was additional evidence connecting Classen to the scene of the crime, i.e., the bolt cutters, soybeans, and Sico Craft paper found in the vehicle.

The defendant's contention that the tools should not have been admitted is without merit.

The defendant claims he was prevented from having a fair trial because the District Court, over the objection of the defendant, permitted Ricky L. Jones to testify as to a previous alleged act of the defend-

ant of stealing beans in Otoe County, Nebraska. On direct examination, the prosecuting attorney asked Mr. Jones: "Prior to October of '76, were you charged and convicted of a similar charge of taking soybeans from a grain bin?" Mr. Jones replied in the affirmative, and when asked whether he was alone or with someone else when this occurred, Mr. Jones replied that the defendant, Mr. Classen, was with him.

This court has previously stated: "The decision to receive evidence which may show that the defendant has committed crimes other than the one charged in the information, where such evidence shows intent, motive, knowledge, or a course of conduct is one left largely to the discretion of the trial court, * * *" State v. Costello, 199 Neb. 43, 256 N. W. 2d 97 (1977). Section 27-404 (2), R. R. S. 1943, provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In accord with the exceptions enumerated in the foregoing evidentiary statute, the trial court overruled Classen's objection to Jones' testimony regarding the similar prior conviction for the reason that said evidence was properly admissible to show intent, plan, or motive of Classen for the particular crime charged. The jury was so instructed and properly so.

The admission of Mr. Jones' testimony by the trial court is further supported by this court's decision in State v. Moore, 197 Neb. 294, 249 N. W. 2d 200 (1976). In Moore, the defendant averred that the trial court improperly admitted into evidence testimony regarding a robbery committed by the defendant almost 1 month prior to the robbery for which he was

being tried. Finding that testimony concerning the previous robbery was relevant, material, and properly admissible, this court reviewed its previous pronouncements, all of which are equally applicable to the case at bar, to wit:

"We have held that evidence of a separate and distinct crime committed by the accused is admissible in the prosecution of a crime that has an element of a motive, criminal intent, or guilty knowledge. Sall v. State, 157 Neb. 688, 61 N. W. 2d 256 (1953). Where prior offenses of the accused are sufficiently similar to the one charged in the case on trial so that the evidence thereof has probity as to intent, motive, or knowledge, such evidence may be received, and the issue of whether such evidence should be received is generally one left to the discretion of the trial court. Sall v. State, *supra*. See, also, State v. Ray, 191 Neb. 702, 217 N. W. 2d 176 (1974); State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87 (1970); State v. Hoffmeyer, 187 Neb. 701, 193 N. W. 2d 760 (1972); State v. Rich, 183 Neb. 128, 158 N. W. 2d 533 (1968). Another exception to the general rule is that the evidence of another crime is admissible if it establishes a course of conduct, scheme, design, or intent. State v. Hoffmeyer, *supra*. Finally, evidence of another crime is admissible if it is relevant to establishing the identity of the accused. State v. Sharp, 184 Neb. 411, 168 N. W. 2d 267 (1969); State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973)." State v. Moore, *supra*.

Ricky Jones' testimony regarding the prior theft of soybeans revealed substantial similarities to the crime for which Classen was being tried. More specifically, the commission of both offenses included the theft of soybeans from an abandoned farm during the nighttime, when the beans were shoveled into pickups. Hence, that evidence tended to establish Classen's method of operation, scheme, and design. It was therefore admissible.

The defendant alleges the verdict was contrary to

law and not sustained by sufficient evidence. He claims that the evidence was circumstantial.

"The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilty." State v. Journey, 201 Neb. 607, 271 N. W. 2d 320 (1978).

The evidence in this case was sufficient to support the jury finding of guilt, even though the evidence was largely circumstantial. There is no rational hypothesis other than the guilt of the defendant.

The judgment is affirmed.

AFFIRMED.

CARROLL L. RUDAT, APPELLANT, V. R. JAMES PEARSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

275 N. W. 2d 279

Filed February 13, 1979. No. 41861.

1. **Motor Vehicles: Implied Consent Law: Blood, Breath, and Urine Tests.** Fact that appellant consumed alcohol subsequent to time of accident does not make officer's request for blood test unreasonable.
2. _____: _____: _____. Fact that appellant consumed alcohol subsequent to time of accident does not make his refusal to take blood test reasonable.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

R. Steven Geshell and Robak & Geshell, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

Heard before SPENCER, Retired Justice, BOSLAUGH, and WHITE, JJ., and WOLF and SPRAGUE, District Judges.

SPRAGUE, District Judge.

This is an appeal under the provisions of section 60-420, R. R. S. 1943, from an order of the District Court for Platte County affirming an order of the Director of the Department of Motor Vehicles made under the provisions of section 39-669.16, R. R. S. 1943, revoking the motor vehicle operator's license of the plaintiff-appellant Rudat for refusal to give a breath test under the provisions of the implied consent law. § 39-669.16, R. R. S. 1943.

The evidence shows that on February 11, 1977, the plaintiff, Rudat, took his wife to do some shopping in Columbus. While his wife shopped, the plaintiff drank beer in a local bar for about 50 minutes. The plaintiff and his wife prepared to drive home. He collided with another car as he backed out of a parking space. The two drivers went back into the bar to discuss the matter as it was cold outside. The police were called. An officer arrived 35 minutes after the accident occurred. The plaintiff testified he had two more beers between the time the accident occurred and the time the police officer arrived. When the two motorists got into the police car to complete the accident reports, the officer smelled alcohol on the breath of both operators. He requested both men take a preliminary breath test. The plaintiff refused to take the test. Plaintiff was placed under arrest and taken to the police station. He was requested to submit to an accurate test of the alcohol in his blood. Plaintiff, after being read the implied consent advisement, asked to speak to his attorney. The police told him he could call his attorney after a preliminary test. Plaintiff refused. He was then allowed to call his attorney who advised him to refuse to take the test. Plaintiff testified he told the police he refused because he consumed beer after the accident and his attorney had advised him to refuse. The arresting officer denied that the plaintiff informed him of his consumption of beer after the ac-

cident. The officer stated he did not see the accident. Defendant's examiner heard the case on April 6, 1977, and found that plaintiff's refusal to submit to the test was not reasonable.

In this appeal plaintiff asserts: (1) The evidence shows the arresting officer had no reasonable grounds to believe that Rudat was driving a motor vehicle while under the influence of intoxicating liquor, and therefore the request to take a sobriety test was unreasonable; and (2) the evidence shows Rudat's refusal to take the breath test was reasonable, and therefore the actions of the Motor Vehicle Department were arbitrary, capricious, and not supported by the facts or the law.

Even if the evidence is taken in the light most favorable to the plaintiff, and it is conceded that the officer was aware of the plaintiff's subsequent ingestion of an alcoholic beverage after the accident, we nonetheless conclude that the officer had reasonable grounds to request a sobriety test.

The record shows that Rudat admitted he had been operating a motor vehicle and that he had been involved in an accident. The record further shows that the officer on the scene smelled alcohol on Rudat's breath. The officer further observed that Rudat's eyes were bloodshot and that he had difficulty in understanding the officer's instructions. Section 39-669.08 (3), R. R. S. 1943, provides that the officer may request a sobriety test if he determines that there are reasonable grounds to believe that a person [operator] has alcohol in his body and has been involved in a traffic accident. The record clearly supports the officer's determination that such grounds existed. The officer cannot be charged with the duty of determining the relative degree of sobriety of the plaintiff before and after the accident.

The plaintiff argues that his consumption of alcohol following the accident establishes a "reasonable" basis for refusal to submit to the test, as the test

would not represent his blood alcohol content at the time of the accident.

The implied consent laws are intended as a means to obtain evidence of violations of the drunken driving statutes. The results of such a test may be subject to challenge at the time of trial. However, a possible defense to the crime of driving while intoxicated cannot be used as an excuse to refuse to provide evidence, otherwise legally obtained, under the implied consent statutes. The question of the probative value of the evidence is properly raised only at the time of trial.

The court has held in Mackey v. Director of Dept. of Motor Vehicles, 194 Neb. 707, 235 N. W. 2d 394, that the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for a reversal. The plaintiff has clearly failed to carry this burden.

The judgment of the District Court should be and hereby is affirmed.

AFFIRMED.

JEFFREY POKORNY, APPELLEE, V. CITY OF SCHUYLER, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

275 N. W. 2d 281

Filed February 13, 1979. No. 41892.

1. **Public Meetings: Public Policy.** The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable.
2. **Public Meetings: Municipal Corporations: Statutes: Notice.** Where notice is required, a notice of a special meeting of a city council posted in three public places at 10 p.m., on the day preceding the meeting is not reasonable advance publicized notice of the meeting as required by section 84-1411, R. R. S. 1943.
3. **Public Meetings: Municipal Corporations: Property.** Negotiations for the purchase of land need not be conducted at an open meeting but deliberations of a city council as to whether an offer to purchase real estate should be made should take place in an open meeting.

4. **Public Meetings: Municipal Corporations: Statutes: Notice.** An agenda which gives reasonable notice of the matters to be considered at a meeting of a city council complies with section 84-1411, R. R. S. 1943.
5. **Public Meetings: Municipal Corporations: Public Officers and Employees.** Any defect in the call for a special meeting of the council of a city of the second class is immaterial if all members of the council are present and participate in the meeting without objection.
6. **Public Meetings: Municipal Corporations.** Where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

James K. Langdon, McGroarty, Welch & Langdon, P.C., and Donn K. Bieber, City Attorney, for appellants.

Martin A. Cannon of Matthews & Cannon, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, CLINTON, and WHITE, JJ., and KNAPP, District Judge.

BOSLAUGH, J.

This was a suit to declare void the action taken by the city council of the City of Schuyler, Nebraska, on March 16, 1977, and March 25, 1977, relating to the purchase of land for use in the improvement of the sanitary sewage disposal system of the City. The petition alleged that the City had violated the provisions of the open meeting law, sections 84-1408 to 84-1414, R. R. S. 1943. The petition also sought to enjoin the expenditure of public funds or other implementation of the resolution adopted by the city council on March 25, 1977.

The plaintiff is a resident and taxpayer of the City and brought the action on behalf of all taxpayers similarly situated. The defendants are the City and the members of the city council.

The trial court found generally for the plaintiff and enjoined the defendants from carrying out any action authorized at the meetings of March 16, 1977, and March 25, 1977. The defendants have appealed.

The record shows that in 1977 the City of Schuyler, Nebraska, was considering a project to improve its sanitary sewage system. As a part of the project it was necessary to acquire land for use as a lagoon and waste water application area.

On February 15, 1977, the city council held a public hearing on the matter of acquiring a tract of land for that purpose. The tract, which was owned by the Langemeier-Wagner Company, consisted of parts of two adjacent sections. The waste water application area consisted of the south 3,000 feet of the east ½ of Section 24, Township 17 North, Range 3, East of the 6th P.M., in Colfax County, Nebraska, and the south 3,000 feet of the west 400 feet of Section 19, Township 17 North, Range 4 East of the 6th P.M., in Colfax County, Nebraska. The lagoon area was a 42.8-acre tract in Section 24 lying north of the waste water application area.

Prior to the hearing the City had obtained an appraisal which valued the land at $1,700 per acre. This appraisal did not consider severance damage. At the hearing it was disclosed that the utilities board favored purchasing the land for $2,000 per acre, the asking price, because the board felt that condemnation might result in a higher cost to the City. The project was to be funded with 87 percent federal and state funds and both the federal government and the state government had approved the purchase of the tract for $2,000 per acre. The council did not accept the recommendation of the utilities board but voted to obtain a second appraisal to be considered at the meeting on March 15, 1977.

On March 9, 1977, the landowners withdrew their offer to sell the land to the City for $2,000 per acre.

The second appraisal estimated the total damages,

including severance damage, at approximately $74 per acre more than the first appraisal. This appraisal was considered by the council at its regular meeting on March 15, 1977, at which all councilmen were present. The council decided to discuss the appraisal with the landowners and announced that a special meeting would be held the following morning.

A notice of a special meeting of the council to be held on March 16, 1977, was posted in three public places at 10 p.m., on March 15, 1977. A written acknowledgment of receipt of advance notice for the meeting and its agenda signed by the mayor and all councilmen is attached to the minutes of this meeting.

The special meeting convened at 10:30 a.m., on March 16, 1977, with all councilmen present. At 10:39 a.m., the council voted to go into executive session with only the landowners, the board of public works, and the utilities superintendent allowed to remain present. At 11:30 a.m., the council reconvened in open session and voted to "recommend to the Board of Public Works" that the board offer the landowners $2,000 per acre for the tract.

On March 17, 1977, the mayor wrote to the landowners enclosing a copy of the minutes of the special meeting of March 16, 1977, and requesting that the landowners consider further negotiations with the board of public works. On March 18, 1977, the landowners replied to the City, submitting what amounted to a counteroffer, and stating that they anticipated "official action" by the city council at the earliest possible time.

A special meeting of the council was held on March 25, 1977. Notice of this meeting was posted in three public places on March 23, 1977, and all councilmen except Pollard signed a written acknowledgment of advance notice of the meeting and its agenda. At this meeting, with all councilmen present except Pollard, the council adopted a resolution

agreeing to purchase the land for $2,000 per acre contingent upon receipt of the City's federal grant.

Another special meeting of the council was held on March 29, 1977, with all councilmen present at the beginning of the meeting. Notice of this meeting was posted in three public places on March 22, 1977, and all councilmen signed a written acknowledgment of advance notice of the meeting and its agenda. At this meeting the council voted to approve the contract for the purchase of the land, one councilman having left the meeting before this matter had been reached. Attached to the minutes of this meeting is the written contract for the purchase of the land dated March 28, 1977.

Apparently the parties concede that all proceedings of the council were regular through the public hearing and meeting of March 15, 1977. If the council had adjourned that meeting until the following day instead of calling a special meeting for March 16, some of the questions concerning the meeting of March 16 could have been avoided.

Section 84-1411, R. R. S. 1943, requires reasonable advance "publicized notice" of the time and place of each meeting by a method designated by the public body and recorded in its minutes. There is an exception for emergency meetings but no effort was made to comply with the requirements applicable to emergency meetings.

The notice of the meeting of March 16, 1977, was given by a notice posted in three public places at 10 p.m., on March 15, 1977. This could hardly be considered to be reasonable advance publicized notice as required by the statute. The record sustains the finding of the trial court that the notice of the meeting of March 16, 1977, was not reasonable advance public notice as required by section 84-1411, R. R. S. 1943.

The trial court found that the executive session held at the special meeting on March 16, 1977, also

violated section 84-1410, R. R. S. 1943. The statute permits a closed session if it is "clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting." The statute requires that the minutes show "the reason for the closed session."

The minutes of the March 16 meeting do not show the reason for the closed session but it is apparent from the record that the purpose was to negotiate for the purchase of the land. The landowners, the board of public works, and the utilities superintendent were permitted to attend the closed session with the council. The record does not show what happened at the closed session, but after the council reconvened in open session it voted to "recommend to the Board of Public Works that they make an offer of $2,000.00 per acre for the land and damages" to the sellers.

The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable. There is nothing in the law that requires negotiations for the purchase of land to be conducted at open meetings, but deliberations of the council as to whether an offer to purchase should be made is action that should be taken at an open meeting. In view of the entire record in this case the violation appears to be more technical than substantive, but the record sustains the finding of the trial court that the closed session violated section 84-1410, R. R. S. 1943.

The trial court found the agenda for the special meetings on March 16 and March 25, 1977, were defective under section 84-1408, R. R. S. 1943. Section 84-1411, R. R. S. 1943, requires that the notice contain an agenda of the subjects known at the time of the notice or a statement that the agenda is available at the principal office of the public body. The purpose of the agenda requirement is to give some notice of

the matter to be considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting.

The agenda for the March 16 meeting contained this item: "2. Lad (sic) appraisals discussion." The agenda for the March 25 meeting contained this item: "Discussion of terms of land acquisition contract." These items, if considered separately, would not furnish much notice of the matter to be considered by the council. But, if they are viewed in the light of the entire record then it is apparent that few persons would be misled as to the nature of the matter to be considered by the council. The purchase of land for the sewage disposal improvement project had been an item of business for some time at the previous council meetings and the agenda for those meetings had contained an adequate description of the matter to be considered by the council. Although technically deficient, the agenda items alone would not destroy the validity of action taken at the March 16 and March 25 council meetings.

The trial court also found that there had been no compliance with section 17-106, R. R. S. 1943, with respect to the meetings of March 16 and March 25. The finding in regard to the meeting of March 16 was incorrect because all councilmen were present and participated in the meeting without objection. Under these circumstances a defect in the call is immaterial. Magneau v. Fremont, 30 Neb. 843, 47 N. W. 280; Nelson v. City of South Omaha, 84 Neb. 434, 121 N. W. 453.

At the meeting on March 25, councilman Pollard was absent. The absence of a written call specifying the business to be transacted is an additional objection to the validity of the March 25, 1977, meeting.

The important question in this case is what was the effect of the invalid meetings of March 16 and March 25. The trial court enjoined the defendants

permanently "from carrying out any action authorized" at the meetings of March 16, 1977, and March 25, 1977. Carried to its logical conclusion this order would prevent the City from ever purchasing the land. We do not think this was the intent or purpose of the public meeting law.

It is a general principle of law that where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred. See 5 McQuillin, Municipal Corporations, § 16.93, p. 299; 56 Am. Jur. 2d, Municipal Corporations, § 508, p. 559, § 510, p. 560; 63 C. J. S., Municipal Corporations, § 1009, p. 597. We think this principle is applicable here.

The effect of the invalidity of the meetings of March 16 and March 25 is the same as if the meetings had never occurred. No action authorized at those meetings could be sustained by reliance upon the proceedings of the council at those meetings. This does not mean the council could not authorize the purchase of the land at a subsequent meeting which complied with all statutory requirements. This is what happened at the meeting of March 29, 1977.

The meeting of March 29, 1977, was a special meeting of the council attended by all members of the council. Notice of the meeting was posted in three public places on March 22, 1977. The agenda stated that an item of business at the meeting would be "approval of contract with Langemeier-Wagner Company requested by EPA." This was a substantial compliance with all statutory requirements concerning notice.

The minutes show that the city attorney read the land contract to the council in open meeting which was followed by a discussion. The council then voted to approve the contract. The fact that one councilman had left the meeting before this item of

business was reached is immaterial. The action of the council at the meeting of March 29, 1977, cured the defects which resulted from the invalidity of the meetings of March 16 and March 25. See 56 Am. Jur. 2d, Municipal Corporations, § 497, p. 548, § 508, p. 559.

The findings of the District Court did not support the judgment which was rendered. The plaintiff was not entitled to injunctive relief. The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROL HANSON, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

275 N. W. 2d 286

Filed February 13, 1979. No. 41896.

Principal and Agent: Municipal Corporations: Public Officers and Employees. The delegation of the performance of a ministerial act by a principal to an agent, and the performance by the agent consistent with his instructions, makes the act that of the principal.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Mary Cannon Veed of Matthews & Cannon, P.C., for appellant.

Kent N. Whinnery, Deputy City Attorney, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and SPENCER, Retired Justice, and BARTU, District Judge.

WHITE, J.

The plaintiff for herself and 28 "card" employees of the City of Omaha brought this action against the City for additional pay due them for working on De-

cember 24, 1976, and on December 31, 1976. The action is based on Article XVIII of the employment contract of the City of Omaha, and the Omaha City Employees Union.

Section 1 of Article XVIII provides as follows: "SECTION 1 — The following, in addition to any other days designated by the Mayor, are holidays and shall be observed in accordance with the dates established by the Federal Government or otherwise designated by the Mayor.

"New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Day, Employees Birthday

"SECTION 2 — For those employees working under the card system, the holidays shall be observed in accordance with Section 1 hereof. * * *."

Card employees, as distinguished from regular employees of the City who regularly work a Monday to Friday 5-day week, work for 6 days and then receive 2 days off. The card employees generally consist of police and fire employees. The plaintiff and assignors are civilian police employees.

The parties concede that the federal government holiday designation for Christmas 1976 and New Year's 1977 were December 24 and December 31, 1976.

Unless other holiday dates were effectively designated by the mayor in accordance with section 1, the parties concede the plaintiff and her assignors, each of whom worked on December 24 and December 31, were entitled to pay of 1½ times regular pay instead of the regular pay received by them.

On November 22, 1976, the mayor of Omaha issued a proclamation that the city employees "will observe the preceding Fridays as their Christmas and New Year's holidays." The preceding Fridays were December 24 and December 31 respectively.

It became apparent to all concerned that the desig-

nation did not take into consideration the card employees and had the effect of being unfair to some of them. As a result, a conference was had between the mayor and assistant city attorney Thomas Young. Young, on December 3, 1976, issued a memorandum distributed to all city departments employing "card" employees to the effect that with regard to card employees: "* * * these two (2) holidays will be celebrated in accordance with the Collective Bargaining Agreements, i.e. on Saturday, December 25, 1976, and Saturday, January 1, 1977."

The trial court held that the memorandum was, in fact, a designation by the mayor of the holiday observance and dismissed the plaintiff's petition. We affirm.

Plaintiff first points out that the memorandum itself does not correctly reflect the collective bargaining agreement, since the agreement specifies that the holidays will be celebrated on the days designated by the federal government, unless otherwise designated by the mayor. The memorandum was not artfully drawn but it does not mislead - it definitely specifies the dates for observance of the holidays.

The crucial question is whether the memorandum was the designation of the mayor.

There is no dispute that the memorandum was prepared at the direction of the mayor and reflected his decision.

The delegation of the performance of a ministerial act by a principal to an agent, and the performance by the agent consistent with his instructions, makes the act that of the principal. Wilken v. Capital Fire Ins. Co., 99 Neb. 828, 157 N. W. 1021; 2 McQuillin, Municipal Corporations (3d Ed.), § 10.41, p. 854.

The memorandum was the act of the mayor as specified by the contract. Plaintiff's contentions are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

KENNETH D. ERICKSON, APPELLEE, V. MARY L. ERICKSON, APPELLANT.

275 N. W. 2d 345

Filed February 13, 1979. No. 41920.

1. **Divorce: Child Support: Parent and Child: Appeal and Error.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. In determining these circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. A decision on this matter rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion.
2. **Divorce: Child Support: Notice: Hearings.** Allowances for child support are not final but are subject to modification when required, after notice and hearing.
3. **Divorce: Property: Appeal and Error.** A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal.
4. **Divorce: Property: Alimony.** 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.
5. **Divorce: Alimony.** The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed as modified.

E. H. Powell, for appellant.

David B. Downing, for appellee.

Heard before SPENCER, MCCOWN, CLINTON, and WHITE, JJ., and WARREN, District Judge.

WARREN, District Judge.

This is an appeal from a dissolution of marriage decree. Respondent-appellant, the wife, attacks the

trial court's determination of child support, the division of property, and the court's failure to award alimony to her.

The parties were married on December 7, 1968. Two children, ages 3 and 6 years at the time of trial, were born of the marriage.

Petitioner is an alcoholic, also suffering from hypoglycemia, who sold fertilizer and hauled propane until the parties purchased and moved onto 80 acres northeast of Superior, Nebraska, in 1974. Since that time petitioner has done sporadic farm work. He is a high school graduate.

Respondent, age 29 at the time of trial, had 2½ years of college before her marriage and is presently attending nursing school in Hastings, from which she will graduate as a registered nurse in September 1980. She worked as a bookkeeper and cashier for the city of Superior in 1969 and 1970, contributing between $2,000 and $3,000 in wages to the family each of those years. Since then, the adjusted gross income of the parties, consisting entirely of petitioner's wages and the farm income of the parties, has, with one exception, steadily declined from $7,397.19 in 1971 to $3,428.36 in 1976. The exception was 1975 when petitioner's father hired him and paid him gross wages of $6,904. Other income in 1975 totaled $3,349.03.

The standard of living of the family has been meager. Respondent's parents helped make the dilapidated farm home liveable and contributed heavily to the support of their daughter and the two children. Petitioner's father contributed the use of his farm machinery. Respondent and the two children left the family home on December 20, 1976, and have resided since that time in the home of her father, E. H. Powell, an Aurora attorney. Petitioner has not paid any child support or temporary alimony. The court awarded custody of the two minor children to respondent, with reasonable rights of visitation in

petitioner, and ordered petitioner to pay a total of $125 per month child support.

Respondent assigns as error the trial court's allowance of child support of only $62.50 per child per month. While this court has judicially noticed in Pfeiffer v. Pfeiffer, 201 Neb. 56, 266 N. W. 2d 82 (1978), that under present economic conditions $100 per month is far less than the actual cost of caring for a child in an acceptable manner, there are circumstances where the husband simply does not have sufficient earnings to pay such an amount. Respondent urges total child support of $150 per month should have been allowed. However, the trial court recognized that to order an admitted alcoholic of long standing, with an average gross income of approximately $285 a month, to pay more than 50 percent of his income as child support would be an exercise in futility. Without countenancing the conduct of the petitioner, the court must recognize the very real disability existing by reason of petitioner's alcoholism. As the trial court noted, the option remains with respondent to apply for an increase in child support if petitioner's income materially increases.

"Allowances for child support are not final but are subject to modification when required, after notice and hearing." Morris v. Morris, 201 Neb. 479, 268 N. W. 2d 431 (1978).

"[I]n determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. A decision on this matter rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion." Hermance v. Hermance, 194 Neb. 720, 235 N. W. 2d 231 (1975). We conclude that the trial court did not abuse its dis-

cretion in fixing child support.

The 80-acre dryland farm was purchased in 1974 for $25,000, the purchase price being obtained from an $18,000 loan from the Farmers State Bank in Superior, which was cosigned by petitioner's father, Leslie Erickson; and from a $7,000 direct loan from respondent's father, E. H. Powell. In 1975, the 80 acres was mortgaged by the parties to the Farmers Home Administration for $15,000, and the proceeds were used to repay E. H. Powell the $7,000 loan, and to reduce the indebtedness to the Farmers State Bank by $8,000. At the time of trial, the parties owed FHA $15,215 on the real estate mortgage. In addition, Kenneth Erickson owed the Farmers State Bank a total of $17,552.63 on two unsecured notes, one of which was cosigned by his father, Leslie Erickson, in the amount of $15,008.63. This bank indebtedness is not a lien on the 80-acre farm. Opposing expert witnesses placed the value of the farm at the time of trial at $25,200 and $30,000 respectively. The $30,000 appraisal was professionally made on the basis of comparable sales and was clearly entitled to greater weight and credibility than the $25,200 appraisal by an auctioneer-real estate broker.

The court awarded the 80 acres to petitioner, subject to the FHA mortgage, and ordered him to pay the entire bank debt. While the $17,552.63 bank debt was not the individual debt of respondent, it is a debt of the marriage, and $10,000 plus interest of the amount remains unpaid from the original loan used to purchase the 80 acres. The remaining portion appears to have been from unpaid interest and normal farm operating loans. It is obvious that even with a $30,000 valuation of the 80 acres, the total debt of $32,767.63 left petitioner in a precarious financial position. Balancing the excess of debts over assets, the court awarded petitioner a 1975 Chevrolet pickup which was unencumbered. Respondent was awarded a 1976 Chevrolet station wagon, but her testimony

was uncontradicted that the funds to purchase the vehicle were a recent gift to her alone from her father and title was placed in the donor and donee jointly. As such, it was not property accumulated by the joint efforts of the parties.

The only remaining assets consisted of household goods, tools, and an old Ford tractor purchased in 1974 for $875. The bulk of the household goods and furniture was awarded to respondent. She complains of the award of such items as the tractor, drapes, carpet, refrigerator, stove, window air-conditioner, and tools to the petitioner. Such items had little market value and the court properly determined that their principal utility was in connection with the use of the farm. Respondent claimed that some of the items so awarded to petitioner were gifts to her, but the evidence was entirely lacking in the degree of specificity necessary for the court to be able to determine which items were brought into the marriage by the respective parties, which were gifts, and whether the gifts were to the marriage partners or specifically to one of the parties to the exclusion of the other.

The sad fact is that after payment of their debts the parties had little or no equity in property to divide. The court equitably divided what there was.

"A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal." Nickel v. Nickel, 201 Neb. 267, 267 N. W. 2d 190 (1978).

The final assignment of error is the most compelling. Respondent contends she should have been awarded alimony.

"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, in-

cluding 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." § 42-365, R. S. Supp., 1978; Morris v. Morris, 201 Neb. 479, 268 N. W. 2d 431 (1978).

"The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness." Baker v. Baker, 201 Neb. 409, 267 N. W. 2d 756 (1978).

"Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion." Hansen v. Hansen, 199 Neb. 462, 259 N. W. 2d 912 (1977).

"Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion." Van Cleave v. Van Cleave, 201 Neb. 211, 266 N. W. 2d 900 (1978).

A review of the record convinces us the trial court did not adequately consider the fact that respondent interrupted her nursing education by her marriage to petitioner and her subsequent raising of the children; and that she has now had to leave the family home, establish a new home for herself and the children, and undertake a 3-year program of education before she will be able to provide sufficient earnings to make up the difference between the actual cost of supporting the two small children and the meager amount petitioner is able to pay. She will have a difficult and expensive period of readjustment and no assets with which to pay for it. In addition, petitioner paid no temporary child support or temporary alimony after the December 1976 separation, and he

has had the use and possession of the farm home and the 80 acres since that time. We find that this failure to allow alimony amounts to an abuse of discretion, and that respondent should be allowed alimony in the sum of $5,000 payable by petitioner on or before December 1, 1979, which alimony judgment shall not be terminable by the death or remarriage of either party, shall bear interest at 8 percent from the due date, and shall be a second lien on the 80-acre farm subject only to the FHA mortgage.

Costs are taxed to the petitioner, including an attorney's fee of $300 for respondent's attorney for his services in this court.

The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

MARILYN L. FITE, WIDOW OF LARRY I. FITE, DECEASED, APPELLANT, V. AMMCO TOOLS, INC., APPELLEE.

275 N. W. 2d 291

Filed February 13, 1979. No. 41985.

Workmen's Compensation: Evidence. A workmen's compensation award can not be based on possibility or speculation, but an ultimate fact fairly and reasonably inferable from facts and circumstances proved may be taken as established.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded.

Yost, Schafersman, Yost, Lamme & Hillis, for appellant.

William M. Lamson, Jr., and John K. Green of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

WHITE, J.

Larry I. Fite was killed when his airplane crashed on Wednesday, July 2, 1975. This suit by his widow

against his employer is before us for the second time on appeal from the Workmen's Compensation Court. In Fite v. Ammco Tools, Inc., 199 Neb. 353, 258 N. W. 2d 922, we reversed an evidentiary ruling of the compensation court and instructed it to admit without limitation three statements made by the decedent which came within the "declarations of intent" exception to the hearsay rule. That opinion contains a more detailed statement of the facts.

Upon remand, the Workmen's Compensation Court found that the plaintiff had not met her burden of showing that the decedent was acting within the scope of his employment at the time of his death. We find the evidence to the contrary to be so convincing that we do not hesitate to say that the findings of that court are clearly erroneous. This court has held that a workmen's compensation award cannot be based merely on possibility or speculation. See Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808. In the present case it appears, however, that the finding that decedent was *not* in the course of his employment is based on mere speculation.

