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REPORTS OF CASES

DECIDED BETWEEN

APRIL 4, 1979 and JULY 9, 1979

IN THE

Supreme Court of Nebraska

JANUARY TERM 1979

VOLUME CCIII

MARVIN L. GREEN

OFFICIAL REPORTER

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1979

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By Marvin L. Green, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1979

ANITA LOUISE DAVIS, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CALLAWAY, APPELLEE.

277 N. W. 2d 414

Filed April 10, 1979. No. 41877.

1. **Schools and School Districts: Contracts: Appeal and Error.** The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached.
2. **Administrative Law: Hearings: Evidence.** In an error proceeding conflicting evidence will not be weighed, and the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its findings and order.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

Brian Cook and Mingus & Mingus, for appellant.

Cook, Lubberstedt & Kopf, for appellee.

Heard before SPENCER, Retired Justice, MCCOWN, and BRODKEY, JJ., and BLUE and REAGAN, District Judges.

REAGAN, District Judge.

Appellant Davis was a tenured teacher in the Callaway school system. Her employment was terminated by the Callaway board of education in 1976 for "just cause" under section 79-1254, R. R. S. 1943. An

error proceeding was lodged in the District Court, and from an order affirming the action of the board of education this appeal was taken.

The appellant contends that the District Court applied an erroneous standard of review. The District Court held in a conclusion of law that the decision of the board of education must be affirmed if any set of facts can be constructed from the evidence before the board that would support the finding.

An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached. Sanders v. Board of Education, 200 Neb. 282, 263 N. W. 2d 461 (1978); Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58 (1958). Although the standard of review announced by the trial court may be arguably erroneous, application of the correct standard in this court cures any error. It is well-settled law that a correct decision of a trial court will not be set aside simply because a wrong reason was announced for the decision. Peitz v. Hausman, 198 Neb. 344, 252 N. W. 2d 628 (1977).

Appellant contends that the evidence was insufficient to support the action of the board of education in terminating her employment. The evidence presented to the board of education consisted of testimony from George Wright, the superintendent; David Weber, the principal; Anita Davis; Frank Swathel; Carolyn Kollmeier; and a number of exhibits. The superintendent testified he has observed the appellant and her class personally; student behavior was poor; appellant was too permissive; appellant lacked organization, control, and planning;

and appellant did not motivate students. He stated in his opinion she should be terminated for just cause. The principal testified that he had taught for 10 years in the system; he personally observed appellant and her class; discipline was a problem; and appellant needed to improve in organization and control. He concurred with the superintendent's recommendation for termination. The testimony of the other witnesses could be summarized as favorable for retention. The exhibits likewise produced conflicts, either directly or in inferences to be drawn therefrom.

Appellant argues the decision herein should be controlled by the Sanders case. That case is not applicable here. In Sanders the expert witnesses charged with the duty of evaluating the performance of the teacher did not testify that her performance failed to meet the appropriate standard. Instead, they recommended to the board of education that the teacher be retained. The evidence, therefore, as a matter of law, did not establish "just cause" for terminating the teacher's employment. In the case now before us the testimony of the expert witnesses charged with the duty of evaluating the performance of the teacher was that her performance did not meet the appropriate standard. They recommended that her employment be terminated and the evidence, including the expert testimony, as a matter of law, was sufficient to support the action of the board in terminating her employment. The language in Sanders with reference to a standard of performance should not be interpreted to mean that in every hearing on termination before a board of education there must first be expert testimony establishing the appropriate and acceptable standard of performance before a board may consider whether particular conduct falls below that standard.

In an error proceeding conflicting evidence will not be weighed and the order of an administrative

tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its findings and order. See, Willits & Co. v. Arena Fruit Co., 58 Neb. 659, 79 N. W. 624; City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co., 201 Neb. 405, 268 N. W. 2d 98; Sibert v. City of Omaha, 201 Neb. 399, 267 N. W. 2d 753. In the case presently before us there is ample competent evidence, including expert testimony, to sustain the findings and order of the board of education.

AFFIRMED.

UNIVERSITY POLICE OFFICERS UNION, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 567, APPELLEE AND CROSS-APPELLANT, V. UNIVERSITY OF NEBRASKA, A BODY CORPORATE, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANTS AND CROSS-APPELLEES.

277 N. W. 2d 529

Filed April 10, 1979. Nos. 41916, 41917.

1. **Constitutional Law.** Each and every clause in the Constitution has been inserted for some useful purpose. Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction.
2. **Court of Industrial Relations: Colleges and Universities: Board of Regents: Statutes: Labor and Labor Relations.** The Board of Regents of the University of Nebraska has primary authority for establishing its own schedules of wages, terms and conditions of employment, and hours of labor, but when an industrial dispute, as defined by section 48-801 (7), R. R. S. 1943, arises, the Court of Industrial Relations may acquire jurisdiction for the limited purpose of resolving such dispute. Likewise, the Court of Industrial Relations may acquire jurisdiction for resolving an industrial dispute concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or refusal to discuss terms or conditions of employment.
3. **Court of Industrial Relations.** Decisions under the National Labor Relations Act are helpful but not controlling upon either the Court of Industrial Relations or the Supreme Court. Likewise, decisions

under the National Labor Relations Act are of no help or benefit in attempting to determine actions absent similar provisions under the Nebraska statutes, nor can common practices under other statutes in other jurisdictions enlarge the statutory power granted the Court of Industrial Relations by the Nebraska Legislature.

4. **Court of Industrial Relations: Administrative Law.** In the grant of power to an administrative agency to legislate such power must be limited to the express purpose and administered in accordance with standards prescribed in the legislative act. An administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act. That authority which is necessary to accomplish the purpose of the act must be narrowly construed. It is fundamental that in the legislative grant of power to an administrative agency, such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act. The limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated. They may not rest upon indefinite, obscure, or vague generalities or upon extrinsic evidence not readily available.
5. **Court of Industrial Relations: Labor and Labor Relations: Jurisdiction.** In the absence of specific statutory authority the Court of Industrial Relations is without jurisdiction to generally find and declare unfair labor practices.
6. **Court of Industrial Relations: Labor and Labor Relations: Statutes.** The adoption of sections 48-801 to 48-838, R. R. S. 1943, was not intended to in any way remove the lawful responsibility nor the proper prerogative of public employers in the exercise of their recognized management rights or in the exercise of their lawful duties, except as may otherwise have