The primary consideration leading to the decision of the compensation court was the fact that the crash site near the Greenwood Interchange of Interstate Highway No. 80 was not on a direct line from the decedent's takeoff point in Fremont to either Lincoln or Omaha, his two announced business destinations.

The deviation, however, was small. The decedent had made separate statements on the morning of the crash to his wife, his father, and a neighbor to the effect that he was on his way to work. He used the airplane rarely for pleasure and regularly for business. He was a salesman-serviceman for the defendant in a large territory. As is typical of similar jobs, he had substantial freedom from supervision in arranging day-to-day work activities. He was to notify his superior if he would be taking time off. He had notified his superior that he was going to take a

vacation over the weekend immediately preceding his death; however, there was no such indication that he would be taking time off on the date of his death. His superior testified that the decedent would work 10-hour days, 5 to 6 days a week. He had business appointments in both Omaha and Lincoln either on or near the date of his death.

What was said in Kirkpatrick v. Chocolate Sales Corporation, 127 Neb. 604, 256 N. W. 89, is almost directly applicable: " 'An ultimate fact, fairly and reasonably inferable from facts and circumstances proved, may be taken as established.' Struve v. City of Fremont, 125 Neb. 463.

"The employment, the nature of the employee's duties, the salary, the accident and resulting death are shown without dispute. The employee was not a day laborer with regular hours in an industrial plant. He was a division superintendent; had three detail men under him in the Omaha office; was required to travel; called at all the jobbing places in Nebraska; * * * At his home in Omaha, on the evening of the accident, he said goodbye to his wife and stated he was going to Lincoln. * * * Later, the same evening, he called his wife by telephone and said: 'Well, goodbye, I am going now.' * * * Evidence of these facts is undisputed. There is nothing in the record to indicate he started to Lincoln for his own pleasure or business. *If he started on the business of his employer and was accidentally injured on the way, deviation from the most direct route, if implied from circumstances, would not necessarily defeat a recovery. Keebler v. Harris, 120 Neb. 739. It may fairly and reasonably be inferred from competent evidence not contradicted that the employee was injured on his way to Lincoln and that the fatal accident arose out of and in the course of his employment, within the meaning of the workmen's compensation law* * *." (Emphasis supplied.)

Without the possibility of testimony of the decedent,

the evidence that he was in the course of his employment at the time of his death, though circumstantial, is convincing. The decision of the Workmen's Compensation Court is reversed and remanded.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion because I believe the majority of the court has, in this case, disregarded fundamental rules applicable to our review of findings of the Nebraska Workmen's Compensation Court. While the opinion purports not to review de novo, it does so in fact.

The plaintiff, in a workmen's compensation case, just as in any other case, has the burden of proving his cause of action by a preponderance of the evidence. It was the plaintiff's burden to establish that the death arose out of and in the course of the employment. § 48-101, R. R. S. 1943; Reis v. Douglas County Hospital, 193 Neb. 542, 227 N. W. 2d 879; Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410. The term "in the course of" refers to the time, place, and circumstances of the accident. Mauser v. Douglas & Lomason Co., 192 Neb. 421, 222 N. W. 2d 119. All this means under the circumstances of this case is that it must be proved that at the time the accident occurred the decedent was going to or coming from a job for his employer.

The evidence in this case is such that the Nebraska Workmen's Compensation Court could find the plaintiff had failed to prove both the "arising out of" and "in the course of" elements of the cause of action. Several factors in the evidence support the conclusion that the decedent was not in the course of his employment when the accident occurred. The preponderance of the evidence, in fact, seems to point that way. These factors are: (1) There is no direct evidence the decedent had any business appointment in either Omaha or Lincoln on the day of the accident. (2) The invitation of the decedent to

the witness Nielsen to have the witness accompany him on a flight may reasonably be construed to be a social invitation for a joyride in a new airplane. There appears to have been no reason for decedent to have gone with Nielsen to either Lincoln or Omaha on a job of work. (3) The flight path as indicated by the location of the crash is not indicative of a trip to either Lincoln or Omaha, but rather of random flight, although this item, as we later point out, is really not a determinative factor. (4) There was no radio contact by the decedent with the airports at either proposed destination, which communication would be routine if he intended to land at either place. (5) The decedent did not contact any customer, either the day before or the morning of the flight, to advise of his coming. (6) Although the decedent told his wife he had work to do when he left home, his activities from 8 a.m., to 10:30 or 11 a.m., of the day of the accident are wholly unaccounted for. (7) The court was not required to believe the testimony of the decedent's wife as to her conversation with her husband just before he left.

All of the evidence recited in the opinion of the court does not demonstrate that the findings of the Workmen's Compensation Court are clearly wrong. The court simply draws a different inference based upon the cold record and not having heard the testimony of the witnesses. Salinas v. Cyprus Industrial Minerals Co., 197 Neb. 198, 247 N. W. 2d 451; Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92.

The discussion in the opinion and the citation of authority on deviation from route is not on point for it assumes the very fact which must be proved, viz., that decedent was in the course of his employment at the time of the crash. Keebler v. Harris, 120 Neb. 739, 235 N. W. 328, cited by the court, is good law, but it simply does not apply until the basic premise is proved.

STATE OF NEBRASKA, APPELLEE, V. GERALD M. HARRINGTON, APPELLANT.

275 N. W. 2d 294

Filed February 13, 1979. No. 42032.

1. **Criminal Law: Trial: Evidence: Sentences.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.
2. **Criminal Law: Trial: Sentences.** Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

Mac H. McConnell, for appellant.

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

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

BRODKEY, J.

Defendant, Gerald M. Harrington, appeals to this court from a sentence imposed upon him by the District Court for Madison County, following his plea of nolo contendere to an information filed against him charging him with committing the offense of forgery of a power of attorney. The court sentenced him to serve a term of 2 years in the Nebraska Penal and Correctional Complex, and also imposed a fine of $1. Except for one matter which will be hereinafter discussed, this case is for all intents and purposes an excess sentence appeal. Appellant makes two assignments of error: (1) The District Court erred by taking judicial notice of allegations and statements not contained in the presentence investigation report; (2) the District Court's sentence of 2 years

in the Nebraska Penal and Correctional Complex was excessive and an abuse of discretion.

Appellant, at all times material to the incidents involved herein, was a member of the Nebraska State Bar Association, and a practicing attorney in Plainview, Nebraska, although he has since surrendered his license to practice law in this state. The record reveals that appellant was attorney for the executor of the estate of one Karl Malmstrom. It appears that as the result of excessive drinking, gambling, and resulting financial pressures, he became in need of substantial sums of money. The executor of the estate turned over to him, as part of the distribution of the estate, two drafts of approximately $26,000 each, payable to certain devisees of the deceased who resided in Sweden, which drafts were to be mailed to them by appellant. Instead of so doing, appellant devised the scheme of opening a bank account in the names of the payees of the drafts in a bank in Norfolk, Nebraska. He then forged a power of attorney, presumably running from Birger Malmstrom and Selma Persson, the two devisees, appointing him their true and lawful attorney in fact "to open a checking account at any Bank in Norfolk, Nebraska, and to deposit the proceeds thereof into said account; to see to the invest [sic] of the proceeds of any funds coming into our possession and having authority and full power to do everything whatsoever requisite or necessary to be done in the premises, as fully as we could or might if personally present, * * *." Appellant then forged the names of the purported grantors of the power of attorney on the instrument, forged the name of his secretary on the acknowledgment to the instrument, and also placed his secretary's notary seal on the acknowledgment, all without her knowledge or consent. Thereafter, from time to time, appellant periodically withdrew sums from that bank account, using the above forged power of attorney for that purpose. The pro-

ceeds of the withdrawals were used for his own personal use in paying off his own debts and obligations, and for other purposes, including gambling, with the result that almost the entire bank account was ultimately withdrawn.

We first discuss appellant's first assignment of error that: "The District Court erred by taking judicial notice of allegations and statements not contained in the Presentence Investigation Report." The matters about which the appellant complains allegedly took place during appellant's sentencing, subsequent to his plea of nolo contendere to the charge against him. The record reveals that at the sentencing, the court reviewed and analyzed the factual situations of certain similar, but not identical, Nebraska cases, and reviewed the sentences imposed upon the defendant in each of those cases. Among those cases discussed by the court at the sentencing were State v. Schmidtline, 199 Neb. 242, 257 N. W. 2d 707 (1977); State v. Trout, 199 Neb. 236, 257 N. W. 2d 703 (1977); State v. Savin, 195 Neb. 501, 238 N. W. 2d 911 (1976); and State v. McMullen, 195 Neb. 796, 240 N. W. 2d 844 (1976). The court felt that the factual situations set out in the above cases were sufficiently similar to justify the sentence imposed upon the appellant in this case. After analyzing and discussing the foregoing cases, the court continued, stating: "I think not disregarding the fact that you engaged in a deliberate and premeditated course of conduct over a period of 42 days which involved 5 separate incidents of embezzlement; while you're not charged with embezzlement, I think I'm entitled to consider that and have to consider that. I have to consider that it's a crime of some magnitude, involving $52,994.76 to be exact, by a man who had practiced his profession for more than ten years, in which you deceived the clients you were representing, the executor you were representing and the Court that was administering the estate.

"I have all the sympathy and compassion in the world for your family, but I don't for you, Mr. Harrington. You have disgraced yourself and your profession; and the Court finds that any sentence other than incarceration will depreciate the seriousness of the offender's crime and promote disrespect for the law, and it will be the judgment of the Court that you be and hereby are sentenced to imprisonment in the Nebraska Penal and Correctional Complex, * * * for a term of two years and that you pay a fine of $1. * * *." Appellant complains of the statement of the court that he took into consideration that appellant had committed five separate embezzlements, when appellant was not charged with embezzlement, nor had he been convicted of embezzlement, but on the contrary had been charged and convicted of the crime of forgery. Contrary to the claim of the appellant, we do not believe the court took judicial notice of any "allegations or statements." The court's comments were based entirely on facts contained in the record in this case; and the confusion, if any, clearly arises from the fact that the same background and factual situation may give rise to more than one crime. It should be noted that the court in its comments did not state that the appellant had been *convicted* of five charges of embezzlement but merely that his course of conduct over a period of 42 days involved five separate incidents of embezzlement. This, we believe, is amply borne out by the record. Appellant admitted he took the two drafts and the power of attorney to the bank at Norfolk and deposited $35,000 of the face amount of the drafts, taking out the further sum of $17,994.76 in a cashier's check. He also described the disposition of the latter funds and its application to his personal debts and expenditures of various kinds. He also admitted that he went back to the bank 12 days later, on June 7, and took out a cashier's check for $12,500, the proceeds of which were also applied to personal indebted-

ness. Six days later, on June 13, he withdrew an additional $9,400 from the Norfolk bank which he used to take a trip to Las Vegas in the hopes of winning money at gambling. Then 11 days later, on June 24, he withdrew an additional $2,000, which he apparently used to attend a high school class reunion and also for gambling. Finally, 12 days later, in July, he withdrew the last $10,000 from the account, and deposited it in the Plainview bank. Of this latter sum $2,000 was a cash withdrawal and the balance was in cashier's checks. This withdrawal also was used for gambling, debts, etc.

Therefore, while it is clear that the charge against the appellant in this case was for forgery, by virtue of his forging the power of attorney which enabled him to obtain the funds belonging to the devisees of the estate, nevertheless the evidence reveals that appellant unlawfully appropriated to his own use money entrusted to him for transmission to the devisees in Sweden, and we think it is clear that the court not only could, but properly did, consider these facts in determining the proper sentence to be imposed upon the appellant, notwithstanding the fact that the same facts might have been the basis for prosecution for another crime or crimes than the one with which he was actually charged. In State v. Miller, 199 Neb. 19, 255 N. W. 2d 860 (1977), we stated: "A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations." We determine that appellant's first assignment of error is without merit.

We also determine that appellant's second assignment of error, that his sentence of 2 years plus a fine of $1 was excessive and an abuse of discretion, is

likewise without merit. Under section 28-601, R. R. S. 1943, the penalty for the offense of forgery in effect at that time was imprisonment in the Nebraska Penal and Correctional Complex for any space of time not exceeding 20 years nor less than 1 year, and the payment of a fine not exceeding $500. It is also well established that where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Stroud, 200 Neb. 27, 261 N. W. 2d 777 (1978). Not only is the sentence imposed by the court well within the above guidelines, but it is clear the court gave considerable thought to the proper sentence to be imposed and analyzed other cases with similar facts to those of the instant case, in which equal or greater penalties had been imposed. Also, we are not unmindful of what we stated in State v. Savin, 195 Neb. 501, 238 N. W. 2d 911 (1976): "The fact the defendant was a lawyer and callously abused the trust that had been placed in him justified a greater sentence than might have been imposed upon a person not occupying the professional status of the defendant." The sentence imposed was justified, and we agree with the trial court that any sentence other than incarceration would depreciate the seriousness of the offender's crime and promote disrespect for the law.

No error appearing in the record, the judgment and sentence of the trial court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES R. NEWTON, APPELLANT.

275 N. W. 2d 297

Filed February 13, 1979. No. 42062.

Post Conviction: Motions, Rules, and Orders: Pleadings. After a

first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

James R. Newton, pro se.

Paul L. Douglas, Attorney General, and Sharon M. Brueggemann, for appellee.

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

MCCOWN, J.

This is a post conviction proceeding to vacate and set aside a 1974 conviction and sentence for statutory rape. The District Court denied the petitioner's motion for post conviction relief without granting an evidentiary hearing and this appeal followed.

On March 8, 1974, the petitioner was convicted by a jury of the offense of statutory rape under former section 28-408, R. R. S. 1943, now repealed. He was sentenced to imprisonment for not less than 10 nor more than 15 years. On direct appeal this court affirmed the conviction and sentence. See State v. Newton, 193 Neb. 129, 225 N. W. 2d 562.

On April 14, 1975, petitioner filed a first motion for post conviction relief. The District Court denied relief because each of the grounds for post conviction relief had been raised, argued, and presumably decided adversely to petitioner in the direct appeal. The petitioner appealed the denial of post conviction relief to this court but on May 14, 1975, dismissed the appeal on his own motion.

On March 3, 1978, petitioner again filed a motion for post conviction relief alleging, for the first time, that the statute under which he was convicted was

unconstitutional because it was vague and denied him equal protection of the law. The District Court denied the motion for post conviction relief without an evidentiary hearing and this appeal followed.

The basis of petitioner's constitutional complaint is that only males and not females could be convicted under the statute. The overwhelming weight of authority is that such a sex classification under a statutory rape statute similar to section 28-408, R. R. S. 1943, is fair and reasonable, and does not deny males the equal protection of the laws. See, State v. Witt, 310 Minn. 211, 245 N. W. 2d 612; Flores v. State, 69 Wis. 2d 509, 230 N. W. 2d 637. However, it is unnecessary to reach that issue in this case.

Since State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826, this court has consistently held that after a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. See, also, State v. Haskett, 194 Neb. 523, 233 N. W. 2d 782; State v. Smith, 188 Neb. 388, 196 N. W. 2d 918. The grounds relied upon by the petitioner for post conviction relief in the case now before us were available to him at the time his first post conviction motion was filed.

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

AFFIRMED.

LENARD SUHR, APPELLEE, V. CITY OF SCRIBNER, APPELLANT.

275 N. W. 2d 596

Filed February 20, 1979. No. 41750.

1. **Trial: Pleadings: Juries.** Issues of liability which have not been pleaded should not be submitted to the jury for determination.
2. **Trial: Pleadings: Damages: Juries.** Claims for damages which do not arise from the issues pleaded should not be submitted to the jury.
3. **Trial: Evidence: Damages: Juries.** Claims for damages should not be submitted to the jury when the evidence relating thereto is not sufficient to enable the jury to determine the amounts of such damage with reasonable certainty.
4. _____: _____: _____: _____. A party seeking damages must furnish appropriate data to enable the trier of fact to find such damages without resort to conjecture or speculation.
5. **Leases: Damages.** The measure of general damages for wrongful eviction of a lessee is the rental value of the leased premises less the amount of rent reserved for the remaining portion of the term. If no amount of damage is proved, nominal damages will be allowed.
6. _____: _____. Special damages for wrongful eviction may be awarded when such damages are certain and the natural result of the wrong.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with directions.

Hurt and Gallant, for appellant.

Kuhlman & Krafka, for appellee.

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

KUNS, Retired District Judge.

This is an action for damages for wrongful eviction brought by Lenard Suhr, the plaintiff and appellee, against the City of Scribner, the defendant and

appellant, in the District Court for Dodge County, Nebraska. Appellant assigns error against an adverse judgment. We reverse and remand with instructions.

In his petition, appellee alleges the execution of a lease by which the appellant leased to him a 1 1/2-acre tract of land for the period of 5 years from October 19, 1973, for the operation of a landfill dump. Appellee agreed to operate the dump in accordance with law, to keep the dump open to the public, and to charge fees for the use thereof at rates fixed by agreement of the parties. No rent was reserved by lessor. Appellee operated the dump until June 7, 1975, when the appellant wrongfully locked him out and would not allow him to operate the dump. The allegations of damage and prayer for relief will be referred to in later portions of this opinion. Appellant's answer was a general denial. At the trial, appellant moved for a directed verdict both at the conclusion of appellee's case-in-chief and at the conclusion of all the evidence, upon the grounds that the evidence was not sufficient to support a verdict and that the evidence of damages was improper, speculative, and conjectural. Both motions were overruled. The court submitted the questions of wrongful eviction and of damages. The jury returned a verdict for the appellee and assessed damages. Judgment was entered thereon. Appellant concedes that the finding by the jury of wrongful eviction was based upon conflicting evidence and makes no contention of error in that respect. Error is assigned as to the overruling of the motions to direct the verdict on damages.

The appellee testified he first secured a lease for the operation of the city dump in 1968, and that the same was rewritten upon the same terms in 1973, so that he could use it to establish his credit for the purchase of a caterpillar tractor; that he was paid a fee or salary by the appellant for the maintenance of the

city dump; that he also entered into a separate oral lease with appellant for the use of a 17-acre tract of land adjacent to the city dump; and that after the appellant filed an injunction action against him, he secured the dissolution of a temporary restraining order and the dismissal of such action. There is neither pleading nor evidence of the terms and conditions of the employment contract or the oral lease or any breach thereof by appellant. It does not appear that appellant gave bond for the temporary restraining order or that its action was filed maliciously. In rudimentary form, these were separate causes of action and should have been separately stated and numbered. § 25-805, R. R. S. 1943. The appellee, however, failed as to each to allege a duty on the part of appellant, a breach thereof, and the causation of damage. Even though his theory of the case involved these issues, the court was correct in not submitting such issues of liability. Swartz v. Peterson, 199 Neb. 171, 256 N. W. 2d 681; Schmidt v. Johnson, 184 Neb. 643, 171 N. W. 2d 64. Issues of special damages arising from these extraneous causes of action also became immaterial, even though they were mentioned in the evidence and the trial court should have sustained the motions for directed verdict as to such issues. In this way, the following claims from special damage should have been withdrawn entirely from consideration by the jury: (1) Lost profit from the fee or salary for maintaining the dump; (2) lost income from loading and hauling sand from the 17-acre tract; (3) lost profit from farming said tract; (4) unreimbursed expense of clearing trees and brush from said tract; (5) cost of defending appellant's injunction action; and (6) damage from detention of appellee's farm machinery during pendency of temporary restraining order.

We come now to the matter of the damages caused by the wrongful eviction of the appellee. The gen-

eral rule is that the measure of damages for wrongful eviction is the difference between the rental value of the premises for the remainder of the term and the amount of rent reserved. Goetz Brewing Co. v. Robinson Outdoor Advertising Co., 156 Neb. 604, 57 N. W. 2d 169; Jarman v. Sexton, 130 Neb. 453, 264 N. W. 305; Philips v. Bossung, 108 Neb. 658, 189 N. W. 172. Special damages may be awarded where such damages are certain and the natural result of the wrong. Shutt v. Lockner, 77 Neb. 397, 109 N. W. 383. The appellee here does not allege or pray for general damages; there is no evidence of the rental value of the leased premises. The remaining questions relate to the claims of special damage.

Two items which will be considered together involve the claim of an annual loss of $250 from the sale of salvage for a total loss of $850; and the claim of a $30 per month loss on account of the inconvenience in disposing of tree trimmings, for a total loss of $1,200. There is no testimony whatever of any amounts of income from the sale of salvage and the only evidence of the value of the use of the dump in disposing of tree trimmings is the conclusion of appellee that it was worth $360 in 1974. Appellee testified that he had books of account of his operation of the dump. These books were not produced; no evidence was given of the operation of the dump in other years besides 1974; nor was there any description of the matters which might bear upon the operation during the remainder of the term. It is obvious that the volume of any business by appellee in these respects depends entirely upon the actions of the patrons of the dump or of persons wishing to have their trees trimmed. There is no evidence from which the jury would be able to forecast such matters over a period of 3 1/2 years, the term remaining, with any reasonable certainty. It was held in K & R, Inc. v. Crete Storage Corp., 194 Neb. 138, 231 N. W. 2d 110, that the claimant of damages must

furnish appropriate data to enable the trier of fact to find such damages with reasonable certainty without resort to conjecture or speculation. In Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287, it was held that: "Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty." The evidence was insufficient to enable the jury to ascertain any amount of damages as to either of these items, and the motion for directed verdict should have been sustained as to each item.

The next item of special damage claimed is an amount of $2,000 by reason of the moving of a storage building from the premises after eviction. The appellee had purchased the building and placed the same upon the leased premises to provide storage for his equipment and shelter for the persons operating the dump. After the eviction, the appellee entered into a contract for the purchase of a tract adjacent to the dump for the sum of $2,000, payable in custom work for the seller. The measure of damages for the loss of storage facilities is the net rental value of the premises for such purposes. The cost of purchasing a new site upon which to place a storage building is completely immaterial. There being no evidence other than such cost and the expense of moving there, the item should have been withdrawn from the jury's consideration and the motion for directed verdict sustained as to the item.

Finally, the appellee claims special damage arising from the purchase of a caterpillar tractor necessary in operating the landfill. The allegation and the evidence show the total purchase price paid in 1973, the trade-in allowance for another tractor, the charges for interest and financing, and the balance due at the time of the eviction. Appellee testified to the frequent use of the tractor away from the dump for custom work for other persons. There is no evi-

dence of the value of the machine at any time or of any loss or depreciation in value caused by the eviction. The motion for directed verdict should have been sustained as to this item because there was no evidence whatever from which either the fact or the amount of damages could have been determined by the jury.

The evidence as to the issue of wrongful eviction was properly submitted to the jury. The evidence as to such issue was in conflict. As noted previously, the appellant does not assign any error as to this portion of the verdict. A lessee, after a wrongful eviction from the leasehold estate, is entitled at least to nominal damages, when the proof is insufficient to support a finding of either general or special damages. Goetz Brewing Co. v. Robinson Outdoor Advertising Co., *supra*. The trial court is directed to enter judgment in favor of the appellee for $10 and costs.

The judgment is reversed and the cause is remanded for further proceedings in accordance with the directions herein.

REVERSED AND REMANDED WITH DIRECTIONS

WHITE, J., concurs in result.

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V. RICHARD G. KIZZIER AND YVONNE A. KIZZIER, ALSO KNOWN AS YVONNE KIZZIER, ET AL., APPELLANTS.

275 N. W. 2d 600

Filed February 20, 1979. No. 41816.

1. **Uniform Commercial Code: Consideration.** No consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person.
2. **Foreclosure: Property: Sales.** Where a secured party in a mortgage foreclosure action seeks only to sell the real estate and to apply the sale proceeds against the debt of the mortgagors, the action

is a proceeding against collateral pledged by the mortgagor and is not an action for a deficiency judgment.

3. **Uniform Commercial Code: Sales.** Under the Uniform Commercial Code, the adequacy of the price and the reasonableness of the expense for which collateral is sold at private sale after default and repossession are relevant along with other issues in determining whether the sale was commercially reasonable.

4. _____: _____. The Uniform Commercial Code requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Ross, Schroeder & Fritzler, for appellants.

Donald J. Buresh of Swarr, May, Smith & Andersen, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH and BRODKEY, JJ., and RONIN and NORTON, District Judges.

RONIN, District Judge.

This is an action brought by the First National Bank of Omaha, plaintiff-appellee, to foreclose a mortgage given by Richard G. Kizzier and Yvonne A. Kizzier, defendants-appellants, on real estate in Kearney, Nebraska. In addition to the real estate mortgage, certain promissory notes from the Kizziers to the plaintiff were also secured with personal property in the form of warehouse receipts on foreign bicycles. After the Kizziers had defaulted in payment of the notes, plaintiff sold the bicycles at private sales and thereafter filed this foreclosure action. Kizziers filed an answer and counterclaim to plaintiff's amended petition. After trial, the District Court found generally for the plaintiff and against the defendants and dismissed their counterclaim. The Kizziers appeal. Other named defendants did not appeal. We affirm the judgment of the District Court.

The factual background of this case is this: In

September 1972, one Barbara Werdehoff, with the backing of Richard G. Kizzier, applied to the plaintiff for a loan to finance the importation of foreign bicycles through her corporation, Wheel Imports, Inc. Kizzier had a written agreement with Werdehoff and her corporation that he would lend his credit to this venture in exchange for a commission of $4 for each bicycle imported. Kizzier lent his credit to the bank by signing promissory notes to plaintiff, which generally backed advances made by plaintiff on behalf of Wheel Imports, Inc. to bicycle importers for the purchase of the bicycles. As the notes came due, they were replaced by renewal notes in amounts disbursed by plaintiff plus any unpaid accrued interest.

In April 1973, all of the notes were past due, and the plaintiff gave notice to Kizzier and Werdehoff that it would require additional collateral to renew the line of credit. Kizzier agreed to give a mortgage on real estate, the subject of this action. On April 13, 1973, the evidence shows that plaintiff took two separate notes each for the amount of $153,054.38, the balance due on all the remaining unpaid notes. One note was designated a "collateral note," and the other a "First Mortgage Note." The collateral note was secured by "warehouse receipts on bicycles and real estate note and mortgage signed by Richard G. Kizzier and Yvonne A. Kizzier," husband and wife. The collateral note was actually signed by Wheel Imports, Inc., Werdehoff, and Richard Kizzier and was later extended by an extension agreement by which it became due February 15, 1974.

The second note taken by plaintiff was designated "First Mortgage Note" in the identical amount of $153,054.38, and secured the same indebtedness to plaintiff. This note was signed by both the Kizziers and was secured by the subject real estate mortgage, which is the same mortgage securing the collateral note. This note was extended later to

become due on February 15, 1974.

Later, on October 15, 1973, plaintiff took another note in the sum of $15,000, which was signed by both Kizziers, Werdehoff, and Wheel Imports, Inc., the collateral being the real estate mortgage signed by the Kizziers. The due date on this note was also February 15, 1974. The trial court held in its decree that this note had been paid by credits from the sales of the bicycles and terminated the mortgage lien securing this note.

Late in 1973, Kizzier and Werdehoff negotiated a sale of about 1,200 bicycles with a Chicago firm. The bicycles were shipped to Chicago by rail, but the sale was not effected and the bicycles remained in the railroad car. On February 15, 1974, plaintiff took an unsecured note for $13,923.38 from Richard Kizzier, Werdehoff, and Wheel Imports, Inc., which sum represented expenses in connection with the bicycles and accrued interest on the notes.

On February 25, 1974, plaintiff gave written notice by mail to the defendants Kizziers, Wheel Imports, Inc., and Werdehoff advising them that plaintiff intended to sell the bicycles held as collateral at some private sale after February 28, 1974. Plaintiff shipped the bicycles to Omaha from Chicago. After various conferences with Kizzier, plaintiff sold the bicycles at various private sales from a warehouse from July 18, 1974, through December 1974, receiving the gross amount of $71,277. From this sum, plaintiff paid expenses for the bicycle storage and sales in the sum of $18,581.26, and then the principal and interest on the unsecured note of $13,923.98 of February 15, 1974, and the $15,000 note which became due on February 15, 1974, with the remaining balance of the sales money being applied on the "mortgage note" of $153,054.38, leaving a balance of $151,312.88. On April 15, 1975, plaintiff filed its petition to foreclose the mortgage securing the unpaid "mortgage note."

The defendants Kizziers, in their answer, plead a

lack or failure of consideration of their notes and mortgages, and that there was commercial unreasonableness on behalf of the plaintiff under the Nebraska Uniform Commercial Code. The Kizziers also filed a counterclaim for a judicial release of their mortgage given plaintiff and for their loss for the reason plaintiff did not act in good faith. The trial court decided generally in favor of the plaintiff and against the defendants Kizziers on all issues.

The first contention of the defendants was that the District Court erred in determining the notes and mortgages signed by the Kizziers were supported by adequate consideration.

Comment 2 of the Uniform Commercial Code, section 3-408, explains that: no consideration is necessary for an instrument given as security "for a debt already owed by the party giving it, or by a third person."

Our court has held that consideration is any benefit to the promisor or any detriment to the promisee. Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544 (1957).

The Kizziers gave their personal note and mortgage on their real estate to secure the collateral note given by Wheel Imports, Inc., and cosigned by Kizzier in order to establish a necessary line of credit with the plaintiff bank for the purchase of foreign bicycles, in which transaction Kizzier had a financial investment. This benefit to Kizzier was consideration for the notes and mortgages sued on in their action.

The District Court properly found in its decree that the "First Mortgage Note" sued on in this action was "evidence of the same indebtedness represented by a certain promissory note, (hereinafter referred to as "collateral note") to plaintiff * * *." We find that all credits which the Kizziers were entitled to were applied on their "First Mortgage Note," and the fact that two notes were executed on April 13, 1973, in the principal amount of $153,054.38 for the

same indebtedness does not render the "First Mortgage Note" invalid by reason of any failure of consideration. No action is pending on the "collateral note."

The second error assigned by the defendants is the finding of the District Court that the plaintiff had given adequate notice of the sale of the personal property collateral, which was the foreign bicycles. The Kizziers contend this foreclosure action is really a suit for a deficiency, that the plaintiff failed to give adequate notice of the private sales of the bicycles and that by reason thereof the foreclosure of the mortgage on their real estate is banned by reason of this court's decisions in DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N. W. 2d 745 (1976); and First Nat. Bank of Bellevue v. Rose, 197 Neb. 392, 249 N. W. 2d 723 (1977). DeLay, *supra*, and Rose, *supra*, involved suits for deficiency judgment against a debtor. The District Court correctly found that the foreclosure action in this case was "not an action for a deficiency judgment against the debtors but a proceeding against collateral pledged by the mortgagor." The only judgment sought by plaintiff in this case was that the mortgage debt be determined and that the real estate be sold and the sale proceeds applied to that debt. No personal judgment against the mortgagors is sought in this foreclosure action after resort to the collateral. Phillips v. Union Central Life Ins. Co., 88 F. 2d 188 (8th Cir., 1937). DeLay and Rose, *supra*, held that failure to give proper notice of the sales of the collateral is a bar to the recovery of a deficiency judgment. See DeLay, p. 402, citing Gering v. Glover, 192 Neb. 575, 223 N. W. 2d 56 (1974), in which no notice was given to the debtor as to the sale of his collateral. Defendants Kizziers seek to extend these holdings not only as to a bar to the recovery of a deficiency judgment, but as to the bar of the recovery of any further collateral without any limitation. We

hold, under the facts in this case, that the plaintiff did proceed in a commercially reasonable manner to liquidate the collateral and that plaintiff was entitled to proceed with the liquidation sale of the mortgage collateral.

The Kizziers claim the notice given to them of the sale of the bicycles, the collateral, was not only a failure to comply with section 9-504 (3), U.C.C., but that it was insufficient to allow them the opportunity to protect their interests. The disposition of collateral securing a note is provided in section 9-504 (3), U.C.C., as follows:

"* * * 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*, * * *" (Emphasis supplied.)

The plaintiff mailed its written notice to all the interested defendants on February 25, 1974, (exhibit 23) that plaintiff intended to sell the bicycles on which it held warehouse receipts at some private sale *after* February 28, 1974, unless the notes which were delinquent were paid prior to that date. (Emphasis supplied.)

Before and after the written notice of sale plaintiff mailed to defendants Kizziers, the plaintiff had several telephone conversations with Mr. Kizzier concerning the sale of the bicycles. Plaintiff had negotiated with the Pamida chain through its headquarters in Omaha for the sale of about 1,200 bicycles which had been shipped to Chicago. Plaintiff and Kizzier discussed this sale at Omaha. Kizzier stated that he thought a better price could be obtained and the plaintiff did not complete the sale. Although the notice said the bicycles would be sold at private sale after February 28, 1974, the record discloses that none of the bicycles were sold by plaintiff until July 1974. There were a number of conferences between the plaintiff and Mr. Kizzier

during this 4-month period. Kizzier made no offer to redeem the bicycles. Kizzier suggested the bicycles might be sold through Port-O-Bikes, but when this did not materialize, the plaintiff proceeded to sell the bicycles from the Omaha warehouse. Most of them were sold with the assistance of Jerry Ellis, who was a consultant to Port-O-Bikes and an acquaintance of Kizzier. The bicycles were sold in a series of sales from July through December of 1974.

Our court, in Delay, *supra*, stated that:

"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."

In DeLay, *supra*, our court further stated that the underlying purpose of the written notice requirement was for the protection of the debtor as follows:

"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."

The Uniform Commercial Code does not provide for any specific number of days that the written notice must have been served on the debtor by the creditor prior to either public or private sale of collateral personal property. The code mandates that the debtor be given a reasonably sufficient time to protect his interest in the collateral. The interpretation given by our court in Rose, *supra*, is that *ordinarily* a minimum of 3 business days is required. The written notice in this case was mailed to Kizzier on February 25, 1974, stating his collateral would be sold at private sale after February 28, 1974, and it is legally sufficient in this case because no sale was held for 5 months as a result of the numerous conferences of the parties. Kizzier was notified in writing

that the bank was going to sell the collateral and every opportunity was given him to redeem or to find prospective purchasers. The purpose of the written notice was to give him a reasonably sufficient time to protect his interest in the collateral. This was fully complied with by plaintiff. The bicycles were sold in various size lots at different times over a period of nearly 5 months. We hold, under the facts in this case, that the plaintiff sustained its burden of proof to prove compliance with the Uniform Commercial Code requirements of notice and reasonableness of notice. Rose, *supra*.

The Kizziers further contend there was commercial unreasonableness in the sale price and expenses in the disposition of the bicycle collateral by the plaintiff. The record discloses there was a total of 2,448 bicycles purchased by Wheel Imports, Inc. on plaintiff's credit. The plaintiff released 522 bicycles to Wheel Imports, Inc. and purchasers from where they were stored in a New Jersey warehouse. Some of these bicycles were used for demonstration or other sale purposes. The plaintiff received about $13,000 for them, which sum has been credited on the defendants' mortgage notes. Thirty-eight bicycles were unaccounted for by the warehouse and were not released by plaintiff. These transactions occurred prior to any default on the mortgage notes and prior to the time plaintiff repossessed the bicycles.

Plaintiff repossessed the bicycles on February 25, 1974, by reason of its written notice to all defendants of its intention to sell the collateral, and it had the bicycles moved by rail to a railroad siding in Chicago. Sixty-five bicycles were stolen there. The District Court properly disallowed plaintiff's contention that this loss should be charged to the defendants, and credited the Kizziers in the sum of $2,600, the value of the 65 bicycles, against their mortgage debt for the reason that the theft occurred subse-

quent to the time that plaintiff had repossessed them. Credit was also given Kizziers in the sum of $1,200 for 40 bicycles still in plaintiff's possession at the time of trial.

The total proceeds of the series of bicycle sales at the Omaha warehouse was $71,277 with expenses of $18,581.26. Most of the expenses included the demurrage expense incurred at Chicago and shipping and storage expenses. The District Court rejected the defendants' contention that plaintiff should have sold bicycles on credit terms to secure a higher price which would have also reduced the sale expense. The District Court approved generally the prices obtained and the expenses incurred in the sales of the bicycle collateral. The District Court correctly held that the plaintiff wrongfully applied collateral sale proceeds in payment of the unsecured note of the defendants dated February 15, 1974, in the principal sum of $13,923.38, and ordered that the principal and interest thereof be applied instead on the Kizzier "First Mortgage Note." The payment of the $15,000 note of the defendants dated February 15, 1974, from the proceeds of the collateral sales, was approved by the District Court for the reason that it was also secured by the mortgage on the Kizzier tract and the mortgage lien of this note was ordered released by reason of payment.

The District Court computed the balance of the mortgage debt of the "First Mortgage Note" of Kizziers to the plaintiff to be $127,425.58 as of March 26, 1975, as itemized on page 19 of plaintiff's brief, and ordered said balance to receive interest from that date at 9 percent per annum, and that the counterclaim of the Kizziers be dismissed.

The record fully supports the findings of the District Court that the notes and mortgages were given by the Kizziers to the plaintiff for valuable consideration; that after defendants defaulted in payment of their notes, the plaintiff gave written notice by

letter, dated February 25, 1974, to all defendants of its intention to sell the bicycles at private sale after February 28, 1974, and that the written notice complied with the Uniform Commercial Code under the facts of this case; that the plaintiff disposed of the bicycle collateral in a commercially reasonable manner as adjusted and determined by the District Court; that the amount of the mortgage debt of the defendants to the plaintiff was correctly computed; that by reason of the aforesaid findings the counterclaim of the defendants was dismissed; and that the decree of foreclosure entered by the District Court is, in all respects, approved.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES S. HEGWOOD, APPELLANT.

275 N. W. 2d 605

Filed February 20, 1979. No. 42028.

1. **Criminal Law: Evidence: Instructions.** Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given.
2. **Criminal Law: Instructions: Appeal and Error: Statutes.** Where the record clearly shows an oral request for a jury instruction, and full understanding of the requested instruction by the trial court, review of the court's ruling on the instruction will not be precluded by failure to reduce the request to writing. § 25-1111, R. R. S. 1943.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for new trial.

Thomas M. Kenney, Douglas County Public Defender, Stanley A. Krieger, and Daniel K. Powers, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

WHITE, J.

This is an appeal from a conviction for the offense of robbery. The defendant was sentenced to a term of from 6 to 10 years in the Nebraska Penal and Correctional Complex. The defendant appeals.

The defendant alleges the trial court committed reversible error in failing to instruct the jury on the lesser-included offense of larceny from the person and/or petit larceny. We reverse and remand for a new trial.

The State's version of the case is that on November 2, 1977, defendant and another individual came to the victim's home. The defendant, who is a neighbor of the victim, allegedly wished to repay him $2 that the victim had lent the defendant earlier. When the victim opened his door, the defendant grabbed him around the neck and forced him back into the house, throwing him on the floor. The defendant and the other individual made him lay against a wall and proceeded to remove some items and money from his home. The victim identified the defendant and heard his voice during the robbery.

The defendant's version, given in his testimony, was that he indeed went to the home with his friend to pay back the $2. When the victim opened the door, the defendant was suddenly pushed into the house and blindfolded, presumably by his friend. He stated that somehow he became aware of the presence of a third individual he was able to identify only by the name of John. The defendant denied he went to the home with the intention of robbing the victim or that he was aware of any intention on behalf of his friend and the third party John to rob the victim. He

stated that after he had ascertained that the friend and John had left the victim's home, he removed the blindfold, observed the victim on the floor, and saw a shotgun in the corner belonging to the victim and left the home with the shotgun. He was seen by a neighbor and apprehended by the police.

The following proceedings took place at trial in chambers. "THE COURT: Just let the record show that we're having a conference on the proposed instructions, and the State has no objections or any requests or any additions or any deletions. And I think Mr. Powers (defense counsel) has several requests in regard to the instructions.

"MR. POWERS: Yes, I would request that an instruction be given on 28-505, that is, larceny from a person and/or, in the alternative, an instruction be given on petit larceny.

"THE COURT: The court's going to deny both requests, and I want the record to show what my reasoning is. The evidence is clear from this case that a robbery took place, and that's taking all the testimony both from the State and the defendant himself; that the money or property was taken from the victim; and that force was used in the taking of the property.

"The request comes on the basis of the defendant's testimony that he was not a part of that act; and then, after the crime had been completed, that he was in a separate room, that he was blindfolded and had no part in that crime; that he, as an afterthought after that transaction was completed, took a shotgun. There was no evidence in the record as to the value of the shotgun, since the charge by the State was that of robbery and not larceny from a person or petit larceny or grand larceny; that if these facts were known to the State — and there's nothing in the record to show that these facts were ever known — perhaps a separate crime of larceny

from the person or grand larceny or petit larceny could have been filed.

"It's the Court's position that the defendant is either guilty or not guilty of the charge of robbery; and that his admission of taking the shotgun constitutes a separate crime, which is not a lesser-included crime; and the giving of extra instructions would only tend to confuse the jury as to his guilt or innocence of the robbery. Anything further?"

The State concedes that our recent case of State v. Tamburano, 201 Neb. 703, 271 N. W. 2d 472, controls here. We said in that case, quoting the Minnesota Supreme Court: " 'The test which must be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense.' " Under that test, refusal of the instruction requested here was clearly erroneous.

The State seeks to sustain this conviction on the basis of section 25-1111, R. R. S. 1943, which states: " * * * and either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked shall be in writing." The State cites State v. Bell, 194 Neb. 554, 233 N. W. 2d 920, for the proposition that the refusal to give a requested instruction shall never constitute grounds for reversal unless the request had been submitted to the trial court in writing. The case does not so hold. In that case there was no request for an instruction at all.

The State further cites State v. Maxwell, 193 Neb. 807, 229 N. W. 2d 195, for the same proposition. The charge in that case was burglary. The defendant complained in this court of the failure of the trial court to give an instruction, requested orally, on the crime of receiving stolen property. This court affirmed for the reason that "Neither the information nor the evidence sustained such an instruction."

There was no identification of the property taken in the burglary and the defendant denied he had received any stolen property. Unlike the case at bar, there was thus no factual basis on which the charge could have been submitted. Language in the opinion which might be understood to require that requests for instructions should, in every case, be submitted in writing was clearly dicta.

This court, in a rule adopted at the time of the publication of Nebraska Pattern Jury Instructions, urged the trial judges of this state to hold instruction conferences at which requests for instructions are made to the court. The trial court in this case knew exactly what defense counsel was requesting and denied the request on the trial court's understanding of the law. To have required, in addition to this presentation directly to the trial court, that the refused instruction be reduced to writing would be a meaningless triumph of form over substance. We do not so hold. The defendant made a proper request to the court for a lesser-included offense instruction. The instruction was warranted. The trial court refused to do so. This was error and requires reversal.

REVERSED AND REMANDED FOR NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. TOM RAY HOPPES, APPELLANT.

275 N. W. 2d 608

Filed February 20, 1979. No. 42065.

1. **Criminal Law: Pleas: Appeal and Error.** Where a plea of guilty is made pursuant to a plea bargain and the sentence is in complete conformity with the plea agreement, it is not reversible error for the attorney to fail to advise the defendant of appeal possibilities.
2. **Criminal Law: Sentences: Post Conviction.** Matters relating to sentences imposed within statutory limits do not form a basis for post conviction relief.

3. **Criminal Law: Attorney and Client.** Where defendant's trial counsel performs at least as well as a lawyer with ordinary training and skill in the criminal law and conscientiously protects his client's interest, he has met the criteria of effective trial counsel.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Paul E. Watts, Gerald E. Moran, Robert C. Sigler, and Julianne M. Dunn, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

SPENCER, J.

This is an appeal from a denial of post conviction relief. Defendant assigns as error: (1) The failure to find a denial of effective assistance of counsel; and (2) a finding that his plea of guilty to second-degree murder was not obtained in violation of his constitutional rights. We affirm.

Defendant was being held in the county jail on felony charges for possession of and intent to manufacture marijuana. At the same time he was under investigation by the police concerning the recent disappearance of his wife. Defendant's mother retained Paul Galter, a Lincoln attorney, to represent her son. She told Galter her son was in custody on other felonies but was also suspected of something in connection with the disappearance of his wife. Galter, who was leaving for Colorado, assigned Arthur Langvardt, one of his associates, to handle the matter until his return.

Langvardt interviewed Hoppes at the county jail. He learned the Lincoln police had been extensively questioning Hoppes in respect to his wife's disappearance. Hoppes had been visiting with the authorities and seemed to be under considerable stress. Langvardt advised defendant not to talk any

further with anyone about any alleged crimes. Upon discussion with the county attorney's office about obtaining Hoppes' release, Langvardt learned the authorities considered him the primary suspect in his wife's disappearance. The police had discovered items at the place of his wife's employment indicating a quarrel and a struggle. The defendant had facial abrasions. He had also made some inconsistent statements to the police. This heightened their suspicions. Langvardt arranged for bond, and defendant was released from custody on January 5, 1976.

That same day defendant met with Langvardt at his office. He told Langvardt he was responsible for the death of his wife, and that he wanted to turn himself in. He also told him where the victim's body could be found. Langvardt told Hoppes he did not want to tell him what to do at that time. Langvardt then consulted with Hal Bauer, one of his senior associates, and the two of them made a telephone call to Galter in Colorado to discuss what to do next. Galter "didn't think it was a bad idea" to turn Hoppes in to the authorities "if that's what Tom wanted to do."

Langvardt advised defendant not to talk to anyone other than counsel about the matter until his attorneys could consult with one another and further investigate the possible legal strategy. Langvardt also personally investigated the area of the lake where his client had stated the body could be found. He noted the area was a shallow inlet frequented by ice fisherman. It appeared to him the discovery of Mrs. Hoppes' body was probably imminent.

The attorneys then weighed the advantages and disadvantages of the defendant coming forward and disclosing to the authorities the location of his wife's body and the implied admission of his responsibility for her death. In this respect they were convinced from defendant's story to them that his wife's death

had been accidental. They believed it might be better strategy to give the police the location of the body rather than to let them make that discovery on their own.

Bauer and Langvardt accompanied defendant to the courthouse where on the record Bauer stated they were there for the purpose of turning Hoppes in on an alleged crime. Bauer stated that Hoppes had admitted to them he was responsible for the death of his wife, and knew where the body was. Bauer further stated for the record that from what Hoppes indicated to them her death was accidental. He had not intended to cause the death. There had been an attack upon him to some degree. After the injury to Mrs. Hoppes he panicked, took her body to a lake near Lincoln, and the body was there at that time.

Bauer testified at the post conviction hearing. He related what the defendant had told them as to how his wife met her death, how he had weighted the body down with tire chains from his automobile and with a wheel or other heavy object from the car, and had pushed the body through the ice where someone had been ice fishing.

The evidence indicated Hoppes had been adamant in wanting to turn himself in. Bauer testified Langvardt brought defendant into his office because defendant wanted to turn himself in and Langvardt wanted some help in the matter. Defendant indicated he had been driving around, even out of the state, and was in a state of mental turmoil not knowing what to do. Bauer testified the lawyers concluded their responsibility was first, to advise Hoppes of his rights, and second, to handle the method in which he turned himself in, if he did that. They did not ask him to turn himself in. They did not attempt to either dissuade him or to persuade him. They advised him if the body was never found he might never be caught. Bauer suggested it weighed heavily on his mind that defendant had

weighted the body with objects from his automobile and if the body was found it would be possible to connect defendant with the body. Bauer also considered that the lake was not deep and there was a strong possibility the body would be found.

The thrust of defendant's assignment of ineffective assistance of counsel is his contention now that the attorneys should not have cooperated with him in turning himself in. He argues it was their responsibility to suggest to him the body might never be found and if so, he would never be charged with the murder. Bauer was asked this specific question: "Did you ever advise the defendant that if the body — that he should keep his mouth shut, not say anything and that if the body's never found, he could walk away from the crime?" He answered: "Yes. We discussed that. It's interesting what you're asking. We wondered about out [sic] duty to the Court at that time knowing that the Police were looking for a body, and I can say our duty to the Court was not considered in any way at all, that our decision was made strictly on the basis of what was best for him, and it was a matter of weighing the odds. On the one side of his leaving the body there, hoping that it would never be found, the odds there versus the benefits of turning himself in, and it was the decision that we decided he was better to turn himself in than to gamble that the body would never be found."

The evidence clearly indicated defendant wanted to surrender to the police, acknowledge responsibility, and put an end to his ordeal. It is evident from the record defendant's attorneys, as a matter of strategy, decided it was best for them to go along with the defendant's idea of turning himself in. By doing so, they were lending credence to a possible defense of accidental death. It would also be possible to explain the disposal of the body because defendant panicked when he discovered his wife had been accidentally killed.

Hoppes also argues he was denied his constitutional right to effective assistance of counsel because his attorneys failed to conduct an in-depth investigation of his case and failed to disclose the fact to him that the State had endorsed the name of Hal Bauer, one of his attorneys, on the information as a possible State's witness. There is no merit to this contention. The evidence clearly reflects that the defense strategy was focused not upon a possible trial but upon negotiation for a lesser charge.

From the record it appears the defendant was adamant in wanting to disclose his crime to the authorities. He instructed his lawyers to seek the least possible charge rather than investigate the evidence to prepare for trial. In this context the defendant could not possibly have feared the testimony of Bauer, one of his attorneys, even if any of it could have been admitted, since no trial was contemplated. Under such circumstances, there is no duty on the part of defense counsel to perceive an unspoken concern of the defendant about a potential witness and to advise him in connection therewith.

Of more moment in attempting to get a reduced charge was the fact defendant's lawyers were in possession of information that while Hoppes still had the body of his wife in his car he spent the night in bed with a girl friend. Galter was convinced this information was available to the prosecution. It would be very damaging evidence and would make it difficult to get the charge reduced. This fact weighed heavy in Galter's final conclusion to advise defendant to accept a plea bargain to second-degree murder, when the county attorney would not settle for manslaughter.

Hoppes' next assertion is that he was under the influence of drugs at the time of his guilty plea to the extent that he did not fully comprehend what he was doing and consequently his plea was not knowingly, intentionally, and voluntarily made. Before Judge

Fahrnbruch accepted defendant's plea, he asked Hoppes if he was under the influence of any alcohol, drugs, narcotics, or other pills. Defendant replied that he was not. The testimony of defendant on this issue therefore is severely impeached by his own earlier contradictory statement.

An examination of the entire record of the plea hearing discloses that all of Hoppes' answers were responsive and coherent without any apparent confusion. This is particularly true of the answers he gave to the court in describing the argument and subsequent assault on his wife.

The testimony of the witnesses who stood on either side of the defendant at his arraignment and plea, who had a particular interest in observing him, was that the defendant displayed no psychological or physiological symptoms of being under the influence of drugs. In addition to the prosecuting attorney and the defendant's counsel, the court reporter noted no faltering or hesitant responses by the defendant during the hearing which he recorded. The jailer having custody of the defendant testified he did not observe any drug-induced symptoms of the defendant immediately prior to or after the court hearing.

We also note the defendant included the legally-prescribed drugs, Tedral and phenobarbital, among those he stated he had consumed prior to his plea. It is significant that his medical record in jail discloses that Tedral was not provided him until 22 days after his plea, and that phenobarbital does not appear until 3 days after his plea.

The witnesses for the defendant on the drug issue were prisoners in the same jail, all of whom had felony records. The trial court weighed and determined the credibility of the witnesses. From the examination of the record as to the nature of the responses of the defendant, the crucial variance in the defendant's testimony as to whether he was under the influence of drugs at the time of his plea, as well

as the indefiniteness of the record as to the kind, quantity, and effect of drugs claimed by the defendant to have been taken previous to his plea, it is evident to us the defendant did not sustain the required burden of proof on this issue.

Defendant further alleges that counsel were ineffective in that they did not advise him of his right of appeal. Previous to the sentencing, Galter had discussed appeal possibilities. There was no discussion about appeal after the sentencing. As the trial court noted, however, the defendant was in no way prejudiced by the lack of this specific advice since the sentence was in complete conformity with the plea agreement imposed, which was the one Galter advised defendant would be imposed. Also, the sentence imposed was within the statutory limits provided for the crime of second-degree murder.

Previous to the sentencing Galter had done extensive research into the actual time Hoppes would serve in prison prior to becoming eligible for parole. He proved to the authorities and those who questioned his result that they were wrong and that his interpretation was eventually accepted as the correct one. This demonstrates the thoroughness and effectiveness of defendant's counsel in respect to the sentencing issue.

We have no hesitancy in saying that on the facts in this case the failure of Galter to discuss with the defendant a possible appeal after sentencing does not indicate ineffectiveness of counsel. Where a plea of guilty is made pursuant to a plea bargain and the sentence is in complete conformity with the plea agreement, it is not reversible error for the attorney to fail to advise the defendant of appeal possibilities.

While matters relating to sentences imposed within statutory limits do not form a basis for post conviction relief, see State v. DeLoa, 194 Neb. 270, 231 N. W. 2d 357 (1975), there is no basis apparent in the record on which this sentence would have been dis-

turbed on appeal. Further, the evidence on the voluntariness of the plea, the only other possible issue on appeal, has been determined herein. We are convinced the plea was knowingly, intentionally, and voluntarily made.

We are in full agreement with the trial court. The defendant wholly failed to prove ineffectiveness of counsel. We held in State v. Haynes, 192 Neb. 445, 222 N. W. 2d 358 (1974): "Where defendant's trial counsel performs at least as well as a lawyer with ordinary training and skill in the criminal law and conscientiously protects his client's interest, he has met the criteria of effective trial counsel." We have no hesitancy in finding that defendant's counsel adequately met this test. There was no basis in the record before us on which the trial court could have found the defendant was materially prejudiced in the way his case was handled by his counsel.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

SHELDON STATION EMPLOYEES ASSOCIATION, APPELLEE, v. NEBRASKA PUBLIC POWER DISTRICT, APPELLANT.

275 N. W. 2d 816

Filed February 27, 1979. No. 41801.

1. **Court of Industrial Relations: Labor and Labor Relations: Employer and Employee.** In attempting to determine the appropriate unit for exclusive bargaining purposes under the provisions of the Nebraska Court of Industrial Relations Act, the mutuality of interest in wages, hours and working conditions, duties and skills of employees, extent of union organization among employees, the desires of employees, a policy against fragmentation of units, the established policies of the employees, and the statutory mandate to insure proper functioning and operation of governmental service, are to be considered. Those factors, however, are not the only factors to be considered, nor must each such factor be given equal weight. The factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from

case to case depending upon its particular applicability in each case.

2. **Statutes: Evidence: Labor and Labor Relations: Public Officers and Employees.** Before the statutory restrictions prescribed by section 48-838 (2), R. S. Supp., 1976, against undue fragmentation in the public employment area can be overcome, there must be strong evidence justifying the need and propriety of such additional division.
3. **Labor and Labor Relations: Public Officers and Employees.** The mere fact that a public employer voluntarily creates employee committees, for the purpose of meeting and conferring about matters of mutual interest between the public employer and the public employee, does not establish that the public employer has recognized such units as the exclusive collective bargaining agent.

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

Barlow, Johnson, DeMars & Flodman, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and SPENCER, Retired Justice.

KRIVOSHA, C. J.

Various employees of the Nebraska Public Power District (District) employed at the District's Sheldon Station, Hallam, Nebraska, petitioned the Nebraska Court of Industrial Relations (CIR) to declare all persons, except supervisors, employed by the District at the Sheldon Station, Hallam, Nebraska, and compensated at an hourly wage, as the appropriate unit for purposes of exclusive representation and bargaining with the District pursuant to the provisions of sections 48-801 to 48-838, R. R. S. 1943, as amended.

The District answered denying the proposed group was the appropriate unit. After trial the CIR entered its order finding in favor of the appellee and authorizing the creation of an exclusive bargaining

unit consisting of all hourly wage nonmanagement personnel employed by the District at the Sheldon Station, Hallam, Nebraska.

As required by law, we have examined this matter on appeal to determine whether the order of the CIR is supported by substantial evidence. House Officers Assn. v. University of Nebraska Medical Center, 198 Neb. 697, 255 N. W. 2d 258. Upon review of the record, we find that the decision of the CIR is not supported by substantial evidence and accordingly must be reversed.

The District is a governmental subdivision created pursuant to the provisions of section 70-601, R. R. S. 1943, for the purpose of supplying electricity in Nebraska, both at wholesale and at retail. The District is a vertically integrated public power system having generating, transmission, and distribution facilities. Its general offices are located in Columbus, Nebraska, although the District operates generating facilities at some eight locations throughout the state. The specific facility in question is located at Hallam, Nebraska, and is identified by the District as the "Sheldon Station."

All matters of general administration are handled at the general office including personnel, finances, and labor relations. Although there is evidence indicating individual stations were authorized to initiate employment applications and interview prospective employees, the final decision concerning hiring was made by the personnel office in Columbus. While it is true that the recommendation of the local unit is given great weight and rarely ignored, the responsibility for making the final decision nevertheless is in the general office at Columbus, Nebraska.

All adjustments of employee benefits, salaries, or job descriptions are made on a statewide basis. Such items are set out in an employee manual prepared by the general office for use by all employees of the District, regardless of their specific location. In ad-

dition, the evidence discloses that executive orders are issued by the central office from time to time, establishing new personnel policies applicable to all employees regardless of their place of employment.

While the record does not disclose the total number of persons employed by the District, the record does disclose that there were, at the time this matter was before the CIR, at least 328 employees at eight specific generating locations. Employees ranged in number from as many as 101 at the "Cooper Nuclear Station" to as few as 6 at the "Spencer Hydro Station," with 77 being employed by the District at the "Sheldon Station."

The record further discloses that the District instituted what it called "employee committees" to allow an interchange of information at the various power plants themselves. Certain of the smaller power plants were assigned to regional employee committees. It appears that the purpose of the meetings was to permit management to "meet and confer" with the employees of the District to discuss matters of mutual interest. None of the meetings have been for the purpose of negotiating wages or other terms and conditions of employment. The record indicates the topics discussed at these meetings did, to some extent, pertain to the District's policy with regard to both wages and terms and conditions of employment. In each instance, however, the meetings were for the purpose of exchanging ideas and not for the purpose of negotiations. As a matter of fact, the record discloses that on July 25, 1977, representatives of the District came to a meeting of the Sheldon Station employees committee, believing the purpose of the meeting to be similar to those that had been held in the past, namely, to meet and to confer concerning various matters involving the operation of the station and the employees. When the management representatives arrived, they were advised by the employees committee and an attor-

ney retained by the committee, that the purpose of the meeting was to recognize the employees committee as the exclusive bargaining agent for negotiating purposes. Representatives of the District refused to remain at the meeting and thereafter left.

There is no evidence in the record to indicate the District at any time created or recognized any employees committee as an exclusive bargaining agent, nor ever met with them for the purpose of "negotiating" terms and conditions of employment. The units were simply in-house committees created by a public employer for the purpose of exchanging ideas and discussing with the employees any problems which they were experiencing. It would appear that because of the geographic locations of the various stations, it was more convenient for the employees to have several representatives of the central office travel about the state and meet with various employee committees, rather than have all the employees congregate for a meeting at a central location. Nevertheless, employee grievances were required to be taken back to the central management of the District and discussed. If an adjustment was to be made, it had to be approved by the board of directors of the District and then applied to all employees in the District and not just to a particular station.

In its order dated November 1, 1977, the CIR declared "it is settled law that in tailoring the appropriate unit, we consider the mutuality of interest in wages, hours and working conditions (community of interest), duties and skills of employees, extent of union organization among employees, desires of the employees, a policy against fragmentation of units, the established policies of the employer, and the statutory mandate to assure proper functioning and operation of governmental service."

While it is true these factors are to be considered, it is likewise true that they are not the only factors to

be considered, nor must each such factor be given equal weight. The factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from case to case depending upon its particular applicability in each case. City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860; American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1.

Likewise, in reviewing factors such as "established policies of the employer," "fragmentation," and "degree of unionization-desires of employees," we must keep in mind the clear dictates of the statutes. These factors must be examined in light of the statutory presumption contained in section 48-838 (2), R. S. Supp., 1976, which provides as follows: " * * * It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utilities districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate."

In interpreting that section, we have previously said: " 'It is clear that in enacting subsection (2) of section 48-838, the Legislature properly sought to avoid *undue* fragmentation of the bargaining units. * * * It (undue fragmentation) fosters proliferation of personnel necessary to bargain and administer contracts on both sides of the bargaining table. It destroys the ability of public institutions * * * to develop, administer, and maintain any semblance of uniformity or coordination in their employment policies and practices.' " House Officers Assn. v. University of Nebraska Medical Center, 198 Neb. 697, 255 N. W. 2d 258. Clearly, it is the intent of the Legislature that fragmentation of bargaining units within the public sector is to be avoided. A reading of the CIR's findings, with regard to these various factors noted by the CIR and applied to the particular case, lead to the conclusion that the order creat-

ing an exclusive bargaining unit at the Sheldon Station cannot be sustained.

In its order, the CIR made specific findings with regard to the various relevant factors to be considered. We now examine each of those findings.

The CIR found that with regard to centralization of management and labor policy, "Personnel actions are generally initiated at the local level, but are forwarded to Columbus for final approval by management and the Board of Directors." This would indicate that there is in fact centralization of management. The mere fact that a multilocation employer permits employment applications or initial interviews to be made at each site, subject to central office approval, does not in itself establish that each location has employment autonomy. In light of the fact that the CIR found the central office retained final approval for hiring, no matter how perfunctory, and that all personnel policies emanated from the central office, which policies applied equally to all employees regardless of location, we must find this factor in the District's favor.

With regard to the extent of interchange of employees, the CIR found "* * * while precise duties at each plant for a given job description may vary, that the duties are sufficiently similar, that an employee in a given description could function satisfactorily in the same job description at another plant with a minimum of training." The evidence indicated that 26.9 percent of transfers, including promotions, are from plant to plant. It would appear from the evidence, however, that this is due in large part to the fact that a person at a particular site is trained in advance for promotion at that site and not by reason of some uniqueness of the particular plant. Again this finding of the CIR would appear to require our finding this factor in the District's favor.

With regard to similarity of skills, the CIR found that there was great similarity between the various

plants. The CIR's order did note that there were differences arising from the fact that the Cooper Station is nuclear, and often has higher compensation levels for the same job title. The evidence discloses this difference is due to the facts that the Cooper Station is a nuclear station and its employees require higher training and skill. Nevertheless, all of the employees continue to operate within an overall statewide policy plan and individuals at the same level of job classification are paid the same wage throughout the District. On that basis, this factor must be found in the District's favor.

As to the factor of geographical location, the CIR found the plants and the transmission and distribution facilities, while scattered across the State of Nebraska from the eastern to the western border and from South Dakota to Kansas, are interlocked with each other. The entire transmission system is dispatched out of the facility at Hastings, Nebraska. The factor of geographical location must be found in the District's favor.

With regard to uniformity of wages, benefits, and working conditions, the CIR found "The District has attempted to equalize wages and benefits by setting up a district-wide compensation plan." While it may be true that the employees of the Sheldon Station do not perceive the plan as uniform, there is no evidence to indicate that wages and benefits are not uniform throughout the District for the same level of skills. As noted earlier, due to certain requirements imposed by a regulatory agency, personnel at the Cooper Station have additional training. As a result, they are sometimes paid at a higher wage level than another individual at a different plant performing similar work. Generally, however, within the same job classification, individuals at the same level are paid the same throughout the District. The factor of uniformity of wages, benefits, and working conditions must also be found in the District's favor.

With regard to current governance of the District, the CIR found "The District has ostensibly set up a highly centralized management. However, it is clear from the evidence that day-to-day decisions on personnel matters are left largely to the local managers." While it may be true that local supervisors have certain day-to-day control, it must be kept in mind this is a public employer and not a private employer. The governance of the District must be established by law and not by the acts of its employees. The responsibility for the operation of the District lies with the board of directors and those individuals to whom authority has been delegated by the board. The record does not justify a conclusion that local managers retain such authority concerning personnel matters whereby it can be said the current governance of the District is vested in each individual plant. This factor, likewise, must be found in the District's favor.

As to the factor of established policy of the employer, the CIR found in its order: "The District, after demand for recognition by the plaintiff, announced that it felt only a district-wide bargaining unit was appropriate. We have previously noted its establishment of local committees, however." While the specific order does not indicate to us how the CIR viewed that factor, it would appear the CIR believed that the public employer had, by reason of establishing local committees, thereby established a policy of recognizing individual units for purposes of exclusive bargaining. The action of the public employer in that regard, however, does not lead to the conclusion reached by the CIR. We do not believe the establishment by the employer of local employee committees justifies the conclusion that the employer has established a policy of creating individual groups for collective bargaining purposes. Before the statutory restrictions against undue fragmentation in the public employment area prescribed

by section 48-838 (2), R. S. Supp., 1976, can be overcome, there must be strong evidence justifying the need and propriety of such additional division.

The mere fact that a public employer voluntarily creates employee committees, for the purpose of meeting and conferring about matters of mutual interest between the public employer and the public employees, does not establish that the public employer has recognized such units as the exclusive collective bargaining agent. Whatever may be the rule in the private sector because of provisions of the National Labor Relations Act, that rule has no application in the public sector. To hold otherwise would be to discourage, if not chill, the public employer's desire to meet and confer with the employees in an open and meaningful interchange of information as was done in the instant case. Such a result cannot possibly be in the best interests of either the public employer or the public employees and certainly is not in the best interests of the public who in the final analysis is the employer of both. We find that the evidence in this case does not meet the requirement to overcome the presumption against undue fragmentation and this factor, likewise, must be found to be in the District's favor.

With regard to the specific factor of fragmentation, we believe what we have said with regard to established policies of the employer likewise applies to this factor. In two recent cases we rejected the employees' desire for fragmentation holding that such units were inappropriate. See American Fed. of S., C. & M. Emp. v. State, 200 Neb. 171, 263 N. W. 2d 643; House Officers Assn. v. University of Nebraska Medical Center, *supra*.

A reading of recent decisions of the CIR would likewise lead one to the conclusion that the unit requested in this case would clearly fall within the prohibition against undue fragmentation. In the case of Retail and Prof. Employees, Local 1015 v. Kearney

Center, 3 CIR 400, the CIR denied the petition of the union, requesting the CIR to find that all persons employed at the Youth Development Center at Kearney, Nebraska, except supervisory employees, constituted an appropriate bargaining unit within the Department of Correctional Services. While the CIR attempted to distinguish that case from the instant case, such distinction fails.

Likewise, in the case of International Brotherhood of Electrical Workers v. State, 3 CIR 23, the CIR denied the request by the IBEW for the creation of two units, one consisting principally of production personnel and the other of engineering personnel. In doing so, the CIR there said: "The public policy provisions of the Court of Industrial Relations Act (Section 48-802) require this Court to insure the continuous operational efficiency of governmental services. Fragmented units interfere with the continuous operational efficiency of governmental services and should, therefore, be avoided to the extent that it is possible consistent with the preservation of the rights of public sector employees to engage in collective bargaining * * *.

"We conclude that the limited units requested by Petitioner herein are not appropriate. We base our decision on the public policy against fragmented units, the object and purpose of LB 1228 to avoid fragmented units, application of the specific statutory criteria of Section 48-838, and application of the criteria established by the Nebraska Supreme Court in the City of Grand Island case, *supra*."

The logic of the IBEW decision, *supra*, as expressed by the CIR, would appear to apply with equal validity to the case now before us, and we must, therefore, on the issue of "fragmentation," find in the District's favor.

The last remaining factor for consideration is the degree of unionization, the desires of employees. The CIR found "The only organizational effort cur-

rently under way is the one now before this Court. There is no evidence of any other present organizational activity among any of the defendant's employees." We are unable to see how this finding could in any manner justify the creation of a separate unit at the Sheldon Station.

The desires of a group of employees standing alone may be of importance to the employer in the manner in which the employer reacts to the employees, but cannot be of legal significance. The statutes clearly provide that before the court can even order an election, it must determine that at least 30 percent of the employees in an appropriate unit have requested in writing that it hold such an election. The CIR may only certify an exclusive bargaining unit if the majority of the employees voting in the requested election vote for the proposed agent. § 48-838, R. S. Supp., 1976. The question, therefore, is not whether some employee at some particular location desires exclusive representation, but whether at least 30 percent of an appropriate unit have properly evidenced that desire. The CIR in its finding in no way gives any indication how or in what manner the desires of the employees of the Sheldon Station were of legal significance in determining the appropriateness of the unit. If an appropriate unit can be fashioned by simply encompassing those who evidence a desire, then the entire dictates of section 48-838, R. S. Supp., 1976, can be effectively defeated. It must be kept in mind that under the provisions of our public law, employees have not only a right to organize and be represented, but likewise have a right not to be organized and be represented. § 48-837, R. R. S. 1943. If both of these prevailing rights are to be maintained in proper balance, then the requirements of section 48-838, R. S. Supp., 1976, with regard to appropriate units, must likewise be maintained in balance.

If the rationale of the CIR is correct with regard to the Sheldon Station, then of necessity this court would be compelled to recognize, as an appropriate bargaining unit, the Scottsbluff Station with 28 employees, the Ogallala Station with 15 employees, the North Platte Station with 7 employees, and the Spencer Station with 6 employees. We cannot believe that such a decision would be in keeping with the dictates of the law nor with the intent of the Legislature to prevent undue fragmentation. Adding the factors in their various columns, we find that there are no factors which can be found in favor of recognizing the Sheldon Station as an appropriate unit, and that, therefore, the order of the CIR is not sustained by substantial evidence. We therefore reverse the order of the CIR with directions to dismiss the petition of the Sheldon Station Employees Association.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH and BRODKEY, JJ., concur in result.

BANK OF MEAD, A BANKING CORPORATION, APPELLANT, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLEE.

275 N. W. 2d 822

Filed February 27, 1979. No. 41803.

1. **Trial: Judgments.** Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
2. _____: _____. Where a second action is on the same cause of action and between the same parties as the first action, the judgment in the former action ordinarily is conclusive in the second action as to every question which was or might have been presented in determining the former.
3. **Judges: Judicial Notice.** A judge or court may take judicial notice, whether requested or not.

4. **Judicial Notice: Trial.** Judicial notice may be taken at any stage of the proceeding.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

Ronald H. Stave, for appellee.

Heard before SPENCER, MCCOWN, CLINTON, and WHITE, JJ., and WARREN, District Judge.

WARREN, District Judge.

This is an action brought by the Bank of Mead, plaintiff and appellant, against the St. Paul Fire & Marine Insurance Company, defendant and appellee, to recover under certain employee fidelity bonds issued to plaintiff by St. Paul, alleging a loss by reason of a prior judgment obtained by the intervenor Foxley Cattle Company against plaintiff.

The trial court found that there was no genuine issue as to any material fact and sustained St. Paul's motion for summary judgment, dismissing plaintiff's petition. The Bank of Mead appeals from the order overruling its motion for new trial. We affirm.

This is the third time this matter has been before this court. In the first action, the Foxley Cattle Company obtained a judgment for $323,659.14 including prejudgment interest against the Bank of Mead in a suit to recover damages for fraudulent misrepresentations made by a bank employee, Kenneth W. Schuette, to Foxley Cattle Company concerning the ownership, clear title, and location of 1,802 head of steers. These statements were relied upon by the Foxley Cattle Company in purchasing and making payment to Agri-Land & Beef, Inc. and the Bank of Mead for the nonexistent cattle. The jury verdict and judgment for Foxley were affirmed by this court on appeal. Foxley Cattle Co. v. Bank of

Mead, 196 Neb. 1, 241 N. W. 2d 495 (1976).

The second action involved an attempt by Foxley Cattle Company to collect its judgment by a garnishment action against the Bank of Mead, as defendant, and St. Paul Fire & Marine Insurance Company, as garnishee, on the ground that St. Paul was liable to indemnify plaintiff under a Bankers Blanket Bond and an Excess Blanket Employee Dishonesty Bond which it had issued to the Bank of Mead. This court affirmed the judgment of the District Court finding that St. Paul "was not indebted or liable to the plaintiff *or the Bank of Mead.*" (Emphasis supplied.) Foxley Cattle Co. v. Bank of Mead and St. Paul Fire & Marine Insurance Company, 196 Neb. 587, 244 N. W. 2d 205 (1976).

St. Paul relies upon the rule of res judicata as a complete defense. The Bank of Mead contends that the judgment in the garnishment action only adjudicated the question of the liability of St. Paul to the bank's judgment creditor Foxley Cattle Company as a third-party beneficiary, and not the question of the liability of St. Paul to its own insured on the fidelity bonds.

We do not agree with this contention. The basic and underlying issue involved in the garnishment action was whether the judgment obtained by the Foxley Cattle Company against the Bank of Mead constituted a loss of the nature insured against. This court expressly held that it did not, in the following language: "Since we hold that plaintiff's judgment was not a loss sustained by the Bank of Mead within the contemplation of these bonds, no indebtedness or liability existed on the part of St. Paul to the Bank of Mead which could be garnisheed by the plaintiff." Foxley Cattle Co. v. Bank of Mead, *supra.* Our specific holding that the Bank of Mead did not suffer a loss within the coverage of these bonds is res judicata, and may not again be litigated.

"The judgment in the garnishment action will be

conclusive between the garnishee, plaintiff, defendant, and any intervener." § 25-1031.01, R. R. S. 1943.

"Where a second action is on the same cause of action and between the same parties as the first action, the judgment in the former action ordinarily is conclusive in the second action as to every question which was or might have been presented and determined in the former." Omaha P. P. Dist. v. Natkin & Co., 193 Neb. 518, 227 N. W. 2d 864 (1975).

"The doctrine of res judicata operates on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. This court has stated the doctrine as follows: 'Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not.' " Vantage Enterprises, Inc. v. Caldwell, 196 Neb. 671, 244 N. W. 2d 678 (1976).

The Bank of Mead attempts to raise a new issue by alleging that although it has not paid the Foxley Cattle Company judgment, it has paid costs and expenses of $25,000 in defending the various suits resulting from the fraudulent misrepresentations of its bank president. The obligation of St. Paul to indemnify the insured for court costs and reasonable attorney's fees incurred and paid by the bank in defending a suit relates only to: "* * * any suit or legal proceedings brought against the insured to enforce insured's liability or alleged liability on account of any loss, claim or damage which, if established against the insured would constitute a valid and collectible loss sustained by the insured under the terms of this bond." The trial court correctly held

that since this court has previously determined that the Foxley Cattle Company judgment was not a "valid and collectible loss sustained by the insured under the terms of the bond," St. Paul is not obligated to pay costs or attorney's fees expended by the Bank of Mead in the defense of the prior actions.

The Bank of Mead further contends that the trial court erred in taking judicial notice of the two prior actions and in making supportive findings of fact gleaned from the two prior decisions of this court as a basis for finding there was no loss within the terms of the bonds. At the summary judgment hearing, the trial court was requested by counsel for St. Paul to take judicial notice of the two opinions of this court in case No. 40227 (Foxley Cattle Co. v. Bank of Mead) and in case No. 40545 (Foxley Cattle Co. v. Bank of Mead and St. Paul Fire & Marine Insurance Company), and copies of the opinions were furnished to the court. Neither plaintiff Bank of Mead nor the intervenor Foxley Cattle Company objected. Neither requested "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." § 27-201 (5), R. R. S. 1943. While prudence and caution might have indicated that a more readily available reference would have been provided the trial court by offering the complete bill of exceptions and transcript of each of the former cases, it is clear that such records upon which the two Supreme Court opinions were based were "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." § 27-201 (2), R. R. S. 1943.

We conclude that the trial court had not only the right but the duty to take judicial notice of the complete record of the two prior cases when requested by a party and supplied with the necessary information.

In any event it can hardly be argued that this appellate court cannot now take judicial notice of its

own records in the two prior related cases.

"A judge or court may take judicial notice, whether requested or not." § 27-201 (3), R. R. S. 1943.

"Judicial notice may be taken at any stage of the proceeding." § 27-201 (6), R. R. S. 1943.

"Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action." Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551 (1959).

Inasmuch as the nonliability of St. Paul Fire & Marine Insurance Company on the specific bonds involved herein has been judicially determined in a prior suit involving the identical same parties as those now appearing, and is now res judicata, we do not find it necessary to discuss the various findings of fact made by the trial court supporting the previous holding of this court.

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

AFFIRMED.

EDWARD ALBERT, DOING BUSINESS AS ALBERT REALTY, APPELLANT, V. ARTHUR A. STUEBER, GUARDIAN OF ESTELLA STUEBER, INCOMPETENT, APPELLEE.

275 N. W. 2d 408

Filed February 27, 1979. No. 41836.

1. **Guardian and Ward: Property: Sales.** Before a guardian may proceed to sell the real estate of his ward he must comply with the statutes in effect at the time of sale.
2. **Guardian and Ward: Judgments.** When a guardian is sued in his official capacity only, a judgment cannot be rendered against him personally.

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

Fredrick L. Swartz and David J. Powers, for appellant.

Rollin R. Bailey of Bailey, Polsky, Huff & Cada, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

STANLEY, District Judge.

This is an action to recover a real estate broker's commission filed by Edward Albert, plaintiff-appellant, filed in the county court of Lancaster County, Nebraska. After trial judgment was entered against the defendant-appellee Stueber individually. Appellee appealed and the District Court for Lancaster County reversed and set aside the judgment entered against the appellee as an individual.

At all pertinent times appellee, Arthur A. Stueber, was the appointed and acting guardian of Estella Stueber, an incompetent. During the latter part of 1973 or early 1974, the appellee discussed the sale of certain real estate of his ward with the appellant. The appellee stated that it would be necessary to obtain court authorization before proceeding with any sale. On February 15, 1974, a license to sell real estate was entered by the Lancaster County court providing in part: " * * * Arthur A. Stueber, guardian [of Estella Stueber] be, and he hereby is, licensed to sell in a manner prescribed by law, the real estate above described." Shortly thereafter appellee informed the appellant that he had obtained a license to sell. The parties then entered into a listing agreement providing for a selling price of $28,500 and a broker's cash commission of 6 percent of the sale price. Appellant subsequently obtained an offer to purchase for the listed price, which the appellee accepted in his capacity as guardian. On May 7, 1974, the appellee, as guardian, petitioned for and received a supplemental order from the Lancaster County

court granting him a license to sell the real estate at either public or private sale.

On May 9, 1974, the parties met to close the transaction, but were unable to obtain title approval since the land had not been sold at public sale. A public sale was then held and the property sold for $24,000 to the same parties that made the offer to purchase under the listing agreement. The sale was confirmed by the county court. The appellant claims he is entitled to his real estate commission since he had produced the buyer and performed all other conditions required under the listing agreement.

Prior to the adoption of the Nebraska Probate Code, which became effective on January 1, 1977, sales of real property of a ward by guardians or conservators was governed by the provisions of section 38-601 et seq., R. R. S. 1943. Section 38-613, R. R. S. 1943, specifically required that all sales must be by public sale unless the value of the real property be less than $500. By law the license to sell order issued by the county court thus restricted the guardian to a private sale of property valued at less than $500 and if the property was valued in excess of this amount, the sale had to be by public sale. The supplemental license to sell entered on May 7, 1974, authorized sale by either private or public sale and carried, by law, the same value restriction. Under the facts in this case there was a legal impossibility for the parties to perform under the conditions of the listing agreement which constituted a private sale and established the value of the real estate far in excess of the statutory limit. Whether either party actually knew the limitation on value under the license to sell does not change the law in effect at that time.

The remaining issue is whether Arthur A. Stueber is individually liable under the listing agreement. The title of the case as filed in county court, the service of summons, the allegations in the petition,

and the evidence at the trial all address the defendant-appellee in his capacity as guardian. This court in Burton v. Williams, 63 Neb. 431, 88 N. W. 765, held that when an administrator is sued in his official capacity only, a judgment cannot be rendered against him personally.

The District Court was correct in reversing and setting aside the judgment entered against the appellee in his individual capacity. The decision of the District Court is correct and should be affirmed.

AFFIRMED.

KRIVOSHA, C. J., and CLINTON, J., concur in result.

IRENE PAGE ET AL., APPELLANTS, V. LLOYD BUCHFINCK ET AL., APPELLEES. NEDRA RAE HIGGINS ET AL., APPELLANTS, V. LLOYD BUCHFINCK ET AL., APPELLEES. IRENE PAGE ET AL., APPELLANTS, V. LLOYD BUCHFINCK ET AL., APPELLEES. ELLSWORTH A. CLYDE ET AL., APPELLANTS, V. LLOYD BUCHFINCK ET AL., APPELLEES. ALVINA AVERY ET AL., APPELLANTS, V. LLOYD BUCHFINCK ET AL., APPELLEES.

275 N. W. 2d 826

Filed February 27, 1979. Nos. 42022, 42023, 42024, 42054, 42055.

1. **Probate and Administration: Jurisdiction: Wills.** The probate court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will. It has no jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate. Such latter jurisdiction is in the District Court.
2. **Probate and Administration: Wills.** Where an executor does not request a construction of the will, the court has no authority to bind the heirs or legatees by any construction.
3. **Wills: Intent.** The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law.
4. _____: _____. Where the question is one of ascertaining the intention of the testator, any hard and fast rule is inappropriate. The modern view favors recognizing that a will should be construed

in accordance with the language used in each particular case as interpreted in the light of all the circumstances.

5. _____: _____. A devise which charges the devisee thereof personally with the duty of paying the testator's debts, or of paying a legacy, or of performing any other onerous act is significant as indicating an intent to create in the devisee an estate in fee simple absolute.

6. **Trusts: Property.** If the property which is attempted to be put in trust is so uncertain that it cannot be separated or distinguished from the individual property of the trustee, the trust will be void for uncertainty. No trust will be created where the property to be the subject of the trust is left uncertain.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Mingus & Mingus and James A. Beltzer of Luebs, Dowding, Beltzer & Leininger, for appellants.

Edward D. Hotz of Hotz, Kluver & Kizer, H. Alan Curtiss of Reddish, Curtiss & Moravek, and William P. Mueller of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellees.

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

BRODKEY, J.

This is an appeal from the District Court for Box Butte County, Nebraska, after five separate cases were consolidated for trial. The parties stipulated that the five cases would be consolidated for argument and consideration upon appeal to this court.

Plaintiffs are appealing the judgment entered by the District Court construing the will of Alven Evans as it affected personal property in his estate. Alven Evans died testate May 7, 1940. He was survived by his wife, Elizabeth K. Evans, and his five children: Darwin Evans, Alta Dykes, Zena Clyde, Emmerson Evans, and Tyndall Evans. Two of the children, Alta Dykes and Zena Clyde, died in 1946 and 1965 respectively, predeceasing their mother, Elizabeth K.

Evans, who died August 6, 1972. The plaintiffs-appellants in this case are the five children of Zena Clyde, and the daughter of Alta Dykes.

Elizabeth K. Evans died testate in 1972. Her will left all of her property to her children that survived her. Two of her children, Emmerson Evans and Tyndall Evans, died in 1973. Both Emmerson and Tyndall Evans left heirs who are defendants in this action. Lloyd Buchfinck, the Administrator with the Will Annexed of Elizabeth Evans' estate, and LeRoy Evans, who was initially the administrator of her estate, are also named defendants. Darwin Evans, as the only living child of Alven and Elizabeth Evans, is also a defendant in this case.

Subsequent to Elizabeth Evans' death, the individual plaintiffs brought separate actions, requesting the court to construe Alven Evans' will to find that the personal property held by him at his death passed to Elizabeth Evans for life only, and that Alven Evans' will created a trust by precatory words upon all of his personal property. Elizabeth and Emmerson Evans were named as executors in Alven Evans' will. The executors petitioned the county court of Grant County, Nebraska, for letters testamentary, for a hearing on Alven Evans' will, and also requested notice of the probate of the will be given to all persons interested in the estate. Alven Evans' will was admitted to probate on June 10, 1940. An allowance of final account and decree of distribution was filed by the county court in the Alven Evans estate on October 7, 1944. The county court found that under Alven Evans' will, Elizabeth Evans took all of his personal property "subject to the terms, conditions and limitations of said last will and testament, and by reason thereof the said Elizabeth K. Evans is the sole owner of same, subject only to the terms, conditions and limitations of said last will and testament * * *."

Defendants raised as a defense, in their answer to

the plaintiffs' petition, that plaintiffs' privies were parties to the probate proceedings of Alven Evans' estate and thus are bound by the decree of distribution because they failed to appeal the final decree assigning all of Alven Evans' personal property to Elizabeth Evans.

The defendants contend that county courts, in probate matters, are courts of general jurisdiction. Judgments rendered in distribution of estates by the county courts, after proper notice, are final, unless set aside by appeal. The county court of Grant County entered a decree of distribution and inheritance tax in the Alven Evans estate assigning all of his personal property to Elizabeth Evans as the sole owner subject to the conditions in Alven Evans' will.

Sections 30-1601 and 30-1602, R. R. S. 1943, provide that in all probate matters appeals shall be allowed from any final decree of the county court to the District Court by any person against whom such decree may be made or who may be affected thereby, within 30 days after the decision complained of is made. This court, in the case of In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195 (1949), held that sections 30-1601 and 30-1602, R. S. 1943, required all appeals in probate to be taken within 30 days after the decision complained of.

In the case of Father Flanagan's Boys' Home v. Graybill, 178 Neb. 79, 132 N. W. 2d 304 (1964), we stated: "It is contended that the county court of Custer County has original jurisdiction to construe the will of the deceased and that the district court has jurisdiction only on appeal. By a long line of cases this court has held to the contrary. The rule is: The probate court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will. It has no jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely

to the estate. Such latter jurisdiction is in the district court. Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834; DeWitt v. Sampson, 158 Neb. 653, 64 N. W. 2d 352; Lutcavish v. Eaton, 166 Neb. 268, 89 N. W. 2d 44; Brown v. Applegate, 166 Neb. 432, 89 N. W. 2d 233."

In Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834 (1933), this court also stated: "[W]here under the terms of the will an executor can assign the property without a construction of the will and does not request a construction, the court has no authority to bind the heirs or legatees by any construction." The executors of Alven Evans' estate did not ask for a construction of his will nor did the county court ever give personal notice to plaintiffs that Alven Evans' will was going to be construed. Thus, this action was properly brought before the District Court and this court upon appeal.

Alven Evans' will reads in pertinent part as follows: "*Item Second*: I give and devise to my beloved wife, Elizabeth K. Evans, all of the *real estate* which I may be seized and possessed of at the time of my death, for and *during her natural life time,* subject however to the terms, conditions, and limitations hereinafter set forth, with the remainder of the title to said real estate over, at her death, to my five children and heirs at law, to wit: Zena Clyde, Tyndall Evans, Emerson (sic) Evans, Darwin Evans, and Alta Dykes, which I hereby devise to them, share and share alike, subject only to said life estate of my said beloved wife, Elizabeth K. Evans; * * * "*Item Third*: I hereby give and bequeath to my said beloved wife, Elizabeth K. Evans, all of my money, credits, livestock and *personal property* of every kind and description, *subject* however to the following *conditions* to-wit: that is to say, she shall *assume* to pay and shall pay promptly the interest upon the indebtedness that I shall owe at my death * * *. This bequest shall be and is subject also to the

other conditions and limitations in this will hereinafter set forth. * * *

"*Item Fourth*: It is my desire and I hereby will and direct as a condition of the bequest contained in 'Item Third' of this will that my beloved wife shall carry on a ranching business upon said real estate, as nearly as is practicable in the same manner and custom and according to the same plan that I have followed in carrying on the ranching business in my life time; * * *

"The proceeds from said business shall be disbursed in the order following:

1- She shall first pay the land and personal taxes upon said property and business.

2- She shall next pay the matured interest and installments of principal due on said Federal Land Bank Mortgage; and upon that due upon said Production Credit Association.

3- She shall next pay all of the proper expenses incurred in the ranching business.

4- She shall then pay all necessary repairs and improvements to be made on said ranch in order to carry on said business successfully.

5- The *balance* of said proceeds, if any, not necessarily used in building up and conducting said ranching business, shall be placed to the *credit of my beloved wife.*

"I further advise and direct that my said wife shall employ as the active manager of said ranching business my trusted son, Emerson [sic] Evans, and shall confer and consult with him in all things (not waiving her control and deciding voice in all matters), provided however that in case she at any time shall by reason of age, ill health, weakness, or inability for any reason become incompetent or unable to conduct said ranching business, then and in that case my said son, Emerson [sic] Evans, shall by competent authority be appointed as trustee for her use and benefit, to carry on said business in all re-

spects in accordance with the plan here set forth, to the end that my said beloved wife may have all of her rights and property preserved to her, as contemplated by the terms of this will. * * *

"I make this my last will and testamony [sic] (as shown herein) upon the *hope, desire and belief* that my beloved wife will at her death leave all of her property to our said five children share and share alike.

"*Item Fifth*: All the rest, residue and remainder of my property, if there be any, I give, bequeath and devise unto my said five children, share and share alike as tenants in common. In case any of my children shall die in my life time, leaving issue or descendents [sic], I direct that his or her share shall not lapse but shall be paid to said descendents [sic] in equal proportion." (Emphasis supplied.)

The District Court in this action found that:

"1. The personal property inventoried in the Alven Evans estate was bequeathed to Elizabeth K. Evans in 'Item Third' of his Will, in fee simple, subject to her personal duty to comply with the directions in 'Item Fourth' of his Will as to the management and operation of the Evans Ranch. Elizabeth K. Evans performed those obligations and the property inventoried in her estate was owned by her in fee simple at her death, and passed pursuant to the dispositive provisions in her will.

"2. The precatory words in the Alven Evans will refer to *her* property and Alven Evans had no power to dispose of such property.

"IT IS THEREFORE ORDERED, CONSIDERED AND ADJUDGED that Plaintiffs have no interest in the personal property inventoried in the estate of Alven Evans at the time of his death; and that Elizabeth K. Evans owned the property inventoried in her estate in fee simple at her death.

"IT IS FURTHER ORDERED that the petitions of

Plaintiffs are dismissed. All costs are taxed to Plaintiffs."

The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. Overbeck v. Estate of Bock, 198 Neb. 121, 251 N. W. 2d 872 (1977). While the rule is simple, its practical application is more difficult, as evidenced by the instant case.

The true intent of Alven Evans, with regard to his personal property, is somewhat difficult to ascertain from the conflicting and ambiguous language he used in his will. The testator very explicitly gave Elizabeth Evans only a life estate in his real property with the remainder, at her death, going to their five children and heirs. It can be concluded from the life estate given to Elizabeth Evans in the real property that the drafter of Alven Evans' will knew how to create a life estate and divide the remainder. If Alven Evans had intended to leave his wife only a life estate in his personal property, it would seem likely that he could and undoubtedly would have used the same or similar language he employed in creating the life estate in his real property. The fact he did not is, in our opinion, strong evidence that he did not intend to do so, but on the contrary intended to give her the property in fee simple.

"Item Fourth" of Alven Evans' will concludes with the following statement:

"I make this my last will and testamony [sic] (as shown herein) upon the *hope, desire and belief* that my beloved wife will at her death leave all of her property to our said five children share and share alike." (Emphasis supplied.) Plaintiffs claim these words created a precatory trust on the testator's property for their benefit.

The District Court found that the precatory words in Alven Evans' will, "hope, desire and belief," referred to the personal property in Alven Evans' es-

tate which it, in effect, found had vested in Elizabeth Evans in fee simple absolute upon her death and over which Alven Evans had no power of disposal.

The term "precatory words" is defined in Black's Law Dictionary 1340 (4th Ed. Revised, 1968) to be "[w]ords of entreaty, request, desire, wish, or recommendation, employed in wills, as distinguished from direct and imperative terms."

It has been held by this court that precatory words may operate to create a trust on a bequest, although the bequest is given in "fee simple," as in Tucker v. Myers' Estate, 151 Neb. 359, 37 N. W. 2d 585 (1949); or "absolutely" as in Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834 (1933); or "forever" as in Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373 (1941).

1 Restatement of Trusts 2d, § 25, p. 69, Comment b, contains an excellent summary of the rules concerning precatory words and circumstances which are considered in determining the testator's intent. Comment b reads in part as follows:

"b. *Precatory words.* On the one hand, the settlor may manifest an intention to create a trust; on the other hand, his manifestation of intention may amount merely to a suggestion or wish that the transferee should use or dispose of the property in a certain manner, leaving it to the transferee to follow the suggestion or comply with the wish only if the transferee desires to do so. *No trust is created if the settlor manifests an intention to impose merely a moral obligation.* In determining the intention of the settlor the following circumstances among others are considered: (1) the imperative or precatory character of the words used; (2) the definiteness of indefiniteness of the property; (3) the definiteness or indefiniteness of the beneficiaries or of the extent of their interests; (4) the relations between the parties; (5) the financial situation of the parties; (6) the motives which may reasonably be supposed to have influenced the settlor in making the

disposition; (7) whether the result reached by construing the transaction as a trust or not a trust would be such as a person in the situation of the settlor would naturally desire to produce." (Emphasis supplied.)

The modern view has also been stated in Scott on Trusts, § 25.2 (3d Ed., 1967), as follows:

"[W]here the question is one of ascertaining the intention of the testator, any hard and fast rule is inappropriate. This change of view is in accordance with the general trend of modern law in favor of doing away with artificial rules as to the presumption of intention, and in favor of recognizing that a will should be construed in accordance with the language used in each particular case as interpreted in the light of all the circumstances."

Thus, the primary concern is the determination of the intention of the testator in using precatory words. Although trusts were held to arise based upon the use of precatory words in Tucker v. Myers' Estate, *supra*, Merrill v. Pardun, *supra*, and Annable v. Ricedorff, *supra,* this court is not obligated to find the existence of a trust because of the use of such words if a contrary intention on the part of the testator is evidenced.

Alven Evans' intention as to his personal property is evidenced by the fact that he bequeathed his wife all of his personal property, subject to a number of conditions and limitations as further set out in his will. Elizabeth Evans was required to pay outstanding debts and future property taxes. In this connection, 1 Restatement of the Law of Property, § 37, Comment j, p. 102, states that:

"A devise which charges the devisee thereof personally with the duty of paying the testator's debts, or of paying a legacy, or of performing any other onerous act is significant as indicating an intent to create in the devisee an estate in fee simple absolute." See, also, 28 Am. Jur. 2d, Estates, § 20, p. 97.

The authorities cited above condition the creation

of a fee simple absolute on the devisee being personally liable for the testator's debts. Alven Evans' will, in the first condition after the bequest of personal property to Elizabeth Evans, in "Item Third" states that "she shall *assume* to pay and shall pay promptly the interest upon the indebtedness that I shall owe at my death to the Alliance Production Credit Association which shall be secured by a chattel mortgage upon and against my livestock. * * *." (Emphasis supplied.)

Alven Evans' will stated that the balance of the proceeds from the ranching business, after payment of the business debts and expenses and not used in the business, were to be "placed to the credit" of Elizabeth Evans. We interpret this provision as evidencing an intention on the part of Alven Evans to give his wife the net income from the ranching business to do with as she pleased. We also believe that the use of the word "desire," when coupled together with the words "hope" and "belief" indicate and suggest that the testator did not intend to impose a mandatory trust upon the personal property he had previously bequeathed. Although the word "desire" has been found to create a precatory trust in some instances, we believe the directory nature of the use of the word "desire" is somewhat restricted or diminished in this case by the addition of the words "hope" and "belief." Some courts have found that no trust was created by the use of the precatory words, "hope" and "belief". In Taylor's Estate, 28 Pa. Dist. 778 (1919), the court held that no trust was created where the testator's will gave his residuary estate to his wife "with the *desire and belief* that she will execute a will giving and bequeathing whatever property she may have received from me" to the testator's brothers and sisters. (Emphasis supplied.) Likewise, no trust was created in the case of Van Duyne v. Van Duyne, 14 N. J. Eq. 397 (1862), where in his will a testator devised a farm to his son and

daughter "*hoping and believing* they will do justice hereafter to my grandson * * *." (Emphasis supplied.) No conclusive rule can be adopted merely on the basis of which precatory words are used, but we believe in this case the use of the words "hope" and "belief" mitigates and diminishes the force of any intention expressed by the word "desire" that a trust be created. We believe the testator's choice of words in this case does not indicate a direction or command that a trust be created, but only indicates a suggestion of a result he would like to see accomplished.

Finally, the clause in Alven Evans' will which contains the precatory words also refers to "her" property. Obviously, Alven Evans had no power to dispose of any property owned by Elizabeth Evans; and in the absence of a definitely described trust corpus, the trust must fail. As we stated in Smullin v. Wharton, 73 Neb. 667, 103 N. W. 288 (1905): "If there is such uncertainty that it cannot be known who is to take as beneficiary the trust will fail, or *if the property which is attempted to be put in trust is so uncertain that it cannot be separated or distinguished from the individual property of the trustee the trust will be void for uncertainty.* No trust will be created where the property to be the subject of the trust is left uncertain." (Emphasis supplied.) 1 Restatement of Trusts 2d, § 25, p. 70, in its illustration 4, gives the following example: "4. A devises and bequeaths all his property to B, his wife, 'desiring her to give all her estate at her death to my relations.' Since the expression of desire applies not only to A's property, but also to B's property as to which A had no power to create a trust, he does not presumably intend to create a trust as to his property. In the absence of other evidence, B is entitled beneficially to the property and does not take it in trust."

Although the evidence in the record is sketchy, at best, that Elizabeth Evans owned property other

than what she received from Alven Evan's estate, there is evidence in the record that Elizabeth Evans had received social security payments for many years. Furthermore, there is no question that as life tenant of the ranch, Elizabeth Evans was entitled to any income from the real estate. Slocum v. Bohuslov, 164 Neb. 156, 82 N. W. 2d 39 (1957). The record reveals that Alven Evans raised crops, particularly hay, upon the land in which he gave his wife a life estate, and directed her to continue the operation of the ranch. By stipulation of the parties, she did so, and complied with all conditions he specified in his will. The Tucker, Merrill and Annable cases, cited above, are not controlling here because it is clear from a reading of those cases that the testator was clearly referring only to his own property in the creation of the trust. Alven Evans also provided in his will that the proceeds from the business, not used in the business, were to be "placed to the credit" of Elizabeth Evans.

Elizabeth Evans undoubtedly owned property of her own at the date of her death. Even if we were to conclude that, by use of the precatory words in his will, Alven Evans intended to create a precatory trust upon his property, we believe the existence of a precatory trust must fail under the facts of this case because of the ambiguity and lack of certainty as to the property upon which the trust was intended to operate, under the rules set forth above.

Plaintiffs further contend, however, that even if the precatory language in the last paragraph of "Item Fourth" should fail, the Evans ranch and personal property and accumulations thereof would pass to his five children, share and share alike, as tenants in common, by virtue of "Item Fifth" of Alven Evans' will, arguing that he would not have inserted that residuary clause in the will if there were not to be a remainder, and hence testator only intended that his wife, Elizabeth K. Evans, was to take

a life estate in his personal property. In support of this argument he cites Merrill v. Pardun, *supra*; and also the case of In re Estate of Curtis, 123 Neb. 97, 242 N. W. 257 (1932), where this court stated the rule that where an irreconcilable repugnancy exists between two provisions of a will, the latter will prevail over the earlier, unless from a consideration of the entire will a contrary intention is evinced. Even assuming that the foregoing rule is viable, and may be considered in appropriate situations, we do not believe it is applicable under the facts of the present case, as we believe that a consideration of the entire will of Alven Evans indicates a contrary intention. We do not agree that the fact of the presence of a residuary in Alven Evans' will is inconsistent in any manner whatsoever with the absolute bequest to his wife of his personal property in fee simple contained in "Item Fourth" of his will. One purpose of the use of a residuary clause in a will is to avoid the possibility that lapsed or ineffectual bequests would pass by intestacy where it is clear that the testator intended to die testate. As a general rule, lapsed or ineffectual legacies of personal property will pass under a general residuary clause, and will not pass intestate to the testator's heirs. 80 Am. Jur. 2d, Wills, § 1688, p. 742. In the instant case, had Elizabeth K. Evans been unable for some reason to receive or hold the fee simple title of the personal property bequeathed to her in Alven Evans' will, then, and in that event, the "safety valve" of the residuary clause would have divided his personal property among his children. It does not follow at all that the mere presence of the residuary clause mandates the conclusion that Elizabeth K. Evans is incapable of receiving a fee simple title to the personal property in question. We conclude that appellant's claim to this effect is likewise without merit.

For all of the foregoing reasons we affirm the findings of the District Court that the plaintiffs had no

interest in the personal property in Alven Evans' estate at the time of his death, and that upon Elizabeth Evans' death she owned the property inventoried in her estate in fee simple. The judgment of the District Court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN R. RUSH, APPELLANT.

275 N. W. 2d 834

Filed February 27, 1979. No. 42075.

1. **Witnesses: Evidence.** An owner of household goods used for family purposes is competent to express an opinion as to its value.
2. **Juries: Witnesses: Evidence.** Value of personal property is a question of fact for determination of the jury. It is for the jury to resolve conflicts in the evidence on this issue and to pass on the credibility of witnesses.
3. **Statutes: Evidence: Proof.** Evidence of other crimes, wrongs, or acts may be admissible in evidence as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404 (2), R. R. S. 1943.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

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

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

BRODKEY, J.

Defendant below, John R. Rush, was charged with the offense of receiving or buying stolen property of a value of $100 or upwards, under section 28-508, R. R. S. 1943. Following a trial by jury he was convicted and sentenced to a term of 2 to 4 years in the Nebraska Penal and Correctional Complex. He ap-

peals his conviction to this court, assigning as error: (1) That the evidence was insufficient as a matter of law to support the verdict of guilt; (2) that the District Court committed reversible error in allowing into evidence the testimony of Mrs. Newsome concerning the value of the property, she being the owner thereof; and (3) that the District Court committed reversible error in failing to grant a mistrial because of alleged misconduct of the prosecutor in trying to implicate the defendant in prior similar crimes. We affirm.

Defendant's assignments (1) and (2) are interrelated and in reality pertain to the same claim of error. Defendant correctly contends that an essential element of the crime with which the defendant was charged is that the goods in question have a value of $100 or greater. Defendant asserts, in this case, the evidence was insufficient to support the necessary value. Section 28-508, R. R. S. 1943, provides: "Whoever receives or buys any goods or chattels of the value of one hundred dollars, or upwards, that have been stolen or taken by robbers, with intent to defraud the owner, * * * shall, upon conviction thereof, be imprisoned in the Nebraska Penal and Correctional Complex not more than seven years nor less than one year." The testimony as to the value of the color television set allegedly stolen from the owner, Mrs. Newsome, and pawned at Mid-City Jewelry and Loan in Omaha, Nebraska, was presented by the witnesses, Mrs. Newsome and Mr. Kaiman, the manager of the pawnshop. Mrs. Newsome testified as to the theft of the color television set from her apartment, her later redemption of the set from the pawnshop, after her notification of its whereabouts by the Omaha police, and her subsequent identification of the set. Her testimony with regard to value was as follows: "Q. When and where did you buy this TV, Mrs. Newsome? A. Sol Lewis on 72nd. Q. When did you buy it? A. About

February 2nd, 3rd, somewhere in there. Q. Of 1977? A. '77, right. Q. Do you recall what you paid for it? * * * THE WITNESS: Four hundred twenty-four dollars. Q. (Mr. Brown) What condition was the TV in at the time it was stolen? A. It was good condition. It was a brand new TV. Q. Do you have an opinion as to the fair market value in Omaha of that TV on — MR. RILEY: I am going to have to object. There is absolutely no foundation for that, Your Honor. THE COURT: You owned the television, did you not? THE WITNESS: Yes." Defendant's attorney then inquired as to whether she was engaged in the practice of selling televisions and stereos and she answered no to that question, whereupon the counsel for the defendant renewed his objection to the testimony. The objection was overruled, the court stating at the time: "She is the owner of the property. She can testify as to its value." The witness then informed the court she had receipts for its purchase if he would like to have them, but the court replied: "No. The question is, do you know what the fair market value of the television was on November 8th. Do you have an opinion as to what it was. THE WITNESS: It was the same for me, because it was brand new. There was just no one there but me and my daughter, so it was still in good condition, brand new TV, four hundred bucks. Q. (Mr. Brown) And your opinion would be the same on December 21, 1977, I presume, Mrs. Newsome? A. Yes."

It has long been the established rule in Nebraska that the owner of chattels may testify as to their value in both civil and criminal cases. In Sprague v. Allied Mills, 129 Neb. 394, 261 N. W. 892 (1935), we ruled that an owner of household goods, used for family purposes, is competent to express an opinion concerning its value. An even earlier case, Lambert v. State, 91 Neb. 520, 136 N. W. 720 (1912), involved a defendant who was convicted on the charge of receiving stolen property of the value of $36. In

that case this court stated: "There is another consideration entering into this case which should, perhaps, be noticed. The evidence of the value of the property alleged to have been received took a wide range, extending from $10 or $15 to $45. The jury found the value to be $36. By an oversight of the legislature, possibly, the receiving of stolen property of any less value than $35 is not a crime. The court was, therefore, compelled to instruct the jury that, in order to find the defendant guilty at all, they would have to find the value of the property to be at least $35. It was then for the jury to find that value or acquit. They went one dollar over the mark fixed by law. It is complained that there was no competent testimony as to the value of the harness. It is shown that it was nearly new and had only been used a few times, that the owner of the harness, whose testimony is particularly complained of, paid $52 for it, and that a small part of it was missing. The principal objection urged is as to the competency of the testimony of the owner as to the price he paid and the amount of wear of the harness, and to his opinion of the value based thereon. We think that the amount that the harness cost when purchased in the regular course of trade a short time previous to the theft and the amount of wear that it had received were proper elements to be considered by the jury in fixing the value. It is shown that the opinion of the witness was based upon these elements. Having before it the facts upon which the witnesses' estimate of value was based, we cannot see wherein the accused was prejudiced in this regard. A number of other witnesses were examined upon both sides of this question, and we think there is no prejudicial error in this regard."

We think Mrs. Newsome, as the owner of the television set, was clearly competent to testify as to the value of her own household goods, and it is clear that from her testimony alone there was sufficient evi-

dence for the jury to find the value of the property received and pawned by the defendant was in excess of the $100 value referred to in the statute defining the crime. It should also be noted that Mrs. Newsome testified $400 was the fair market value of the television, and was nearly what she paid for the set which she described as brand new.

The other testimony as to the value of the television in question was presented by the manager of the pawnshop, Mr. Kaiman. He testified generally as to his experience in buying, selling, and receiving in pawn various makes and models of television sets, and was then asked the question on direct examination: "Do you have an opinion of the fair market value in Omaha of that MGA TV set that you took in pawn on December 21, 1977 shown on Exhibit No. 4?" He replied: "It would be in the one hundred twenty-five to one hundred fifty dollar area." On cross-examination he was asked by counsel for the defendant as to whether that figure included profit. He replied: "Yes." He was then asked: "How much profit?" Counsel for the State objected to the question on the ground of relevancy, and the court replied: "Well, he answered your question, I think. It includes profit." The court then sustained the objection of the attorney for the State to the question of the defendant as to the amount of profit included in the opinion of the value of the set expressed by the manager of the pawnshop. It should be added, however, that the evidence in the record reflects Mr. Kaiman loaned only the amount of $80 on the set. It does not follow, however, that that figure represented the market value of the television set. Even assuming Mr. Kaiman's opinion as to the market value of the television set might be considered somewhat ambiguous and of doubtful validity because of the absence of evidence as to the amount of the profit included in his estimate of $125 to $150, it must be remembered that the question of value

was a question of fact for the determination of the jury. In Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516 (1951), the jury was faced with conflicting testimony as to the value of the goods which were stolen, one witness placing the value over the statutory minimum and another testifying to a value below such minimum. In refusing to set aside the jury's verdict as to the value, this court said it is for the jury to resolve conflicts in the evidence and pass on the credibility of the witnesses.

In the instant case, the jury had before it not only the testimony of the owner, Mrs. Newsome, that the fair market value of the television was $400, but also the testimony of Mr. Kaiman, although somewhat indefinite in nature, that the market value of the television set was between $125 and $150, but that there was an element of profit included in those figures in an unspecified amount. The court in instructing the jury stated one of the material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant was "That said goods and chattels had a value of one hundred dollars or upwards at the time they were received or bought by the defendant; * * *." The court also instructed the jury that " 'value' means the fair market value of the goods and chattels in question at the time and place of the alleged crime." The court also instructed the jury it was not necessary for them to determine a specific fair market value but only that the fair market value of the item or items at the time in question was at least $100. By bringing back a verdict of guilt against the defendant in this case, it is clear, in view of the foregoing instructions, the jury found the value of the television set to be at least $100. We conclude there is sufficient evidence in the record to support the verdict in that regard.

The defendant also claims the District Court committed reversible error in failing to grant a mistrial

because of misconduct of the prosecutor in trying to implicate the defendant in prior similar crimes. It appears the prosecutor asked the defendant on cross-examination: "Have you ever had any other experiences with stolen property?" The court sustained the defendant's objection to the question. The prosecutor informed the court the defendant was offering the defense of lack of knowledge and mistake or accident and that the State was inquiring with respect to his experience, knowledge, and intent in connection with the case. The prosecutor then asked: "John, did you ever sell any article to another party and then find out that the article had been stolen?" The defendant objected again and the court sustained the objection, following which a hearing was held out of the presence of the jury. At the hearing, the defendant moved for a mistrial because of the prosecutor's questions with reference to prior criminal activity on the part of the defendant claiming the questions obviously drew inferences as to the character of the defendant "which I think prejudices him in front of the jury, * * *." At that point the court stated: "Before I rule on this, I think perhaps the State should make an offer of proof as to what the answers would be to these questions if the court allowed them to be asked." The prosecutor indicated to the court that he had a report from a police officer indicating the defendant told him he had purchased a motorcycle not knowing it was stolen, but later found out it was stolen and subsequently attempted to sell the motorcycle to another party knowing it was stolen; and, also, that he, the prosecutor, would have evidence that in March of 1976, the defendant sold a CB radio stolen from a Brandeis store to another party with the explanation he did not know it was stolen at the time he bought it or sold it but subsequently found out it was stolen; and third, that the defendant participated in the burglary of Dominican High School and led the police

to where the property stolen from Dominican was supposedly located, which property was not there. This event occurred on April 15, 1976. At that time, the prosecutor also informed the court: "I am not offering them to show his character or to show that he was convicted of prior offenses but merely because the test of guilty knowledge is if a person of his age, intelligence, education and experience, would know, then the State has met its burden, and I am merely showing that he has had numerous, at least three, exposures to the police in connection with stolen property and therefore does have experience and knowledge and lack of mistake in connection with this case." After further argument, the court stated: "I think it's awful close to being on the idea of absence of mistake or accident. * * * I think that it might well be pertinent in the idea of absence of mistake and accident or knowledge, intent, but especially in view of the fact one of them is two years old or thereabouts, one of them is pending — * * * Well, in any event, I am going to rule that they be excluded. On the other hand, I think they're close enough to it that I really can't feel that there is any damage to the Defendant at this point sufficient to grant a mistrial, and so I am going to kind of rule both ways. Mistrial is denied. However, I am now going to admonish you that I will not allow anything along this line in. You have made your offer of proof. And so you are now directed not to."

It is clear from the record itself that although the prosecutor did ask two preliminary questions leading up to the introduction of the specific incidents to which he referred, the court did not allow the testimony of the specific incidents to be introduced into evidence, although it appears he might properly have done so. Section 27-404 (2), R. R. S. 1943, provides as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, *or absence of mistake or accident.*" (Emphasis supplied.) In State v. Swiney, 179 Neb. 230, 137 N. W. 2d 808 (1965), a case antedating the Nebraska Evidence Code, we held that evidence of similar acts and offenses is admissible where an element of a crime charged is motive, criminal intent, or guilty knowledge. In that case, quoting from 1 Wharton, Criminal Evidence (11th Ed.), § 350, p. 520, we stated: "Where an act is equivocal in its nature, and may be criminal or honest according to the intent with which it is done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act." Under the above authorities, there would seem to be little doubt that it would have been proper for the court to admit the proffered testimony relative to the acts of the defendant, at least one of which was within a period of a few months of the incident involved in this case. However, the court did not do so, and we do not believe any prejudice resulted to the defendant from the preliminary questions asked by the prosecutor. The error, if any, was harmless error, and we believe there was more than sufficient evidence to sustain the conviction of the defendant by the jury.

We conclude that defendant's three assignments of error are without merit, and, no other error appearing in the record, the judgment of the lower court must be affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

STATE OF NEBRASKA, APPELLANT, V. CLIFFORD E. HUFFMAN, APPELLEE.

275 N. W. 2d 838

Filed February 27, 1979. No. 42154.

1. **Criminal Law: Motor Vehicles.** A violation of the "Nebraska Rules of the Road" is a crime, and the prosecution for such violation is a criminal action.
2. **Criminal Law: Constitutional Law.** 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. **Criminal Law.** The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

Vincent Valentino and Michael J. Murphy, for appellant.

Larry R. Baumann, for appellee.

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

KRIVOSHA, C. J.

This matter comes before the court on error proceedings brought by the County Attorney of York County, Nebraska, pursuant to the provisions of sections 29-2315.01 and 29-2319 (3), R. R. S. 1943. The specific question concerns the constitutionality of section 39-669, R. R. S. 1943, which provides as follows: "Any person who operates a vehicle in a manner so as to endanger *or be likely to endanger* any person or property shall be guilty of careless driving." (Emphasis supplied.) The county court of York County, Nebraska, wherein the appellee was tried on an amended charge of careless driving, sustained appellee's motion to dismiss the charge, finding section 39-669, R. R. S. 1943, was void for vagueness and therefore in violation of the fundamental

constitutional requirements of the due process clause. On appeal the District Court for York County, Nebraska, also found the statute to be vague and in violation of the constitutional requirements applicable thereto, and ruled the statute unconstitutional. We agree with the District Court and affirm the judgment.

It is without question that a violation of section 39-669, R. R. S. 1943, constitutes a crime for which a perpetrator is subject to criminal prosecution. State v. Knoles, 199 Neb. 211, 256 N. W. 2d 873. Since the statute in question is criminal in nature, it is a fundamental requirement of due process of law that such criminal statute be reasonably clear and definite. Markham v. Brainard, 178 Neb. 544, 134 N. W. 2d 84; State v. Adams, 180 Neb. 542, 143 N. W. 2d 920.

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; Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adams, *supra;* State v. Nelson, *supra.* The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State, ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607; Connally v. General Con-

struction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential element of due process of law. State v. Adams, *supra*; State v. Pocras, 166 Neb. 642, 90 N. W. 2d 263.

In the case of State v. Adams, *supra,* this court was called upon to determine the constitutionality of section 39-7,108.01, R. R. S. 1943. We there held that the statute in question was sufficiently vague as to violate the constitutional requirements saying: "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."

The statute in question makes it a violation not only to operate a motor vehicle "in a manner so as to endanger * * * any person or property," but likewise makes it an equal violation to operate a motor vehicle "in a manner * * * *likely* to endanger any person or property." (Emphasis supplied.) If, in fact, as we said in State v. Adams, *supra*, men of common intelligence cannot ascertain in advance when they are operating a motor vehicle in a manner so as to *endanger* any person or property, all the more must it be said that it would be difficult or at least open to sufficient conjecture as to when one was operating a motor vehicle "in a manner so as to * * * *be likely* to endanger any person or property * * *" (Emphasis supplied.) Obviously the question of whether one is operating a motor vehicle in a manner so as to be likely to endanger must of necessity involve opinion and therefore be open to conjecture. Likewise, whether one is "likely" to be operating a motor vehicle in such a manner as to endanger any person or property may to some extent depend

upon the ability of the driver as well as conditions, known or unknown, to the driver.

The determination as to whether the particular driving was, in fact, in a manner "likely" to endanger may in some instances be ascertainable only after the fact. The standard announced in the statute fails to describe a crime and the elements constituting the crime in a clear, prospective manner as required by our criminal law. There appears within the statute no ascertainable standard by which men of common intelligence can determine what is unlawful. Under the provisions of the act as it now stands, no injury need occur. The test is only to determine if, in fact, one operated an automobile in such a manner "likely" to endanger. In certain instances that may only be ascertainable after the fact and based upon speculation and conjecture. To permit the doing of an act without violation of the statute if performed by an experienced driver, while making the same act unlawful if performed by a novice driver, is far too vague and indefinite to withstand constitutional attack. We, therefore, find and declare that section 39-669, R. R. S. 1943, is vague and indefinite and is thus unconstitutional. We accordingly affirm the judgment of the District Court for York County, Nebraska

AFFIRMED.

MCCOWN and BRODKEY, JJ., concur in result.

CLINTON, J., dissenting.

I respectfully dissent. The majority finds that the statutory language, "operates a vehicle in a manner so as to endanger or be likely to endanger any person or property shall be guilty of careless driving," is so vague and unsusceptible of a determinable meaning that it is unconstitutional. I agree that criminal statutes (as well as others) occasionally may be that vague. In my judgment, however, this is not one of those cases.

This court held a predecessor statute, section 39-

7,108.01, R. R. S. 1943, unconstitutional for vagueness. The language of the statute under consideration there was: " '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 . . . .' " State v. Adams, 180 Neb. 542, 143 N. W. 2d 920.

It is apparent the opinion in Adams was founded upon the premise that the language describing the act prohibited did not import an element of "careless or negligent operation," and that some such language was necessary to make it sufficiently precise. The opinion referred to a New Jersey case with the apparent purpose of indicating the kind of language which would be acceptably definite and said: "The New Jersey statute included an element of careless or negligent operation which is absent from section 39-7,108.01, R. R. S. 1943."

The first argument of the majority here seems to be that the word "careless," in section 39-669, R. R. S. 1943, only names the crime but does not describe the act which is prohibited. It seems clear enough to me that the words of section 39-669, R. R. S. 1943, import the concept of driving in a careless or negligent manner so as to endanger. Apparently if the statute read: "Any person who operates a vehicle in a careless [or negligent] manner so as to endanger or be likely to endanger any person or property shall be guilty of a misdemeanor [infraction]," the majority would be satisfied. We have a duty to construe statutes so they satisfy constitutional requirements if possible. Here, where the statute in its body calls the crime "careless driving," it quite obviously means the manner of driving must be careless. As so construed the statute is not vague.

The majority also argues the statute is vague because whether the manner of driving is likely to endanger "may in some instances be ascertainable

only after the fact." This seems an unusual and tenuous argument, since whether a violation has occurred must always be ascertained after the fact by the trier of fact in the light of the evidence. If section 39-669, R. R. S. 1943, is vague, then it seems to me that the same is true of section 39-669.01, R. R. S. 1943, where the proscription is against driving "in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property . . . ." It would also be true of section 39-669.03, R. R. S. 1943, where the disregard must be "in such a manner as to indicate a willful disregard . . . ."

Various statutes and ordinances relating to speed limits, in addition to prohibiting driving higher than a specified number of miles per hour, also contain general provisions making it unlawful to drive at a speed "greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." § 39-662 (1), R. R. S. 1943. This language is no more vague than the careless driving section and I dare say no one can determine beforehand precisely the facts which constitute a violation. No one has ever suggested that section 39-662, R. R. S. 1943, or other similar enactments are unconstitutionally vague and I predict that this court will never say so.

Third, the majority relies upon one of the myths of the law which the courts have long mouthed unthinkingly, i.e., that the statute must be sufficiently definite so persons examining it may be informed of what conduct is prohibited, or as stated in the majority opinion, so the "person can intelligently choose in advance what course it is lawful for him to pursue." Such statements are myths because the real reason for the requirement of reasonable certainty is to enable courts to determine after the fact what the lawmakers intended to prohibit and whether or not there has been a violation. Nothing is more elementary in the law than that ignorance of

a statute is no defense to a charge of its violation. Few people consult the statutes before acting, and then only in highly technical areas such as tax matters and antitrust regulations.

In the very nature of language and human understanding, some concepts, such as careless, reckless, negligent, and greater than reasonable under the circumstances, can be described only in quite general terms. I would hold the statute in question constitutional.

SPENCER, Retired Justice, joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. KENDELL N. RADFORD, APPELLANT.

276 N. W. 2d 82

Filed February 27, 1979. No. 42174.

Statutes: Right to Counsel. For the purpose of determining whether a defendant is entitled to the appointment of counsel at public expense, indigency is defined as the inability to retain counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family. § 29-1804.04, R. R. S. 1943.

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

Dean E. Erickson, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal in a post conviction proceeding. The defendant was convicted in the county court of second offense operating a motor vehicle while his operator's license was suspended and was sentenced to 6 months imprisonment in the county jail. No appeal was taken from the judgment and the defendant commenced serving the sentence.

On January 31, 1978, the defendant filed a petition in the county court seeking post conviction relief on the grounds that the county court should have appointed counsel for the defendant and that he was denied his right to trial by jury. The county court dismissed the petition and on appeal to the District Court the judgment was affirmed. The defendant has appealed to this court.

The record shows the defendant was first arraigned in the county court on August 9, 1977. At that time the county judge explained that the defendant had a right to be represented by an attorney, and if he could not afford an attorney, one would be appointed at public expense. The county judge also explained that the defendant had a right to trial by jury. The defendant stated that he understood the explanation of his rights; that he wished to be represented by an attorney, but was unable to retain one; and that he wanted to be represented by an attorney at public expense.

The defendant was then examined under oath by the county judge. The defendant testified that he was employed at Petersen's Vise Grips earning "about 116 every four days." He was single and had no cash or bank accounts. He owned no other property except an automobile, on which he owed more than it was worth.

The county judge then denied the defendant's request for the appointment of an attorney at public expense and continued the matter until August 16, 1977, so that the defendant could see if he could retain and talk with an attorney before entering a plea.

On August 16, 1977, the defendant appeared without an attorney and stated that he wished to plead not guilty and represent himself. After further questioning the defendant stated that he wanted "just an ordinary trial" without a jury. The trial was then set for October 17, 1977. The county judge

recommended to the defendant that he obtain counsel and suggested he talk to an attorney and find out what the expense would be.

On October 17, 1977, the defendant appeared for trial without counsel. The county judge summarized what had happened before stating that the defendant had pleaded not guilty and had waived a jury trial. The defendant stated that this was correct; that he was present without an attorney; and that he was prepared to proceed with the trial. The trial proceeded and the defendant was found guilty of driving on a suspended license on July 31, 1977. The matter was then continued until October 20, 1977, for the determination as to whether it was a second offense.

On October 20, 1977, the defendant appeared in the county court with James Sharp, an attorney. Sharp was unable to represent the defendant because of a conflict of interest. The matter was continued until October 21, 1977, at which time the defendant appeared with his present counsel.

The principal issue in this case is whether the finding of the county judge that the defendant was not indigent is supported by the evidence. Section 29-1804.04, R. R. S. 1943, defines indigency as "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."

At the time the defendant appeared before the county judge claiming to be an indigent he testified he was earning $116 per week and was single. Although the record indicates the defendant became unemployed before the date of the trial, the record does not show this information was communicated to the county judge until November 10, 1977. The defendant made no effort to obtain counsel at his own expense until after he had been found guilty on October 17, 1977, more than 60 days after his first appearance in the county court. There is some sug-

gestion in the record that the defendant preferred to represent himself if he could not obtain counsel at public expense before trial.

Although this is somewhat of a borderline case, we think the record sustains the finding of the county judge that without a further showing of inability to obtain counsel the defendant was not entitled to the appointment of counsel at public expense. The evidence developed at the post conviction hearing did not show otherwise.

The record fully sustains the finding of a waiver of trial by jury.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL EUGENE MILLER, APPELLANT.

275 N. W. 2d 614

Filed February 27, 1979. No. 42250.

1. **Criminal Law: Trial: Guilty Pleas: Motions, Rules, and Orders.** A motion to withdraw a guilty plea addresses itself to the discretion of the trial judge, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere.
2. **Criminal Law: Trial: Guilty Pleas.** It is not proper for a trial judge to permit the withdrawal of a guilty plea which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice.
3. **Criminal Law: Evidence: Burden of Proof.** The burden is on the defendant to establish the manifest injustice by clear and convincing evidence.
4. **Criminal Law: Guilty Pleas: Waiver.** When the defendant waives his state court remedies and admits his guilt, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.
5. **Criminal Law: Guilty Pleas.** A guilty plea may not be withdrawn as a matter of right solely because the defendant chose to withhold facts from his attorney and the court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Thomas A. Vakulskas, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

CLINTON, J.

Defendant-appellant Michael Eugene Miller pled guilty to a charge of breaking into a dwelling with the intent to steal property. Before sentencing, defendant made a statement alleging several improprieties on the part of a county attorney and the sheriff's department, after which defendant's attorney moved that defendant be allowed to withdraw his guilty plea and proceed to trial. The court denied the motion and sentenced defendant to serve 2 to 8 years in the Nebraska Penal and Correctional Complex with no credit given for time already served.

The sole issue on this appeal is whether the trial court erred in refusing to set aside defendant's guilty plea. The claim is that the statements made by defendant at the time of sentencing clearly showed that his guilty plea was not knowingly, intelligently, and voluntarily entered. We affirm.

The principles which govern in this case are as follows: A motion to withdraw a guilty plea addresses itself to the discretion of the trial judge, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere. Jurgenson v. State, 166 Neb. 111, 88 N. W. 2d 129. It is not proper for a trial judge to permit the withdrawal of a plea of guilty which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice. State v. Evans, 194 Neb. 559, 234 N. W. 2d 199; State v. Johnson, 187 Neb. 26, 187 N. W. 2d 99. The burden is on the defendant to establish the manifest injustice by clear and con-

vincing evidence. State v. Krug, 187 Neb. 551, 192 N. W. 2d 163; State v. Johnson, *supra*.

The defendant does not and could not allege any defect in the proceedings wherein his plea was entered and accepted. Before accepting the plea, the trial court conducted a comprehensive inquiry to ensure that defendant understood the maximum and minimum penalties for the crime with which he was charged, the constitutional rights which he was waiving, and the fact that the court was not bound by the terms of the plea bargain which defendant and his attorney had entered into with the county attorney. The court specifically inquired: "Has anybody made any promises, threats or inducements to get you to come into this court and enter a plea of guilty, Mr. Miller?" to which defendant replied, "No, sir." Defendant then admitted to the court that he was in fact guilty and described the commission of the crime in detail. After asking whether defendant understood the proceedings and giving defendant an opportunity to ask questions, the court accepted the plea of guilty.

Before the date set for sentencing, defendant wrote a letter to the county attorney in which he threatened to stir up trouble unless the county attorney followed through on unspecified promises to help defendant. In another letter to the trial court, defendant alleged promises, threats, and denial of the right to counsel.

At the sentencing proceedings, the court first permitted defendant to make a statement concerning the allegations in his letter to the court. Defendant's statement will not be summarized here since, even if the statement were accepted as true in every respect, it utterly failed to establish by clear and convincing evidence that defendant's plea had not been knowingly, intelligently, or voluntarily entered, or that withdrawal of the plea was necessary to correct a manifest injustice.

One other matter requires comment. Defendant had not informed his attorney of any of the alleged improprieties until after the arraignment because he thought he would not be believed and because he was relying on the county attorney's promise to help him if he pled guilty. However, defendant alleged no promises by the county attorney other than a version of those disclosed in the plea bargain, which the county attorney honored in every respect although the court chose not to accept some of the terms of the bargain.

It is possible defendant's attorney would have recommended pleading not guilty and proceeding to trial had defendant informed him of these allegations prior to the arraignment, but it is pointless to speculate about that now. Defendant chose not to tell his attorney or the court of these matters, and, in fact, chose to tell the court that no one had made any promises or threats to induce his plea. "[W]hen the defendant waives his state court remedies and admits his guilt . . . he assumes the risk of ordinary error in either *his* or his attorney's assessment of the law and facts." (Emphasis supplied.) State v. Bevins, 187 Neb. 785, 194 N. W. 2d 181. We hold that a guilty plea may not be withdrawn as a matter of right solely because the defendant chose to withhold facts from his attorney and the court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it.

AFFIRMED.

McCOWN, J., dissenting in part.

This court has again approved a denial of credit for time served in jail while awaiting sentence without explanation. The District Court gave no explanation or reason for denial of credit in the record. This court has held that ordinarily a defendant should be given credit for time spent in jail prior to sentencing. See State v. Blazek, 199 Neb. 466, 259 N. W. 2d 914.

See, also, my concurring opinion in Eutzy v. State, 199 Neb. 384, 258 N. W. 2d 829.

Most judges of the District Court now grant credit for jail time as a matter of course. All judges of the District Court should do so and this court should consistently demand that credit be given for jail time where no explanation appears to justify denial.

RICHARD J. COOK ET AL., APPELLEES AND CROSS-APPELLANTS, V. OTTO H. BEERMANN, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH ALLEN L. HEIKES, APPELLEE AND CROSS-APPELLEE.

276 N. W. 2d 84

Filed March 6, 1979. No. 41634.

SUPPLEMENTAL OPINION

Trial: Pleadings. Affirmative allegations made by a defendant in his answer to a cross-claim against him by a codefendant, which allegations are in essence denials of allegations of the cross-claim, are not to be treated as judicial admissions upon which the plaintiff may rely in his claim against the defendant, where the rights of the cross-claiming defendant against his codefendant arise from an independent contract between them.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Pierson, Ackerman, Fitchett & Akin and Joseph E. Marsh, for appellant.

Maurice S. Redmond and Gleysteen, Harper, Eidsmoe & Heidman, for appellees Richard J. Cook et al.

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

PER CURIAM.

Upon motion for rehearing, the opinion previously adopted by this court and appearing at 201 Neb. 675,

271 N. W. 2d 459, is modified in the following particulars.

Syllabi 7 and 8 are withdrawn and the syllabus appearing above is substituted.

The following statement is stricken from the opinion because it constitutes mere dicta and appears to decide a matter not at issue: "Actually, there is authority that the irrigation pipe and sprinkler system were also fixtures even though they were not physically attached to the real estate. We said in Frost v. Schinkel, 121 Neb. 784, 238 N. W. 659 (1931): 'It should be a safe rule to say that parts of property which are not physically attached to realty, but which are absolutely necessary to the operation of machinery and equipment which is physically attached, become themselves governed by the same rules as that which is annexed to the freehold.' "

All of that portion of the opinion beginning with the words: "While this involved a dispute as to value between the codefendants," down to and including the end of the opinion is stricken and the following substituted therefor.

The rule of evidence is that matters contained in pleadings are judicial admissions insofar as the adversary is concerned. Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435; Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291; Saum v. L. R. Foy Constr. Co., Inc., 190 Neb. 783, 212 N. W. 2d 648; State v. Mahloch, 174 Neb. 190, 116 N. W. 2d 305; Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65; In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923. Matters contained in pleadings in other cases are simple admissions. Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415; Sears v. Mid-City Motors, Inc., 178 Neb. 175, 132 N. W. 2d 361, affirmed on rehearing, 179 Neb. 100, 136 N. W. 2d 428. The same is true of superseded pleadings. Sleezer v. Lang, *supra*; Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

If in this case the plaintiff had brought action

against Heikes alone and obtained judgment against him, then Heikes could have, in an independent action, sought recovery from Beermann on implied warranties of title. In such an action, so far as plaintiff was concerned, whatever Beermann said would only be simple admissions under the above principles. We believe that under the facts here the "admission" was at most a simple admission and not a judicial admission binding the trial court.

We hold that affirmative allegations made by a defendant in his answer to a cross-claim against him by a codefendant, which allegations are in essence denials of allegations of the cross-claim, are not to be treated as judicial admissions upon which the plaintiff may rely in his claim against the defendant, where the rights of the cross-claiming defendant against his codefendant arise from an independent contract between them.

The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

Assuming that the majority is correct in its determination and its characterization that the statement in Beermann's pleading was not a judicial admission, the majority have come to an improper result. As both the majority and the opinion on rehearing point out, the pleading which contained the admission was not admitted into evidence by the trial court; it was therefore not considered. Such evidence is acknowledged by all parties to be relevant and bears directly on the issue in controversy. Logic would require that the case be remanded for a new trial in which the admittedly admissible evidence would be considered by the trier of fact in arriving at his judgment. Instead, the majority votes to affirm, both condemning the refusal of the trial court to admit the evidence and agreeing with it on the result. I would reverse and remand for new trial.

BOSLAUGH, J., joins in this dissent.

DAVID H. STAHMER ET AL., APPELLANTS, V. FRANK MARSH, STATE TREASURER, ET AL., APPELLEES.

276 N. W. 2d 87

Filed March 6, 1979. Nos. 41790, 41791, 41792.

1. **Schools and School Districts: Voters.** Legal voters of school districts have the right to maintain legal action in their own names to determine the boundaries of the district.
2. **Pleadings: Statutes: Parties.** Separate causes of action may not be joined in a single petition unless each cause affects all parties. § 25-702, R. R. S. 1943.

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

Wright & Simmons, for appellants.

Verne Moore, Jr. of Moore, Moore & Peters and James W. R. Brown of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee District 66 of Douglas County.

Shrout, Christian, Krieger & Merwald, for appellee Ralston School District.

Young, White, Ramsey, Wieland & Owens, for appellee Millard School District.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and VAN PELT, District Judge, and KUNS, Retired District Judge.

WHITE, J.

In this trio of lawsuits, the plaintiffs are residents and taxpayers of the School District of Omaha, Douglas County, Nebraska. On behalf of themselves and persons similarly situated, they seek declaratory relief against the three principal defendants, School District 66 (Westside), Ralston School District, and Millard School District, all of Douglas County. The School District of Omaha and various county and state officials are also named as defendants. Each of the named defendants was a party defendant to each lawsuit.

The relief requested was a determination in each case that such parts of the three districts as may be within the city limits of the City of Omaha, are a part of the School District of the City of Omaha. Plaintiffs further prayed for reassignment of various tax revenues, this prayer directed at the county and state officials responsible for this function.

The defendants demurred and the trial court sustained the demurrer. Plaintiffs elected to stand on their petition. The petition was dismissed and the plaintiffs appeal.

In the order sustaining the demurrer, the trial court held that: (1) The plaintiffs had no standing to maintain the suit; (2) there is a defect of parties and a misjoinder of causes of action; (3) that boundaries of a metropolitan school district do not automatically expand by additions or annexations to a metropolitan city. We will discuss only assignments (1) and (2).

Do the plaintiffs have standing? We said in School Dist. of Gering v. Stannard, 193 Neb. 624, 228 N. W. 2d 600: "* * * this court has repeatedly held that legal school voters of school districts involved in district boundary proceedings have the right to maintain legal action with respect thereto in their own names." See, also, Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626. Whether or not, as the trial court held, the petition on its face disclosed conflicts in the class so that a class action suit could not be maintained under present Nebraska law is immaterial. See Blankenship v. Omaha P. P. Dist., 195 Neb. 170, 237 N. W. 2d 86. The fact is that by clear Nebraska authority plaintiffs have standing in their own right to maintain this action.

In each of the three suits, the plaintiffs, in their first cause, sought general relief as against all parties to the action including the three school districts. The second cause of action in each of the suits was

respectively directed only at School District 66 (Westside), the Ralston School District, and the Millard School District. It is elementary that causes of action may not be joined in one petition unless each cause of action affects all parties to the action. See, § 25-701, R. R. S. 1943; § 25-702, R. R. S. 1943; Sickler v. City of Broken Bow, 143 Neb. 542, 10 N. W. 2d 462. The trial court was correct in holding that there was a misjoinder of causes of action and properly sustained the demurrer.

The plaintiffs elected not to amend and the petition was dismissed. Any further ruling by the trial court with respect to any of the substantive issues involved in the pleadings was not properly before it and is not properly before this court. We do not make any determinations of the merits of plaintiffs' cause either on the statutory grounds they cite or on the constitutional grounds which they argue and which could be the subject of evidence in the event of further action. Because of the misjoinder of causes of action, the order of the trial court sustaining defendants' demurrer is affirmed and the cause dismissed.

AFFIRMED.

CLINTON, J., concurs in result.

SANDRA ANDERSON, APPELLANT, V. Y. S. MOORE, M.D., APPELLEE.

275 N. W. 2d 842

Filed March 6, 1979 No. 41802.

1. **Verdicts: Trial.** A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

2. **Malpractice: Negligence.** Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment.
3. _____: _____. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients.
4. **Malpractice: Negligence: Burden of Proof: Damages: Probable Cause.** Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing both these essential elements rests upon the plaintiff's introduction of expert medical testimony.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded.

Edward F. Fogarty of Guilfoyle, Fogarty & Lund and J. Michael Moeller, for appellant.

Fredric H. Kauffman of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

Heard before SPENCER, MCCOWN, CLINTON, and WHITE, JJ., and WARREN, District Judge.

SPENCER, J.

This is a medical malpractice action brought by Sandra Anderson against Y. S. Moore, M. D. At the close of the plaintiff's evidence the District Court sustained the defendant's motion for a directed verdict and plaintiff prosecutes this appeal. The issue involved is whether the doctor violated the standard of care in the Lincoln community by negligently diagnosing plaintiff's symptoms, and in prematurely discharging her from the hospital. We reverse.

Plaintiff, at the time of the incident giving rise to this action, was a 29-year-old resident of Lincoln, Nebraska. On August 4, 1974, she traveled to Fort

Collins, Colorado, to visit her estranged husband. Two or three days later, while still in Fort Collins, she experienced lower abdominal pains and vomiting. On August 8, 1974, she went by bus to Denver, Colorado, to stay with her brother. She still experienced stomach pains, was vomiting, and had diarrhea. The following day she entered a Denver hospital emergency room and was prescribed medication. On August 10, she returned by plane to Lincoln. That evening, while at her sister's home, the pain became more severe and she was taken to Bryan Memorial Hospital.

Plaintiff was admitted to the emergency room at Bryan Memorial Hospital at 9:55 p.m. The physician on duty, Doctor J. D. Nelson, conducted a physical examination. He observed abdominal tenderness, especially in the right lower quadrant. A vaginal examination revealed extreme tenderness in the right adnexal area and a creamy white vaginal discharge. Blood tests, X-rays, and cultures were taken. The diagnosis made by Doctor Nelson was possible pelvic inflammatory disease (PID), appendicitis, or viral gastroenteritis.

The defendant was plaintiff's regular physician. He was contacted by Doctor Nelson and prescribed Lomotil. Plaintiff returned to her sister's home, but when the pain did not subside after taking the medication, she called the defendant. He had her report to Lincoln General Hospital, where she checked in at 1 a.m., on August 11, 1974.

Plaintiff was examined by the defendant at Lincoln General Hospital. His notes indicate she was experiencing moderately severe pain in the lower abdominal region. Nausea, diarrhea, and vaginal discharge were present. Plaintiff did not have a fever. Defendant's impression was noted as probable PID. He also made a notation to rule out appendicitis, meaning he considered appendicitis a possibility. In these respects his diagnosis con-

formed to that made by Dr. Nelson. Defendant prescribed Demerol for the pain and ordered another blood test for a white blood cell count. He visited plaintiff again during his rounds that morning and observed she was feeling better and was not suffering from nausea. He directed that Demerol be given as needed and that penicillin be administered.

On August 12, defendant received the report on the X-ray taken at Bryan Memorial Hospital. It indicated a possible fecalith in the appendix. This suggested the possibility of appendicitis. The defendant then called in Doctor Richard Toren for surgical consultation. Doctor Toren examined the plaintiff on the evening of August 12, and made the following notation: " 'Patient examined, history reviewed. Very hard to evaluate because of over-reacting. Rectal exam reveals very tender when cervix manipulated. Abdomen difficult to evaluate. Bowel sounds are rare. Think this may still be PID. Will follow.' " Doctor Toren followed the case throughout plaintiff's stay at the hospital and continued to consult with the defendant.

From a review of his progress notes, the nurses' notes, and the medication chart, defendant described plaintiff's condition through August 14, as follows: "It was very stormy. She had a lot of pain, was very uncomfortable, required a lot of narcotics for relief of pain. She didn't get to sleep very much, I don't think. She had a miserable two or three days." During this period of time from August 11 to August 14, plaintiff was given penicillin injections. Her white blood cell count decreased from a high of 18,900 on August 11, to 11,700 on August 14.

On August 13, defendant directed that plaintiff be given light food as opposed to a liquid diet and that antibiotics be administered by mouth. The next day shots were stopped completely and penicillin was given by mouth. Plaintiff began to experience

nausea and vomiting. Defendant attributed this to the change in medication. He did not think it was caused by a bowel obstruction because this would be accompanied by a very distended, firm abdomen which plaintiff did not have. Further, plaintiff was not experiencing pain consistent with a bowel obstruction and was having bowel movements. Defendant prescribed Tigan to relieve the nausea and vomiting.

By August 16, plaintiff's condition had improved to the point where defendant could conduct a pelvic examination. Her pelvis was still tender but there were no masses. There was some fullness on the right side indicating salpingitis, or inflammation of the uterine tube. Plaintiff began vomiting on the night of the 16th, and defendant, thinking the oral medication might have to be discontinued, started plaintiff on intravenous fluid. Some vomiting continued during the early morning hours of August 17.

When defendant visited plaintiff during morning rounds on the 17th, she was much improved. She no longer had nausea; her abdomen was soft; and she was without pain. Plaintiff expressed a desire to go home and defendant was of the opinion she could be placed on an outpatient status. He discharged her from the hospital and prescribed penicillin to be taken orally. He instructed plaintiff to notify him if her condition worsened and also to report at his office at the end of a specified time, at which time he expected to do a physical and pelvic examination and to make further blood tests. Defendant testified that although he believed plaintiff could be released from the hospital, she was not completely well. This was indicated by tachycardia, or a rapid pulse rate, and the fact she had vomited during the night, most recently at 4:30 a.m. Plaintiff was discharged into the care of her mother at 9:10 a.m., on August 17, 1974. She never contacted the defendant after that time.

Plaintiff spent the following week with her parents in Deshler, Nebraska. She testified that after she had been home for a day she started to have a lot of pain, was vomiting, and had diarrhea. Toward the end of the week she began to feel better and returned to Lincoln on Saturday, August 24, 1974. She went to work on Monday and experienced no pain during the day. That night, however, the pain returned. She attempted to work on Tuesday morning but could not stand the pain. She called her mother-in-law who took her to another Lincoln physician, Doctor J. M. Stemper. Doctor Stemper examined plaintiff in his office and then had her admitted to Bryan Memorial Hospital at 4:20 p.m., on August 27, 1974. His diagnosis at the time was: Possible pelvic inflammatory disease (PID) or possible appendicitis. This is the same diagnosis made by defendant on August 11, 1974.

After a consultation with a surgeon, exploratory surgery was performed on August 28, 1974, by Doctor L. E. Tenney. A large inflammatory mass was discovered in the lower right quadrant of the abdomen. The small bowel was markedly distended and fecal matter was leaking from a defect in the ileum. There was a tremendous amount of contamination in the pelvic area, with fecal matter. The appendix was acutely inflamed. An appendectomy and ileostomy were performed. Attempted repair of the ileum was not considered suitable at that time. Instead, the bowel was divided at the affected area and the two segments were exteriorized. The peritoneal cavity was thoroughly irrigated and drains were inserted for the pelvic abscess. Plaintiff's recovery was somewhat slow because of the infection and a fistula which developed following surgery. She was released from the hospital on October 5, 1974, at which time she went home and was cared for by her mother. An ileostomy bag was attached to the exteriorized bowel.

On October 21, 1974, plaintiff reentered Bryan Memorial Hospital for reanastomosis of the ileum. This corrective surgery was performed by Doctor Tenney on October 24, 1974. Plaintiff's stay in the hospital following this operation was prolonged because of infection, but she was finally discharged on November 10, 1974. She convalesced at home and returned to work in January 1975, without encountering further problems.

Plaintiff alleged defendant was negligent in the following two respects: "a. Lack of due care in his diagnosis of the Plaintiff's affliction, resulting in his incorrectly diagnosing the Plaintiff's true condition, which was either one or more of the following: acute or peri appendicitis, or regional illeitis (sic). b. Prematurely discharging Plaintiff from Lincoln General Hospital on or about the 17th day of August, 1974, when he knew or should have known she needed continued diagnosis, care and treatment, in that she was until early that morning experiencing nausea, vomiting, fever, elevated pulse rate, & abdominal pain."

Following plaintiff's first surgery, consultation was had with two gastroenterologists, Doctor Joseph Stitcher and Doctor David Dyke. The diagnosis of Doctor Stitcher on September 9, 1974, was as follows: "Acute pelvic inflammatory process, probably acute enteritis/possible Crohn's disease with subsequent small bowel fistula." Enteritis refers to inflammation of the small intestine. Crohn's disease is another name for regional ileitis. Biopsy reports and X-rays, however, did not reveal the presence of Crohn's disease. Doctor Stemper's diagnosis following plaintiff's October discharge was as follows: "1. Pelvic abscess. 2. Acute appendicitis. 3. Possible regional ileitis with fistula formation."

On October 22, 1974, just prior to plaintiff's second surgery, Doctor Dyke noted that plaintiff's "surgical

tissue has been personally reviewed and the rebiopsies of the ileum plus the small bowel study (X-ray) have not suggested Crohn's disease."

Plaintiff's expert witness, Doctor John Dunn, an Omaha family practitioner, testified from his review of the hospital records he concluded plaintiff had Crohn's disease. Plaintiff developed the complications of an abscess formation and a fistula formation as a result of regional ileitis. He did not think there was any difference between the standard of care for a practitioner in Lincoln as contrasted with Omaha. He testified the standard of care at the time of hospitalization "is to develop what's called differential diagnosis of the symptoms and the findings that are presented." From the symptoms the plaintiff was exhibiting, Doctor Dunn thought the differential diagnosis would include appendicitis, pelvic inflammatory disease, disease of the ovary, viral infection of the bowel, and urinary tract infection. He testified he had no fault with Doctor Moore having chosen PID as a working diagnosis. He further testified he had no objection to his mode of treatment for the first few days. He did feel, however, that Doctor Moore deviated from the standard of care after what he considered to be a reasonable length of time when the patient's condition did not improve as it should have if the working diagnosis had been correct.

Doctor Dunn testified as to the standard of care as follows: "The standard of care, first of all, requires a concept of what a general standard of medical care is. And I think the important thing is that the general standard of medical care requires that a physician treating a patient develop a mechanism or a procedure by which he develops a proper approach to the solution of a problem, whatever that problem might be. The way to approach a medical problem in terms of a recognized standard of medical care is to develop, first of all, the possibilities for the causes

of the problem, to develop the most likely possibility or the most workable possibility, and design a therapy for that particular problem, hoping to find a solution to the medical problem. And I think that part of the standard of medical care is to evaluate the approach at appropriate intervals to decide whether the approach decided on was the one that's working. And what essentially the standard of care is is to try and develop a method of procedure which solves a medical problem at hand and which allows for re-evaluation and development of a different approach if a particular medical problem seems to be stubborn or seems to be resistant to the therapy that's been chosen the first go-round."

Doctor Dunn further testified in his opinion there was a deviation from the standard of medical care at approximately the third or fourth day of the hospitalization. His testimony on this point was as follows: "I think that the deviation, to summarize, I think the deviation was the failure to re-evaluate what I think was a therapy that was not solving the problem that the patient presented with and that the deviation basically centered around a failure to re-evaluate and to go on to another possible therapy for the problem or to approach it from another angle and order appropriate tests to find out whether there were other possibilities."

He further testified: "The standard of care, the standard of medical care requires that the physician involved in the therapy of the patient re-evaluate the therapy and if the therapy is not effective to go on to other laboratory or x-ray tests or to other appropriate tests that might indicate why the patient, either why the patient isn't responding to therapy or whether the original working diagnosis was incorrect."

Doctor Dunn was then asked what the standard of care required at the time she responded as she did to the penicillin, ampicillin, chloromycetin therapy. He answered as follows: "I think the standard

of care would require that two or three courses of action be taken. One, a consultant be recalled to re-evaluate the patient. Two, x-ray tests, which in this case may have been helpful, could have been ordered. And, three, a re-evaluation of the blood work could have been done."

Doctor Dunn then testified as to the standard of care applicable to the discharge of a patient. It is as follows: "The standard of care basically is relative to the pre-hospital condition of the patient. The ideal is to achieve the same medical state or state of health at the time of discharge as at the time of admission to the hospital or prior to the time that the patient became ill. With some conditions there is no way to reachieve that state of health. And, so, the ultimate goal is to reach optimum recovery from whatever caused the hospitalization. The other parts of appropriate discharge are to establish a pattern for the patient to be seen in the office, to make sure that the patient is aware of the medications or the therapies required on discharge, and to appropriately inform the patient as to the problem that they had and treatment and the possible problems that might occur in the future."

Doctor Dunn then described plaintiff's condition immediately prior to the discharge. He felt the plaintiff should not have been discharged on the 17th because the nurses' notes on the 16th indicate she was crying, upset, and could not sleep. She vomited what is described as "greenish fluid." She complained of abdominal discomfort and received Demerol. She was also on Percodan, which is another pain medication. On the 17th, the day of discharge, her pulse continued at the rate of 120 to 130. She continued to receive Demerol. She had vomited as late as 4:30 that morning. She had been given Tigan for nausea. In his opinion she was still sick and her problem had not been solved.

In Doctor Dunn's opinion the deviation from the

standard of medical care was that she was discharged with a high pulse rate which is an indication of body stress. She was discharged shortly after she had had significant problems with vomiting and that even up to the day of discharge she was receiving very strong pain medication. All of these indicators to him demonstrated that her problem had not been solved.

Doctor Dunn was asked whether any complications resulted from defendant's deviations from the standard of care. He replied: "On the basis of the medical records that I have reviewed, including pathologic specimens and the reports from the pathologists, the operative reports, the consultants' reports, I feel that the patient developed complications and those complications were increased because of failure to, a failure to treat appropriately at an early stage."

Doctor Dunn testified that what he thought she had was regional ileitis because the complications that she developed and the findings at the surgery were consistent with complications of regional ileitis, those being an abscess formation and a fistula formation. "There are other things that can cause those complications, but those two are definitely associated with regional ileitis." During later questioning, Doctor Dunn stated that in his opinion earlier medical or surgical treatment would have avoided the ileostomy.

On cross-examination, Doctor Dunn acknowledged that tests had not revealed the presence of Crohn's disease and there was some question as to whether this was in fact the cause of plaintiff's problem. He further stated that Crohn's disease is difficult to diagnose and he could not fault defendant for failing to arrive at a diagnosis of Crohn's disease. He also recognized that a pelvic abscess is a common complication of pelvic inflammatory disease. He answered in the affirmative when asked whether "pel-

vic inflammatory disease can result in an abscess which will surround the appendix and bowel and will cause the type of problems Mrs. Anderson had."

Doctor Dunn maintained, however, that regardless of whether plaintiff had Crohn's disease or PID, there was a deviation from the accepted standard of medical care. He testified: "No. My opinion as to — as to a deviation from the standard of care is not based on the ultimate diagnosis. Because as far as I'm concerned, the ultimate diagnosis, even on the basis of what is available in the chart, is still not solidified. The only thing we can really say is that the biopsies that were done after the surgery showed no evidence of Crohn's disease. But what I'm basing my opinion on is the fact that the patient didn't get better."

On further cross-examination as to whether or not his opinion in the case was based upon his judgment that the patient had Crohn's disease, his answer was as follows: "What I'm saying is that I think the patient had Crohn's disease and that she had to have an operation because of it. And if that was the case, then her early treatment might have prevented the necessity for the ileostomy. But what I'm ultimately saying is that it's the deviation from the standard of care doesn't have anything to do with what ultimately the cause of all these problems was. It's the fact that in the last few days of the hospitalization the patient was still sick."

In reviewing this case, the applicable rule is: "A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence." Kortus v. Jensen, 195 Neb. 261, 237 N. W. 2d 845 (1976).

In a malpractice action, the burden is on the plaintiff to prove the generally recognized medical standard involved; that there was a deviation from that standard by the defendant; and that such deviation was the proximate cause of the plaintiff's injury.

The first of plaintiff's two allegations of negligence alleges a lack of due care on the part of the defendant in his diagnosis of the plaintiff's affliction. As we said in Golonka v. Gatewood, 199 Neb. 216, 257 N. W. 2d 403 (1977): "Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment." In that case we quoted the following from Cook v. Moats, 121 Neb. 769, 238 N. W. 529 (1931): " 'To make a skilful and careful diagnosis of the trouble from which the plaintiff is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer therefor.' "

A patient is entitled to an ordinarily careful and thorough examination such as the circumstances, the condition of the plaintiff, and the physician's opportunities for examination will permit, and, while he does not insure the correctness of his diagnosis, a physician or surgeon is required to use reasonable skill and care in determining through diagnosis the condition of the patient and the nature of the ailment, and is liable for a failure, due to want of the requisite skill or care to diagnose correctly the nature of the ailment, with resulting injury or detriment to the plaintiff. In re Estate of Johnson, 145 Neb. 333, 16 N. W. 2d 504 (1944).

In Kortus v. Jensen, 195 Neb. 261, 237 N. W. 2d 845 (1976), we said: "In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily

exercise for the benefit of their patients. * * * Under the foregoing rules, proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony."

On the point under consideration, it is to be noted that plaintiff's evidence discloses every doctor who made a diagnosis before the surgery made substantially the same diagnosis as the defendant. After the surgery, Doctor Stitcher, one of plaintiff's gastroenterologists, made a diagnosis of acute PID, probable acute enteritis or inflammation of the small intestine, or possibly Crohn's disease with subsequent bowel fistula. However, his biopsy reports and X-rays did not reveal the presence of Crohn's disease.

Looking at the evidence most favorably to the plaintiff, plaintiff's expert ruled out acute appendicitis and periappendicitis during the period that plaintiff was under defendant's care. The question then arises as to whether a physician could be negligent in failing to use due care in diagnosing something the patient did not have at the time the patient was under the physician's care. A physician could not be negligent in failing to give tests for something the patient did not have while under his care. Considering the fact that plaintiff's expert found no fault on the part of the doctor on this point, there can be no liability for them. Assuming, however, that both of those symptomologies were present while the plaintiff was under the care of the defendant, plain-

tiff's expert did not delineate the medically recognized standard of diagnosis in either instance, nor did he set forth any deviation from the standard by the defendant. There would then be a lack of proof on the part of the plaintiff to submit those issues to the jury.

Considering regional ileitis, which is technically called Crohn's disease, plaintiff's expert asserts that the plaintiff had Crohn's disease. He admitted this is a difficult disease to diagnose and nowhere does he fault the defendant for failing to diagnose it. Actually, he was asked the following question: "Now, as I understand it, it's your opinion that it certainly is not a deviation from the standard of care to be unable to diagnose Crohn's disease, is it? A. That's right."

We have heretofore set out Doctor Dunn's concept of the general standard of medical care to develop a proper diagnosis. We note he said part of the standard of medical care is to evaluate the approach at "appropriate intervals," to decide whether the approach decided on was the one that's working, and what essentially the standard of care is to try and develop a method of procedure which "solves a medical problem at hand" and which allows for reevaluation and development of a different approach if a particular medical problem seems to be stubborn or seems to be resistant to the therapy that's been chosen the first go-around.

Assuming this is the standard of care, where in the standard is "appropriate intervals" defined? There is no evidence in the record of another standard defining "appropriate intervals." This must be left to the judgment of the treating physician.

Plaintiff's expert supplied his own standard: "I think the deviation occurred in that after what I consider to be a reasonable length of time, the patient's condition did not improve as should have been the case if the working diagnosis had been correct * * *."

We emphasize "in that after what I consider to be a reasonable length of time." A medical expert witness cannot set up his own standard and bind a physician charged with malpractice with that standard. To permit this practice would put every physician at the mercy of any so-called expert willing to conjure up a standard to fit the case in which the expert is testifying.

We are not suggesting by this statement that the plaintiff's expert was intentionally doing so. We emphasize the point, however, to suggest that a medical standard cannot depend upon the idiosyncrasies of the expert, or the personal standard of the expert, which in and of itself may be a deviation from the generally accepted medical standard.

Plaintiff's failure to introduce in evidence a standard on "appropriate intervals" in and of itself defeats the negligence attributed to the defendant by plaintiff's expert. The testimony is undisputed that defendant called in a surgeon, Doctor Richard Toren, for surgical consultation the day after plaintiff was admitted to the hospital and Doctor Toren examined plaintiff and followed the case throughout plaintiff's stay at the hospital, continuing to consult with the defendant. We point this out to show that defendant was meeting the first criteria suggested by plaintiff's expert. Relative to X-ray tests, we emphasize his language "may have been helpful," and also "a re-evaluation of the blood work could have been done."

Plaintiff's expert testified these procedures should have been undertaken at, according to his own standard, "appropriate intervals." Nowhere in the record is there an opinion based upon reasonable medical certainty as to what these procedures would have shown had they been accomplished. Nor is there any opinion that such procedures would have confirmed the doctor's after-the-fact diagnosis at the time.

Besides proving a physician charged with malpractice deviated from a standard of care, a plaintiff must prove such deviation caused injury or damage to the plaintiff. In other words, there must be proximate causation. In this case, plaintiff's expert attributed plaintiff's injury to negligence in the lack of early treatment. There is a reasonable inference from the expert's testimony that if plaintiff had not been prematurely discharged from the hospital the iliostomy would have been avoided.

This brings us to plaintiff's other allegation of negligence: "(b) Prematurely discharging Plaintiff from Lincoln General Hospital on or about the 17th day of August, 1974, when he knew or should have known she needed continued diagnosis, care and treatment, in that she was until early that morning experiencing nausea, vomiting, fever, elevated pulse rate, & abdominal pain."

Plaintiff adduced evidence that at the time of her discharge from the hospital she was still on strong pain medication. She had a pulse rate between 120 and 130, which was an indication of body stress. She was discharged approximately 5 hours after experiencing severe abdominal pains and significant problems with vomiting. Dr. Dunn testified these were deviations from the standard of medical care required by the circumstances.

We are considering this evidence on the sustaining of a motion for a directed verdict. We are required to give the plaintiff the benefit of every inference which can reasonably be deduced from the evidence. On the record before us, we cannot say this did not present a jury question. On this issue the motion should have been overruled.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

JOSEPH WEISS, APPELLEE, V. UNION INSURANCE COMPANY, A CORPORATION, APPELLANT.

276 N. W. 2d 88

Filed March 6, 1979. No. 41806.

1. **Motor Vehicles: Certificate of Title Act.** The execution of the certificate of title is the exclusive method of conveying ownership to a motor vehicle, but the certificate is not in itself conclusive of ownership.
2. **Statutes: Intent: Words and Phrases.** In the construction of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous; rather, the plain and ordinary meaning of all the language employed should be taken into account in order to determine the legislative will.
3. **Certificate of Title Act.** In determining whether there has been delivery of an executed certificate of title, the ordinary rules pertaining to the delivery of a written instrument apply.
4. **Certificate of Title Act: Intent.** The delivery of a written instrument is largely a question of intent, which is to be determined from all the facts and circumstances of the particular case. There must be an intent on the part of the grantor that the instrument operate as a muniment of title to take effect presently and an acceptance by the grantee with the intent to take title.
5. **Judgments: Evidence.** 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. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party, 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.
6. **Negotiable Instruments.** An instrument is not delivered until it has passed beyond the dominion, control, and authority of its maker and is no longer capable of being recalled; and where the maker gives the instrument to a third party to hold until the happening of some contingency, there is no delivery.
7. **Certificate of Title Act: Escrows.** Where a third party has the duty to hold an executed certificate of title on behalf of the seller of a motor vehicle until the performance of the conditions of the sale and then deliver the certificate to the buyer, that party is acting as an escrow agent.
8. _____: _____. When an executed certificate of title is held in escrow, legal title to the motor vehicle remains in its seller until performance of the conditions of the contract by the buyer.
9. **Supreme Court: Appeal and Error.** The Supreme Court may, at its option, consider plain error not specified in appellant's brief.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Affirmed in part, reversed in part, and remanded for modification in conformity with this opinion.

R. Kevin O'Donnell & William P. Mueller of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellant.

Terry E. Savage and Joseph M. Caffall, for appellee.

Heard before SPENCER, MCCOWN, CLINTON, and WHITE, JJ., and WARREN, District Judge.

CLINTON, J.

Union Insurance Company appeals from a holding that Joseph Weiss was the owner of a motor vehicle covered by Weiss' automobile insurance policy with Union on the day the motor vehicle was involved in an accident, that Union's attempted termination of the policy was null and void, and that Weiss was entitled to damages in the amount of the fair market value of the vehicle on the day of the accident less its salvage value.

Joseph Weiss owned a 1974 Chevrolet pickup truck. During the period relevant to this action, the truck was insured with Union for a policy period ending September 21, 1976. Among other things, the insurance contract covered collision damage to the truck in the amount of its actual cash value less $100, and the policy was in effect while any person was using or operating the truck with Mr. Weiss' permission.

In July 1976, Weiss agreed to sell the truck to Ivan Shill, a fellow employee, for $3,100, provided Shill could come up with the purchase price. Since there was a lien on the truck in the amount of $3,100, Weiss felt he needed to receive the entire purchase price at the time of the sale. Weiss and Shill discussed the possibility of financing the sale with a Mr. Beckett, an officer of the bank holding the security interest in

the truck. It was eventually agreed that the bank would loan Shill $2,300 and Weiss' and Shill's employer would loan Shill an $800 downpayment and cosign the note for the bank loan. The two loans to Shill were to be used to pay Weiss' debt, so that after the sale Weiss would have no further obligation to the bank.

On July 13, 1976, Weiss and Shill went to the bank and signed several documents relating to the transaction. Their employer was not present at that meeting as he was out of town that day, but he intended to go to the bank at some other time to cosign the note and hand over the downpayment. Among other things, Weiss and Shill executed and Mr. Beckett notarized the certificate of title to the truck. The certificate had been held by the bank pursuant to Weiss' loan and remained with the bank after it was executed.

Prior to July 13, Weiss had allowed Shill to use the truck from time to time. Between July 13 and 18, Shill used the truck several times. Weiss used the truck at least once in that period and, on one of the days, the truck was in the shop for repairs which were authorized and paid for by Weiss. On July 18, Shill was involved in an accident while driving the truck, and the truck was damaged beyond possibility of repair. It was stipulated at trial that the truck had a fair market value of $3,100 prior to the accident and a salvage value of $400 after the accident.

Weiss reported the accident to Union. In early August, Weiss received a letter from Union denying liability under the policy as of July 13, 1976, on the ground that Weiss had given title to Shill on that day. A check for the remainder of the premium on the truck was enclosed in the letter. Weiss returned the check to the company and, after further efforts to communicate with Union failed, brought this suit.

A jury was waived and trial was had to the court. After hearing the evidence, which consisted primari-

ly of the testimony of Beckett, Weiss, and Shill, the court ruled that Weiss was the owner of the truck on July 18 because there had been no delivery of the truck or the title on July 13 or thereafter. The court found that the attempted cancellation of the policy was null and void and ordered that a judgment be entered for Weiss and against Union in the sum of $2,700 plus costs. Union appealed. We affirm in part and reverse in part.

Union's assignments of error consolidate into a challenge to the Court's finding that Weiss was the owner of the truck after July 13 because there had been no delivery of the truck or the title. Whether or not Weiss was the owner of the truck after July 13 controls the validity of Union's termination of the policy and its liability under the policy; hence, the assignments of error on these points are meaningless.

The sale of motor vehicles in Nebraska is regulated by the Certificate of Title Act. §§ 60-102 through 60-117, R. R. S. 1943. Section 60-105 (1), R. R. S. 1943, states in pertinent part: "No person . . . acquiring a motor vehicle . . . from the owner thereof . . . shall acquire any right, title, claim, or interest in or to such motor vehicle . . . until he shall have had delivered to him physical possession of such motor vehicle . . . and a certificate of title . . . duly executed in accordance with the provisions of this act, and with such assignments thereon as may be necessary to show title in the purchaser thereof . . . ."

As required by section 60-114, R. R. S. 1943, the form for assignment of title which appears on the reverse side of the motor vehicle certificate of title states in part: "The undersigned, being the owner of the motor vehicle described in the within certificate of title, hereby sells and assigns all his right, title and interest in and to said certificate of title and the motor vehicle described therein . . . ." The form

for application for a certificate of title, as required by section 60-114, R. R. S. 1943, also appears on the reverse side of the certificate of title and states that the applicant "hereby states that he is the lawful owner or purchaser of the following described motor vehicle . . . ."

Union takes the position that the mere signing of the above statements under oath by the buyer and the seller constitutes "delivery" of the executed certificate of title regardless of the intent of the parties to the sale. This may be the rule when an innocent third party has relied on a duly executed certificate of title to his detriment. Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315. In the absence of such circumstances, this court has consistently held that, while the execution of the certificate of title is the exclusive method of conveying title to a motor vehicle, the certificate is not in itself conclusive of ownership. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co., 196 Neb. 595, 244 N. W. 2d 209; Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614.

The phrasing of the statute does not support Union's contention that mere execution of the certificate of title constitutes delivery of the certificate. Section 60-105(1), R. R. S. 1943, requires delivery of both the executed certificate of title and possession of the motor vehicle rather than execution of the certificate of title and delivery of possession of the motor vehicle. To adopt Union's interpretation of the act would require us to construe "delivery" as modifying only "possession of such motor vehicle," a construction which clearly violates the grammatical structure of the language of the statute. This we decline to do. In the construction of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous; rather, the plain and ordinary meaning of all the language employed should be taken into account in order to determine the legislative will. Pettigrew v. Home Ins. Co., 191 Neb. 312, 214 N. W. 2d 920.

In determining whether there has been delivery of an executed certificate of title, the ordinary rules pertaining to the delivery of a written instrument apply. The delivery of a written instrument is largely a question of intent, which is to be determined from all the facts and circumstances of the particular case. There must be an intent on the part of the grantor that the instrument operate as a muniment of title to take effect presently and an acceptance of the instrument by the grantee with the intent to take title. Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Ehlers v. Seip, 136 Neb. 722, 287 N. W. 202.

Whether the parties had the requisite intent is a matter for the finder of fact, and 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. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party; 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. Burgess v. Curly Olney's, Inc., 198 Neb. 153, 251 N. W. 2d 888. In this case, Weiss and Shill both testified they did not intend to pass title to the truck at the time of the execution of the certificate of title but were only completing the preliminary paperwork so that title could pass when their employer paid over the down-payment and cosigned the note. The evidence is clearly sufficient to sustain the trial court's holding that delivery of the certificate of title never took place.

The evidence that Weiss and Shill did not intend delivery of the certificate of title is not negated by the fact that the instrument was left with Mr. Beckett. "An instrument is not delivered until it has passed beyond the dominion, control, and au-

thority of the maker and is no longer capable of being recalled," Kula v. Kula, 149 Neb. 347, 31 N. W. 2d 96, and where the maker gives the instrument to a third person to hold until the happening of some contingency, there is no delivery. Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188.

Beckett testified that he did not believe a sale had taken place on July 13 and was merely holding the documents until the downpayment and cosigning were completed. Beckett further testified that he had no authority to deliver title to Shill or anyone else until these conditions were met and in fact took no action with respect to any of the documents signed by Shill, including the loan papers, because he considered the sale had never been completed.

Union argues the bank could not have been acting as an agent for Weiss because it had already entered into a financing arrangement with Shill and was therefore not completely under Weiss' control. In fact, the evidence clearly shows that the bank was acting as an escrow agent and had a duty to Weiss to hold the certificate of title until the performance of the conditions of the sale and a duty to Shill to deliver the title when the conditions had been fulfilled. Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311. That the bank also had a financial interest in the transaction does not negate the agency where the bank's own interests coincided exactly with its duties as an escrow agent. Since the certificate of title was held in escrow, legal title to the truck remained in Weiss until performance of the conditions of the sale. Pike v. Triska, *supra*.

The trial court also held that there had been no delivery of physical possession of the truck. As section 60-105 (1), R. R. S. 1943, clearly requires delivery of both physical possession of the vehicle and an executed certificate of title and delivery of the certificate of title never took place, we need not review that issue on this appeal.

We affirm the verdict, but the trial court's award of damages requires modification. By stipulation, the parties agreed the value of the truck was $3,100 before the accident, its salvage value after the accident was $400, and the total loss was therefore $2,700. The trial court accordingly entered judgment for Weiss in the amount of $2,700. However, the insurance policy, which is incorporated into the record, shows Weiss' collision insurance was the "$100 deductible" variety. Thus, under the policy, Weiss was entitled to a judgment of only $2,600.

Union neglected to assign the excessiveness of the award as error, but this court may, at its option, consider plain error not specified in appellant's brief. § 25-1919, R. R. S. 1943; Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 215 N. W. 2d 105. We therefore hold the trial court's award of damages was excessive to the extent that it did not reflect the "$100 deductible" provision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR MODIFICATION IN CONFORMITY WITH THIS OPINION.

LOREN L. LINTNER, APPELLANT, V. DEAN R. ROOS, APPELLEE.

276 N. W. 2d 93

Filed March 6, 1979. No. 41844.

1. **Trial: Juries: Witnesses: Evidence.** A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence.
2. **Trial: Damages: Evidence.** Under a claim of damages for personal injuries, the evidence in proof of damages must be direct and certain. Proof that damage might or could have been caused by an accident is not sufficient to sustain a verdict for the claimant.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Robert E. O'Connor & Associates, for appellant.

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, for appellee.

Heard before SPENCER, Retired Justice, BOSLAUGH, and WHITE, JJ., and WOLF and SPRAGUE, District Judges.

WOLF, District Judge.

The jury returned a verdict for the defendant in this action for damages as a result of a rear end automobile collision accident occurring on September 28, 1975, at the intersection of Highway No. 50 and 11th Street in Syracuse, Otoe County, Nebraska. The defendant's answer admitted that the accident was proximately caused by his negligence but specifically denied the accident caused the injury and damages alleged to have been sustained by the plaintiff. The trial court instructed the jury that the defendant had admitted he was negligent in the operation of his automobile and that his negligence was the proximate cause of the collision. The court instructed the jury that before the plaintiff may recover from the defendant, he must prove by a preponderance of the evidence that (1) he sustained personal injury, (2) that the personal injuries were proximately caused and the proximate result of the accident in question, and (3) the nature, extent, and amount of his damages for such injuries.

The plaintiff's motion for a new trial contended that the verdict was not sustained by sufficient evidence, the verdict was contrary to law, the jury failed to follow the instructions of the court, and the verdict was contrary to the evidence. The District Court overruled plaintiff's motion for a new trial. We affirm the judgment of the District Court.

The plaintiff contends the evidence before the jury clearly indicates the plaintiff's injuries were the result of the accident and that in finding for the de-

fendant, the jury obviously must have ignored the evidence and the defendant's admission of negligence.

The court's instructions to the jury, the competency of the witnesses and the foundation for their testimony, and the conduct of the jury are not in any way questioned in this appeal. Thus the sole question is whether, upon review of the evidence, the verdict was so clearly wrong that we can say, as a matter of law, that the jury disregarded the instructions and returned a verdict for the defendant when reasonable minds could come to no other conclusion under the evidence than that the verdict should be for the plaintiff.

It is clear the plaintiff would not be entitled to a verdict, even for nominal damages, unless there is evidence to support a finding that the plaintiff was injured as a result of the accident or, as more commonly stated, that the accident was the proximate cause of the injury.

Plaintiff's evidence shows that the plaintiff was approximately 18 years of age at the time of the accident and was a student at Peru State College. On that day he had been to a rodeo where he had participated in the saddle bronc ride and bulldogging and as he was returning to his parents' home in Syracuse, Nebraska, the accident occurred. The plaintiff testified that he was shocked by the injury and his back and neck started to hurt. However, the officer investigating the accident has no record of any complaint of personal injuries by either party to the accident. After the accident the plaintiff drove the vehicle to his parents' home in Syracuse and took two aspirins. He drove to Peru State College that night, a distance of 35 or 40 miles, and although he didn't sleep too well that night, he went to his classes the next morning and for the next week or two ran a mile or a mile and a half each day to get in shape for wrestling. Plaintiff did not receive

medical attention until October 21, 1975, when he went to Dr. Wilson who advised the plaintiff he had bruised muscles and gave him some medication to relax his muscles. The plaintiff continued his working out for collegiate wrestling and next saw a physician on November 6, 1975, a Dr. Getscher, who advised him to discontinue wrestling. He next went back to Dr. Getscher on December 4, 1975, and the doctor released him to go ahead and wrestle. On December 6th the plaintiff was wrestling with a teammate in preparation for their first collegiate meet. His opponent threw a hold on him, twisted the plaintiff's arm around in a certain way, and something popped in the plaintiff's neck. Plaintiff next saw Dr. Getscher on December 11th and he had to stop wrestling for the year. Plaintiff relates additional incidents on January 27, 1976; January 30, 1976; and on October 13, 1976, when without any particular exertion on the part of the plaintiff, he experienced neck pain. In most instances the plaintiff went to a local physician and received a shot or other medication.

On October 22, 1976, the plaintiff saw a Dr. Matisons who gave the plaintiff permission to go ahead and continue his wrestling.

The only medical witness on behalf of the plaintiff was Dr. Gross who first saw the plaintiff on January 24, 1977. It was Dr. Gross' testimony that in his opinion the plaintiff's injuries were caused by the automobile accident of September 28, 1975. Dr. Gross described the plaintiff's injuries as a cervical strain with left cervical neuritis and myositis. He further testified that the plaintiff sustained a tear of his anterior longitudinal ligament and injury to the intervertebral disc at the C-5, C-6 level. Dr. Gross described the plaintiff's neck injury as permanent and placed plaintiff's degree of permanent disability at 5 percent loss of the use of the body as a whole.

Evidence introduced by the defendant included ad-

missions by the plaintiff that his neck felt better the second and even the third week after the accident and the admission that between September and November he could do almost everything he could do before the accident. When the wrestling season started in the middle of November, he was working out with the wrestling team 2 hours a day, 5 days a week, and was wrestling about 1 hour a day. After the plaintiff injured his neck wrestling on December 6, 1975, he said there wasn't anything he couldn't do except wrestle or ride a horse.

During the summer of 1976, the plaintiff worked for an electrical company pulling heavy bags of tools to other workers by pulley. He participated in several rodeos where his specialty was bronco riding. In the fall of 1976, he returned to college and did play some flag football but said the running did hurt his neck.

During the summer of 1977, he worked for Omaha Public Power District in Nebraska City in the trenches where he pulled wire and threw sandbags.

In August of 1977, he was involved in another automobile accident in which his automobile sustained about $1,200 damages. The plaintiff also participated in rodeos during the summer of 1977.

Plaintiff's evidence includes the medical records of Dr. Matisons and the doctor's examination on October 22, 1976. The examination report showed a normal examination of the cervical spine with a recommendation that the patient can participate in physical activity such as wrestling as desired. The physical examination showed no restriction of the motion of the neck, no particular tender areas, and X-rays of the cervical spine failed to reveal any gross abnormalities. The report showed "there was a question that either C-3 level [sic] of previous injury but this is well healed now" and there was no evidence of nerve root irritation.

The defendant brought out, on cross-examination

of the plaintiff, that the plaintiff didn't tell Dr. Gross about his previous injury to his head in 1968 when he was kicked by a horse or of his sustaining another injury to his head in an accident in 1973. Neither did he tell Dr. Gross about his wrestling accident in December of 1975, nor that he had participated in several rodeos after the accident.

The basic issue in this case is not whether there is some disability on the part of the plaintiff but whether any disability or injury was proximately caused by the accident. The question of causation and proximate cause is a question of fact for the jury. It is fundamental in our adversary system that a jury alone is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Meadows v. Skinner Manuf. Co., 178 Neb. 856, 136 N. W. 2d 184. A jury has the right to test the credibility of witnesses by their self interest and to weigh disputed parol testimony against all the facts and circumstances in evidence. It may then properly conclude whether the parol testimony is either false or incredible of belief. The jury is not required to accept the opinions of experts and the court so instructed the jury.

To justify this court in interfering with the findings of a jury on such a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of a reviewing court to correct the mistake. In reviewing the evidence herein, we must do so in the light of the fact that the jury verdict was for the defendant. Therefore, the defendant must have the benefit of any and all reasonable inferences deducible from the proof. Beavers v. Christensen, 176 Neb. 162, 125

N. W. 2d 551. We have also said in similar cases involving generally the same issue of proof of damages by subjective oral testimony that the evidence of damages is required to be direct and certain. The proof that damage might or could have been caused by the accident is not sufficient to sustain a verdict for the claimant.

Under our rules of review, we must resolve all conflicts in the testimony in favor of the defendant, who received the verdict of the jury together with inferences that may be reasonably drawn therefrom. Based upon the evidence before the jury, it is clear they could have found under all the evidence that the plaintiff received his injury, if indeed he was injured, at the rodeo the same day as the accident or that the injury diagnosed by Dr. Gross was actually incurred subsequent to the accident either in the wrestling or in the rodeo activity of the plaintiff.

A review of the evidence does not reveal that the verdict of the jury was so clearly against the weight of the evidence as to induce this reviewing court to believe that it was the result of passion, prejudice, mistake, or some means not apparent in the record.

The judgment of the District Court in overruling the motion for a new trial is correct and is affirmed.

AFFIRMED.

CLARENCE DAVIS, JR., APPELLANT AND CROSS-APPELLEE, v. LOUISE P. DAVIS, APPELLEE AND CROSS-APPELLANT.

276 N. W. 2d 97

Filed March 6, 1979. No. 41848.

Divorce: Property. In a dissolution action, the distribution of property rests in the sound discretion of the trial court and, in the absence of an abuse of that discretion, will not be disturbed on appeal.

Appeal from the District Court for Polk County: SAMUEL VAN PELT, Judge. Affirmed as modified.

M. A. Mills, Jr. of Mills & Mills and C. Russell Mattson of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Steven J. Flodman of Barlow, Johnson, DeMars & Flodman, for appellee.

Heard before BOSLAUGH and WHITE, JJ., and SPENCER, Retired Justice, and WOLF and SPRAGUE, District Judges.

WHITE, J.

This is an appeal by the petitioner, Clarence Davis, Jr., from a property division award in the District Court. Appellee Louise P. Davis cross-appeals. We affirm with modification.

The parties were married on June 25, 1968, in Albany, New York. At the time of the marriage the petitioner, Dr. Clarence Davis, a physician, was a resident of New Mexico, and the appellee, Louise P. Davis, was a resident of New York. It was the third marriage for Dr. Davis and the second marriage for Louise. At the time of trial, Dr. Davis was 50 years old and Louise was 56. Each had three children from prior marriages. At the time of the marriage, Dr. Davis was employed by the State of New Mexico and living in a home furnished by the State of New Mexico. Louise was employed as the acting head nurse in the emergency room at Albany Medical Center. She was a registered nurse and was enrolled at a college, it being her aim to gain a degree of bachelor of science in nursing. At the time of the marriage, Dr. Davis owned an automobile and an unspecified but presumably small amount of money in a bank account. This is evidenced by the facts that he borrowed from Louise a sum of $1,000 to purchase a used automobile and that she paid a substantial portion of the moving expenses. At the time of the marriage, Louise owned a 1967 Chevrolet automobile and had approximately $10,000 in a bank and

a house of furniture. Louise had been living in a home in Albany, the life use of which had been awarded to her in a previous divorce action which she surrendered when she married.

The parties moved to Albuquerque, New Mexico. Louise worked part time in a family planning clinic. During various times, the children of the parties lived with them, three of the children leaving shortly after the marriage, two to be married and the other to go to the armed services. In June 1970, Dr. Davis and Louise moved to Osceola, Nebraska, where Dr. Davis opened a medical practice. Both Dr. Davis and Mrs. Davis took an active role in preparing the office for the practice of medicine. They purchased the equipment together, painted the building, stripped the floors of wax, and generally cleaned the offices. Louise, in addition to her household duties, worked for Dr. Davis in the practice, acting as general bookkeeper, receptionist, and nurse. She was the only employee for approximately 5 months and worked 5 days a week plus Saturday morning without pay until 1973 when she received $3 per hour as a salary. The money was used for personal expenses, clothing, and some household expenses.

In appellant's brief-in-chief, he concedes that his assertion of $163,400 of net worth in the trial court was not correct due to certain significant omissions which were developed at trial. He contends in this court that the correct valuation is $194,954.

The appellant's principal assignment on appeal is that the trial court abused its discretion by awarding the appellee Louise a total sum of $120,000 of property, plus the personal property then in her possession. The appellant contends the guideline this court recited in Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430, namely, that awards to the wife are from one-third to one-half of the marital property depending on the facts in each particular case, was not followed. He argues the marriage was one of relative-

ly short duration and, in fact, that the trial court awarded a value in excess of 62 percent of the total property. Appellant here urges application of the percentage guidelines in Kula, *supra*, based on the assumption that the trial court could not have found the valuation of the marital estate to be in excess of the $194,954 appellant now admits to in this court.

On introduction of a financial statement disclosing the total value of $163,400, the following items were developed as omissions from the financial statement: An anticipated federal income tax refund of $12,079; an $8,000 note due on a land contract that was not then in default; a $2,000 promissory note from another physician; a $6,000 bank account; an understatement of another bank account of $2,250; and an understatement of the value of a Keogh Plan of $2,500. Also included in the net worth statement submitted by appellant at trial was a figure of collectible accounts receivable of $35,000 on total accounts receivable of $60,000. At a deposition, Dr. Davis had indicated his collection rate was approximately 80 percent and, therefore, the value of the collectible accounts receivable would be $48,000. In the financial statement submitted at trial, without referring to other than what he concluded were general economic conditions, he reduced that value to the $35,000 figure.

There were four parcels of real estate owned either by Dr. Davis or by the parties jointly. The house in Osceola, almost totally constructed by the doctor himself, was valued at $35,000. The evidence indicated the material cost alone of the house was $45,422 and the testimony of appellee's expert was that the fair market value of the house was $52,820. A vacant lot, on which an existing building had been destroyed and on which foundation footings were laid, was understated by $8,500 below the actual cost. There were substantial differences in value for an existing cafe building in Stromsburg, Nebras-

ka, and a house in Osceola. Both were valued below their actual acquisition costs. Dr. Davis also constructed, during their marriage, a twin-hulled catamaran which he valued at $5,000. The cost of material of the boat alone was $5,500 in excess of its estimated value and the testimony of Louise was that Dr. Davis stated the value was in excess of $30,000. There was also minimal value attached to a 1976 Grand Prix automobile which had been acquired at a cost of $6,000 and was listed by the doctor at a value of $3,200, although slightly in excess of 1 year old at the time of trial. In addition, the court could have found minimal values were attached to a variety of other equipment consisting of a truck, tractor, jeep, pickup, and cement mixer.

In a dissolution action, the distribution of property rests in the sound discretion of the trial court and, in the absence of an abuse of that discretion, will not be disturbed on appeal. Edwards v. Edwards, 199 Neb. 581, 260 N. W. 2d 319. Although the trial court made no specific finding on the disputed evidence, it is evident the determinations of valuation could have been substantially in excess of that asserted by Dr. Davis. It is true the marriage here is of relatively short duration; but it must be pointed out that the substantial and perhaps indispensable assistance rendered to Dr. Davis by Louise lead to the establishment of a successful practice in Osceola, Nebraska, and accumulation of a substantial amount of property over a comparatively short period of time. Assistance was rendered both in housekeeping and caring for children. The valued service as a bookkeeper and professional service by way of nursing duties in the clinic itself probably contributed substantially to the asset accumulation. While it is true Louise does have training and skill and is now engaged in practicing her profession, and, as the trial court felt, the need or justification for alimony was not present, nevertheless, a decree which awarded

approximately 50 percent or thereabouts of the assets of the marriage, to which the wife is shown to have contributed substantially by both rendering the normal services of a wife and mother and professional services, cannot be said to be an abuse of discretion by the trial court.

Louise cross-appeals for the failure of the trial court to award alimony. Although Louise has had some health problems, she is capable of and engaged in practicing her profession and apparently the trial court felt, as we do, the award of alimony was not warranted in view of the amount awarded under the property division.

On her cross-appeal, Louise also asserts that the court erred in failing to assess an attorney's fee. We agree. The bill of exceptions suggests a considerable effort by Louise's counsel in the discovery and valuation of the assets of the parties. As has been indicated, Dr. Davis' attitude could, at best, be termed "uncooperative." The omission of acknowledged assets in excess of $30,000 and the low valuations consistently placed on the property were met with evidence produced by Louise's counsel which persuaded the trial court to accept a higher valuation than that given by Dr. Davis. We think an allowance of $3,000 for fees in the trial court and $1,500 in this court is warranted.

The judgment of the trial court is affirmed with the exception of its order not allowing attorney's fees. The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. MABEL D. JONES, APPELLANT.

275 N. W. 2d 851

Filed March 6, 1979. No. 41860.

1. **Equity: Appeal and Error.** Quo warranto is an action in equity and is triable de novo in this court on appeal.
2. **Trial: Equity: Evidence.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

Appeal from the District Court for Cherry County: GEORGE H. STANLEY, Judge. Affirmed.

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

Bill Quigley, Cherry County Attorney, for appellee.

Heard before SPENCER, Retired Justice, BOSLAUGH, and WHITE, JJ., and WOLF and SPRAGUE, District Judges.

WOLF, District Judge.

This is an appeal from the judgment of the District Court for Cherry County in an action in quo warranto. After trial, the court held that the defendant, Mabel D. Jones, ceased to be a qualified elector of Cherry County, Nebraska, and that the office of Cherry County commissioner then held by her was vacated.

Cherry County is organized under the county commissioner system and all three of the commissioners are elected at large. The defendant was elected as county commissioner in the November 1974 election and took office in January of 1975. At the time of her election and for approximately 2 years thereafter, the defendant lived with her husband on a rented ranch residence located in Lackey precinct of

Cherry County. The ranch house was located approximately 24 miles north of the south line of Cherry County. The Jones' also owned a residence in the town of Whitman which is in Grant County approximately 4 miles south of the Cherry County south line. In previous years, the defendant had lived in the Whitman dwelling with their children so that they could attend the local Whitman school.

In May of 1976, the defendant and her husband lost their lease on the Cherry County residence and sold the nearby ranch land they owned in Cherry County. Defendant's testimony was that she and her husband stayed on at the Lackey precinct ranch house to help the new tenants and in the fall of 1976, she changed her residence to an apartment in Valentine in Cherry County, Nebraska, and the husband moved to their residence in Whitman in Grant County, Nebraska.

The records of the county clerk and election commissioner in Cherry County show that she changed her registration for voting to Valentine, Nebraska, on November 10, 1976, although she was unable to move into her apartment because of prior occupants until sometime between November 15th and December 1st of 1976. Her husband, Albert Jones, left his registration for voting at the Lackey precinct in Cherry County, Nebraska, until August 11, 1977, when he changed his registration to the defendant's address in Valentine. He resided at the Grant County residence from November of 1976 until the time of trial.

During the spring of 1977, the defendant told other commissioners of Cherry County that she resided in Whitman and she filed expense vouchers for travel expense from the town of Whitman to Valentine for the purpose of attending board meetings. The county clerk of Cherry County testified that he mailed her correspondence after November 10, 1976, to her Valentine address but when he telephoned her or

when he received telephone calls from her, they were from Whitman, Nebraska.

The defendant and her husband filed their 1976 income tax return which was prepared in February of 1977, and showed their residence address to be Whitman, Nebraska, but in School District No. 6 in Cherry County, which address would be appropriate for their former ranch home in Cherry County. The two vehicles which she used in the performance of her duties as county commissioner were both registered in January of 1977 in Lackey precinct of Cherry County, and their other four vehicles were registered in Grant County, Nebraska.

The defendant testified that she stayed overnight at her Valentine apartment on an average from 11 to 18 days each month but she spent weekends and holidays with her husband in the Grant County residence.

A deposition of the defendant, taken August 23, 1977, was received in evidence at the trial and contained the following:

"Q. November 30, the last claim for November, would have been from Whitman?

A. Yes.

Q. And is that where you were living at the time?

A. Yes. We had moved in there and were there most of the time.

Q. All right. Where did you spend that Christmas, last Christmas?

A. Where did we spend Christmas? We spent it in Whitman. * * *

Q. * * * Spent it at your home in Whitman?

A. Yes."

Section 23-150, R. R. S. 1943, provides: "The commissioners shall have the qualifications of electors, and shall be residents of their respective districts."

Section 32-475, R. R. S. 1943, provides in part: "The judges of election and the registrars of voters, in determining the residence of a person offering to

vote or register as defined in section 32-107, shall be governed by the following rules, so far as the same may be applicable: (1) That place shall be considered and held to be the residence of a person in which he is actually domiciled, which is the place of residence of an individual or a family or the place with which a person has a settled connection for determination of his civil status or other legal purposes because it is actually or legally his permanent and principal home, and to which, whenever he is absent, he has the intention of returning; (2) if a married man has his family domiciled in one place, and he does business in another, the former shall be considered and held to be the place of his residence; * * *"

Section 32-107, R. R. S. 1943, provides: "Residence shall mean that place at which a person has established his home, where he is habitually present, and to which when he departs he intends to return."

Section 32-1037, R. R. S. 1943, provides in part: "Every civil office shall be vacant, except as provided in section 32-1038, upon the happening of any one of the following events at any time before the expiration of the term of such office: The * * * (5) incumbent ceasing to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office are to be exercised, or for which he may have been elected; * * *"

The question thus presented is whether the defendant, in November of 1976 or subsequently, ceased to be a resident of Cherry County, Nebraska.

Quo warranto is an action in equity and is triable on appeal de novo in this court.

It is clear that a person may have two places of residence, but only one of them may be his domicile. To continue to hold her office as county commissioner, the defendant must maintain her domicile within that county.

In re Estate of Meyers, 137 Neb. 60, 288 N. W. 35, this court quoted with approval the following language: " 'No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case.'

'It is universally held that in order to acquire a domicile by choice, these essentials must concur: (1) Residence (bodily presence) in the new locality, and (2) an intention there to remain. In other words, there must be a concurrence of the fact and the intent, the factum and animus. Act and intent must, therefore, concur, and the absence of either of these thwarts the change. In addition there must be an intention to abandon the old domicile. As some writers express it, there must be an animus non revertendi and an animus manendi. The purpose to remain in or at the domicile of choice must be for an indefinite period of time.' "

The court further said, "We recognize that the intent of a person is not readily susceptible of analysis, and, therefore, in keeping with the great weight of authority, conclude that all of the surrounding circumstances and the conduct of the person must be taken into consideration to determine his domicile."

In this case, bodily presence of the defendant seems to be almost equally divided between her apartment in Valentine and the husband's home in Grant County. Defendant's act of changing her voting registration to the Valentine precinct in November of 1976 is an act indicating her intention to be domiciled in Cherry County, but is not conclusive. Her declarations to others that her residence was in Whitman, her failure to register her vehicles in Valentine, and her subsequent claims to the county for mileage from Whitman to Valentine are acts which indicate an intent to claim residence in Grant County. Her returning to her husband's Grant County residence during the times that her business

activities did not require her presence in Cherry County are also indicative of her intention not to abandon her husband's domicile.

Our court has held that a wife is not prevented, for good cause shown, from having a domicile or residence separate and apart from that of her husband. Wray v. Wray, 149 Neb. 376, 31 N. W. 2d 228. There may be circumstances in which there is no presumption that the domiciles of married persons are not identical, such as when they are separated in preparation for dissolution or intend a permanent separation; however, such is not indicated in this case. The location of the husband's domicile is one of the factors to be considered by the trial court in determining intent.

Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786.

The evidence supports the finding of the District Court that the defendant ceased to be a resident and qualified elector of Cherry County, Nebraska, and the order vacating her office is affirmed.

AFFIRMED.

BONNIE K. SMITH, APPELLANT, V. UNIVERSITY OF NEBRASKA MEDICAL CENTER, APPELLEE.

276 N. W. 2d 86

Filed March 6, 1979. No. 41915.

SUPPLEMENTAL OPINION

Appeal from the Nebraska Workmen's Compensa-

tion Court. Affirmed in part, and in part reversed and remanded with directions.

David L. Herzog, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

WHITE, J.

Upon motion for rehearing, the opinion previously adopted by this court appearing at 201 Neb. 730, 271 N. W. 2d 852, is modified in the following particulars. The last full paragraph and the two sentences immediately preceding it are withdrawn and the following is substituted therefor:

The three-judge compensation court should have awarded the 50 percent penalty as provided in that section and suitable attorney's fees for services rendered both before the one-judge Workmen's Compensation Court and the three-judge court. Harrington v. State, 198 Neb. 4, 251 N. W. 2d 653. The cause is remanded for that purpose.

The plaintiff also seeks reasonable attorney's fees for services before this court. The plaintiff is allowed the sum of $750 for the services of her attorney in this court. Reversed and remanded with directions.

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

NADINE MONINGER, APPELLANT, V. ROBERT MONINGER, APPELLEE.

276 N. W. 2d 100

Filed March 6, 1979. No. 41967.

1. **Divorce: Parent and Child: Minors.** In determining the question

of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.

2. _____: _____: _____. Ordinarily, alternating custody of young children should be avoided.
3. **Supreme Court: Evidence: Appeal and Error.** Evidence which does not appear in the record cannot be considered by the Supreme Court on appeal.
4. **Trial: Evidence.** Courts will not consider evidence which is not relevant.

Appeal from the District Court for Garfield County: HENRY F. REIMER, Judge. Affirmed in part, and in part remanded for further proceedings.

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

Schaper & Schaper and Wood, Wolfe & Hurd, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and HASTINGS, JJ., and KELLY, L. W. JR., District Judge.

KELLY, L. W. JR., District Judge.

This is an appeal by the petitioner, Nadine Moninger, from a decree of divorce wherein the District Court for Garfield County, Nebraska, dissolved the marriage of the parties hereto, divided the assets of the parties hereto, made various provisions for the alternate custody of the two minor children involved herein, and made provisions for support of the minor children while they were in the custody of the petitioner. Petitioner claims that the court erred in certain evidentiary matters and that she is entitled to a new trial. We affirm the judgment of the District Court as herein modified.

In the appeal of this matter no complaint is made of either the decision to dissolve the marriage or the division of the property as awarded to the parties herein. The only complaint made is to the court's order as it relates to custody of the minor children.

This is the only matter to which this court will address itself.

On de novo review, we have examined the evidence and abstract that portion which we consider to be pertinent to a final decision. The parties were married on September 22, 1973. They were residing in Burwell, Nebraska, and at the time of trial petitioner was 22 years old and the respondent was 23 years old. There were two children born the issue of this marriage, a boy age 2½ and a girl age 1 at the time of trial. Certain problems had arisen during the marriage and prior to the institution of the present action the petitioner and respondent had separated on a prior occasion.

During the pendency of this proceeding, which had been instituted in April of 1977 with trial on December 1, 1977, the parties had consulted with a marriage counselor. The petitioner had seven consultations, the respondent, nine consultations, and the two had counseled together on two occasions. An exhibit appears in the record which is a letter written by the counselor stating that in the counselor's opinion the marital relationship was irretrievably broken and further marital counseling would not effect a change. The marriage counselor did not testify at the time of trial, although there is a statement in the record by petitioner's attorney that the marriage counselor had been subpoenaed and a subpoena served the day prior to trial by the sheriff of Loup County, Nebraska. This apparently was the residence of the marriage counselor.

The testimony reflects that the respondent had physically struck the petitioner on a few occasions during the marriage and during the time of separation. The testimony further showed that the respondent had, at the age of 14 or 15, been hospitalized in Omaha, Nebraska, and given psychiatric treatment for approximately 1 week. The occasion that precipitated this treatment was the fact that the

respondent had struck his sister. The respondent had further been hospitalized for a nervous condition on two occasions during the pendency of the divorce proceedings. This was done by his local family physician who did not testify at the time of trial.

During the pendency of the action, the petitioner had consulted with a psychiatrist who did testify at the time of trial. The psychiatrist had observed the petitioner and her two children on one occasion. The witness was unable to give an opinion as to fitness as a custodial parent without examining both the petitioner and the respondent. The petitioner filed a motion with the court to have the court order the respondent to undergo psychiatric evaluation. This motion was denied by the trial court.

The evidence showed that the petitioner, during the pendency of the proceedings, cohabited with an individual other than her husband. The petitioner attempted to call this individual as a witness offering to show that when he was divorced from his wife and petitioner secured a divorce from her husband they were going to marry. The petitioner attempted to show that this person was a good father and he would be a good stepfather to her children. The petitioner also offered testimony of a character witness who was acquainted with her boy friend who would testify that the boy friend had a favorable reputation in his community and that he would be generally fit to raise children. The offered evidence of both the boy friend, and the witness to testify as to the boy friend's fitness, was refused by the trial court for the reason that it would not be relevant to any of the issues in this case.

The criteria the trial court should use in determining the custody of the minor children has been stated so often that it barely needs repeating; however, one of the best statements, which is well recognized by our courts, is found in the case of Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111:

"In determining the question of who should have the care and custody of children upon the dissolution of a marriage, 'the paramount consideration is the best interests and welfare of the children.' Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682. See, also, Lanz v. Lanz, 189 Neb. 578, 203 N. W. 2d 761; Section 42-364, R. S. Supp., 1972. The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider. 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 the instant case the court determined both parties were fit parents and that custody of the minor children should be alternated between the petitioner and respondent for various periods of time. The evidence showed that the petitioner was going to attend a beauty school, which schooling would take approximately 1 year. The court ordered the respondent to have custody of the minor children during this 1-year period of time. At the conclusion of that year the petitioner was to have custody of the two children for 1 year. At the conclusion of that 1-year period of time the respondent was to have custody of the minor children for a 3-month period of time and the petitioner was then to have custody of the chil-

dren for a 3-month period of time. At the expiration of this period and in June of 1980, the court would then review the custody matter and prior to the first child starting to school would determine who would best be fit to have custody of the children on a more or less permanent basis. Although a good portion of the second year's period of time will have expired by the time this opinion is filed, we feel that it is not in the best interests of the children to be alternated between the petitioner and respondent in this manner. One of the primary objectives after the dissolution of a marriage where young children are involved is to create a stable atmosphere for the children to adjust. We are not prepared to say that this type of alternating custody is never suitable. There may be instances where the parties themselves agree that it would be in the best interests of the children. However, where there has been such turmoil and such a strenuous tug of war for custody of the children, we feel that it would not be in their best interests. We feel the trial court should hold a hearing as soon as possible to determine in whose custody the children should be placed.

There is a statement in the record by counsel for the petitioner that a witness, Iva Jo McKinney, was subpoenaed but had declined to appear at the time of trial for two reasons. The witness apparently was trying to claim a privilege under section 27-504 (2), R. R. S. 1943. This the witness would not be able to do without appearing in court and stating the reasons therefor. The problem presented in this case is further complicated by the fact that the witness was not a resident of the county and there is nothing in the record other than the statement made by the attorney that she was served with a subpoena and did not respond thereto. Section 25-1226, R. R. S. 1943, provides for the service of a subpoena. A review of the transcript in this matter reveals there is no subpoena showing a return of a sheriff confirming he

has served her personally as claimed by the attorney in a statement to the court. The rule in this court is that evidence which does not appear in the record cannot be considered by the Supreme Court on appeal. Hanson v. Hanson, 198 Neb. 675, 254 N. W. 2d 699.

The petitioner complains the trial court erred in overruling the petitioner's motion for an order compelling the respondent to submit to a psychiatric examination. The petitioner relies upon the Nebraska statute section 25-1267.40, R. R. S. 1943. The only case cited by the petitioner was a criminal case wherein the court held that to refuse a psychiatric examination was an abuse of the discretion of the trial court. A review of this statute shows that it is permissive upon the court to order a psychiatric examination. In reviewing the evidence in this case, we do not feel that there is any abuse of discretion by the trial court in refusing the motion of the petitioner to require the respondent to submit to a psychiatric examination.

Finally, the petitioner complains that the trial court erred by its exclusion of testimony of certain witnesses for the petitioner, namely, the petitioner's boy friend and his character witness.

Objections to their testimony were sustained by the trial court on the basis that the same would not be relevant to any of the issues presented in the case. The trial court was correct in its ruling.

We therefore affirm the trial court in the dissolution of the marriage and the division of the property of the parties hereto. This case should be remanded for a hearing as soon as possible, but in any event not more than 60 days after the filing of the mandate of this court, to determine the fitness of the parents as to permanent custody. Petitioner is allowed a fee of $250 for the services of her attorney in this court.

AFFIRMED IN PART, AND IN PART REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. HATTIE SMITH, ALSO KNOWN AS HATTIE BROWN, APPELLANT.

276 N. W. 2d 104

Filed March 6, 1979. No. 42019.

1. **Criminal Law: Evidence: Statutes.** Newly discovered evidence must be relevant and credible, and not merely cumulative. It must involve something other than credibility of witnesses who testified at the former trial. § 29-2101 (5), R. R. S. 1943.
2. **Trial: Evidence.** Newly discovered evidence must be of such a nature as to create strong probabilities of a different result had it been offered and admitted in the former trial.
3. **Trial: Evidence: Hearsay: Statutes.** Hearsay statements made immediately prior to an incident which results in the death of the declarant are admissible as a statement of the declarant's then existing state of mind and emotion to prove the declarant's intent, plan, motive, or conduct under section 27-803 (2), R. R. S. 1943.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

Heard before SPENCER, Retired Justice, BOSLAUGH, CLINTON, and WHITE, JJ., and BARTU, District Judge.

BARTU, District Judge.

This is an appeal from a conviction and sentence for second degree murder by the appellant-defendant, Hattie Smith, also known as Hattie Brown. An earlier trial resulted in a hung jury and a mistrial. She assigns as error the denial of a new trial upon the ground of newly discovered evidence.

The defendant shot and killed William E. Brown, her husband, in the parking lot of the Easy Drive Through Liquor Store at 24th and Clark Streets in Omaha, Nebraska, at approximately 12:30 p.m., May 31, 1977. These facts are undisputed. The defendant admitted the shooting, but alleged she acted

in self-defense. Her intent, at the time of the shooting was the ultimate question for the jury. The accounts of the shooting are in conflict.

Ike Seals testified that immediately prior to the shooting he was standing in the back parking lot of the liquor store and observed the victim drive up in his car, park it, and get out. As he did so, Seals called to Brown and asked him to get him a can of beer from the liquor store. At approximately the same time, he observed a car pull into the parking area of the liquor store and someone in the car said something to the victim. As Brown turned around by his car door, he was shot by the defendant, who was 10 or 15 feet away, sitting in the car that had just entered the parking lot.

Elton Brunt testified that he observed the incident from about 50 feet away and he saw the defendant and the decedent standing between the two cars, 2 or 3 feet apart, in the parking lot area of the liquor store. It appeared to him that the defendant and her husband were arguing or quarreling, and the deceased had the defendant's arm in his grasp. The defendant jerked away from Brown. Brunt heard a shot and saw the victim fall.

Robert Hoskins, Jr. related that as he drove into the parking lot of the liquor store, the defendant was standing in back of a car and she called to him as he drove in. He stopped and the defendant entered his car. She was sitting in the front seat facing him and talking with him as Brown approached the automobile on the passenger side. Brown commanded the defendant: "Hattie, get out of that damn car." The decedent opened the passenger door and reached in and grabbed the defendant by her arm. The defendant then got out of the automobile and said to her husband, "You ain't going to beat me no damned more.". Immediately thereafter, the shooting occurred.

The defendant testified that she and her husband

moved to Omaha from Florida in 1970 and during the course of the marriage he kept the company of other women. He lived with her and their children off and on. As to the shooting, she related that she heard her husband tell her to get out of the Hoskins vehicle. She did not remember how she got out but as she did so she was "scared" and withdrew from her bosom a gun, which she had purchased 3 or 4 days earlier. When she got out of the Hoskins auto, her husband stepped back and she observed that he had his fist drawn back to hit her. She then closed her eyes and pulled the trigger.

Investigating officers from the Omaha police department testified that immediately following the shooting incident, while in a police cruiser, the defendant was crying and stated that she had been afraid and shot her husband because he had beaten her the day before. While at the police station, the defendant was very emotional and exhibited a bite mark on her left breast and brusies on her right arm which she claimed had been inflicted by the victim.

On cross-examination, the State was permitted to question the defendant with regard to a life insurance policy on the life of her husband. The defendant related that she made a telephone call to the Teamster's Union office about 4 hours after the shooting to find out if her husband had insurance, and if so, how much. On redirect examination, the defendant testified she learned of the insurance policy after the shooting through a telephone call her mother had made to her husband's mother in Alabama. The decedent's mother had indicated there was an insurance policy, that the defendant was the beneficiary, and that it was her obligation to bury her husband.

The defendant further testified that William E. Brown had, on prior occasion, assaulted her and threatened her life. This testimony was corroborated by Amos Jones, the 10-year-old son of the defendant.

Robert Wolf and Joseph Patrylak, Omaha police officers, testified that on May 30, 1977, the day before the shooting, they investigated a disturbance incident between the defendant and her husband at 16th Street and Commercial Avenue in Omaha. On that occasion, they observed the defendant standing outside an automobile in which her husband and a female companion were sitting and the defendant was yelling obscenities at him. The officers told the deceased to leave the area, and as he did so, the defendant yelled, "It's not over," or, "this thing is not over." The defendant testified that this incident was prompted by Brown being with Tara Smith and by the failure of her husband to give her any money for rent, because she had received notice that she and her family were going to be evicted from their apartment.

Curtis Johnson, an employee of National Disposal Company and working partner of the victim, testified that the Brown marriage was "off and on" and that upon one occasion, the defendant had come out to the garbage route where he and Brown were working, seeking her husband. On that occasion, Brown hid from the defendant behind some cars, called his employer, and was removed from the route pursuant to his request.

Subsequent to the trial and conviction, but prior to sentencing, the defendant filed her motion for a new trial, and supported the same with the following affidavit:

"John Henry Pargo, being by me first duly sworn upon oath deposes and states as follows: That on May 31, 1977 he was in Herbs which is located across the street from the E. Z. Drive Thru Liquor Store, that he was playing pool with William E. Brown, that William E. Brown was drinking some whiskey, that William E. Brown sent a Robert Frog Thomas to the E. Z. Drive Thru to buy some wine, that when he came back he told William Brown that Hattie was

over at the E. Z. Drive thru, [sic] that William Brown threw his pool stick down and said 'I am going to kill that bitch,' that said William Brown jumped into his car and sped over to the E. Z. Drive Thru, that about ten minutes later he heard a shot from the E. Z. Drive Thru, that he went over and saw William lying on the ground, that William E. Brown looked up, groaned and then died, that he was not contacted by the Omaha Police Department, that he contacted no one until now, that he has been out of town, that he is willing to submit to a polygraph test as to what he saw and heard on May 31, 1977."

There is no dispute whatsoever in this case that the evidence on which defendant relies was newly discovered evidence which she could not, with reasonable diligence, have discovered and produced at the trial. The record clearly establishes that witnesses to the shooting were extremely reluctant to acknowledge themselves, did not do so at the scene of the shooting, and appeared at trial only under subpoena.

The issue squarely presented is whether the newly discovered evidence satisfies the other requirements of section 29-2101 (5), R. R. S. 1943.

Newly discovered evidence must be of such a nature that if offered and admitted at the former trial, it probably would have produced a substantial difference in result. Such evidence must be relevant and credible, and not merely cumulative. It must involve something other than credibility of witnesses who testified at the former trial. Finnern v. Bruner, 170 Neb. 170, 101 N. W. 2d 905 (1960); State v. French, 200 Neb. 137, 262 N. W. 2d 711 (1978).

Had the identity of John Pargo been known to the defendant, his testimony would have been relevant and credible at the time of trial. The statement of William E. Brown to him, "I'm going to kill that bitch," although hearsay, would have been admis-

sible under section 27-803 (2), R. R. S. 1943, as a statement of the declarant's then existing state of mind and emotion to show his intent, plan, motive, or mental feeling, and inferentially, his demeanor and actions prior to the shooting. Exclusion of the evidence, had it been available to and offered by the defendant at trial, would have constituted reversible error. The jury's determination of the defendant's guilt or innocence inevitably rested on the intent of the defendant immediately prior to the shooting, and the presentation of the newly discovered evidence might very well have resulted in a verdict of manslaughter or an acquittal. It is essential when a jury is required to determine the intent of the defendant in a criminal action that it be given an opportunity to assess all relevant evidence before it reaches its decision. Fundamental due process requires that the defendant be granted a new trial to permit her the opportunity to present such evidence to the jury.

The judgment of the District Court overruling and denying defendant's motion for a new trial is reversed. The matter is remanded to the District Court for a new trial to be held within 60 days of the mandate herein in conformity herewith.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. BENEDICT, APPELLANT.

276 N. W. 2d 108

Filed March 6, 1979. No. 42183.

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

Anthony S. Troia, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Defendant, Robert D. Benedict, was charged under section 39-669.07, R. R. S. 1943, with operating or being in the actual physical control of a motor vehicle while under the influence of alcoholic liquor or of any drug or with ten-hundredths of 1 percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine. Defendant was tried to a jury and convicted, following which a hearing was had with reference to the number of prior convictions of defendant for drunk driving, at which hearing it was determined that he had had two prior convictions and that the current offense was his third conviction. The defendant was then sentenced to serve 2 years in the Nebraska Penal and Correctional Complex. He has appealed from that conviction and sentence to this court. We affirm.

Defendant's sole assignment of error is that the jury erred in its finding that defendant was in actual physical control and in operation of his vehicle when arrested for the offense. The facts as revealed and sustained by the record are that on February 27, 1978, at approximately 7:30 p.m., two witnesses observed a blue Ford automobile traveling north on Military Avenue and weaving back and forth across the center line. The driver of the automobile failed to negotiate a curve, and struck a pickup truck parked in a private lot. The accident was also observed by three girls on a porch across the street. The evidence is uncontradicted that the driver of the automobile was the only person in the car at the time, and the defendant was subsequently identified by all the witnesses as the driver of the automobile.

The driver of the automobile then drove away, followed by the two original witnesses, Martin and John McPherson. After observing the driver of the blue automobile park the car, the witnesses drove to a phone booth and notified the police of the accident. They were met by a police officer shortly after 7:39 p.m., and the three of them checked the area in the officer's cruiser for the driver of the car. They observed the defendant walking and identified him as the driver of the blue Ford car, which was approximately one-half block from the place of identification. At the trial Officer Brock expressed his opinion that at that time the defendant was intoxicated, and gave the basis for his opinion, which was that the defendant was staggering and had a strong odor of alcohol on his person and breath, his eyes were bloodshot, and his speech was slurred. Defendant was then placed under arrest and transported to the police station at approximately 8:05 p.m., where Paul Koltz, a criminalist for the Omaha Police Division, administered a breath test to the defendant which resulted in a reading of sixteen-hundredths of 1 percent of alcohol in defendant's blood, which even at that time was six-hundredths of 1 percent over the statutory minimum of ten-hundredths of 1 percent.

In his brief on appeal, appellant argues that although witnesses had identified him as the driver of the vehicle that struck the other vehicle on the occasion in question, none of the State's witnesses testified that defendant was under the influence of intoxicating liquor at the time he was observed in the accident. He states: "Here, assuming defendant was identified positively by all witnesses, certainly does not tend to prove the existence of the key phrase in the State Statute which specifically states one can only be convicted of the offense of drunken driving if he is under the influence of intoxicating liquor *when observed by the charging or complaining parties involved.* Sec. 39-669.07, R. R. S. Neb. 1943, Reissue

1976." (Emphasis supplied.) That section contains no such requirement. See, also, State v. Stanosheck, 186 Neb. 17, 180 N. W. 2d 226 (1970). We know of no rule which requires that all of the elements of a criminal offense be proved or testified to by the same witnesses. Here the fact that the defendant was driving the automobile in question at the time it struck the truck in the parking lot was testified to by five witnesses. The fact that defendant was in a clearly intoxicated condition approximately 20 minutes later was testified to by the police officer, whose opinion was shortly thereafter corroborated by the breath test given defendant at the police station. At the time the police officer and the two witnesses saw the defendant, he was near his automobile, which also bore evidence of the damage presumably sustained in the collision in the parking lot. The evidence at the trial, as reflected in the record, is more than ample to justify the conclusion of the jury that the defendant was operating his motor vehicle while under the influence of intoxicating liquor, in violation of section 39-669.07, R. R. S. 1943. The conviction and sentence of the defendant by the District Court were clearly correct, and its judgment must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REGINALD COUNTRY, APPELLANT.

276 N. W. 2d 110

Filed March 6, 1979. No. 42192.

1. **Criminal Law: Guilty Pleas: Habitual Criminals.** A plea of guilty or nolo contendere is not involuntary because it is induced by the filing of an habitual criminal charge.
2. **Criminal Law: Guilty Pleas.** Questioning the defendant as to the factual basis for the charge is not required where the defendant enters a plea of nolo contendere.

3. _____: _____. A plea of guilty or nolo contendere waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.

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

Reginald Country, pro se.

Paul L. Douglas, Attorney General, and Lynne Fritz, for appellee.

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

CLINTON, J.

In 1974, defendant Reginald Country entered a plea of nolo contendere to a charge of forcible rape, and, pursuant to a plea bargain, a second count charging him with being an habitual criminal was dismissed. He was sentenced to serve 10 to 30 years in the Nebraska Penal and Correctional Complex. On appeal to this court, the sentence was affirmed. State v. Country, 194 Neb. 570, 234 N. W. 2d 593.

In November 1975, defendant filed a "motion to vacate" in the District Court, alleging excessiveness of sentence, the plea was not knowingly made, and defendant had not been adequately represented by counsel. The motion was overruled without a hearing and no appeal was ever taken.

In July 1977, defendant filed a second "motion to vacate and set aside sentence." He again alleged the plea was not knowingly entered and added that the trial court had failed to ascertain whether there was a factual basis for the plea. He then repeated his allegation that he had been inadequately represented by counsel in that counsel had neglected to interview certain witnesses who would testify favorably to defendant and had generally failed to pursue defendant's interests in the case or inform defendant of his rights. Three affidavits favorable to the defendant and signed by the witnesses in

question were attached to the petition.

An attorney was appointed to represent defendant and an evidentiary hearing was held pursuant to section 29-3001, R. R. S. 1943. Following the hearing, the trial court held the plea was freely and voluntarily entered after defendant had been fully advised of his rights by the trial court, there was a sufficient factual basis for the plea, and defendant had been adequately represented by counsel at all stages of the proceedings.

Defendant now appeals pro se to this court, assigning as error each of the above holdings. We affirm.

Defendant had initially entered a plea of not guilty to the charge of rape. When an amended information additionally charging him with being an habitual criminal was served on him, he called his attorney and asked that a plea bargain be arranged whereby defendant would agree to plead nolo contendere to the charge of rape if the habitual criminal charge was dismissed. The county attorney agreed to the bargain and a second arraignment was held the day after defendant had called his attorney.

An examination of the transcript of the second arraignment shows defendant was fully advised of his constitutional rights and voluntarily waived them. It is clear from the record and the information that defendant was advised of the essential elements of the crime of rape. The court told defendant there was no real issue as to whether intercourse had occurred and stressed that trial of the case would involve "a rather difficult factual and legal question as to how much force was used, and also how much force would be necessary." Defendant nevertheless insisted he wanted to enter the plea in order to avoid the habitual criminal charge. A plea of guilty or nolo contendere is not involuntary because it is induced by the filing of an habitual criminal charge. State v. Reed, 187 Neb. 792, 194 N. W. 2d 179. The record shows the court was well apprised of the

factual basis for the charge. Although questioning the defendant as to the factual basis is not required where the defendant enters a plea of nolo contendere, State v. Hyslop, 189 Neb. 331, 202 N. W. 2d 595, the court must satisfy itself that there is a factual basis for the charge.

Defendant's claim that he was inadequately represented by counsel is also without merit. The only allegation in this area which is supported by the evidentiary hearing is that counsel had not, as of the time the nolo contendere plea was entered, interviewed three witnesses who might have testified on defendant's behalf. While this argument might have had merit had the case proceeded to trial, it is inapplicable where, as here, trial was avoided by a plea bargain instituted at the defendant's request.

A guilty or nolo contendere plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. State v. Kluge, 198 Neb. 115, 251 N. W. 2d 737; State v. Griger, 190 Neb. 405, 208 N. W. 2d 672. Once defendant's plea was accepted, the potential testimony of witnesses on his behalf became irrelevant.

AFFIRMED.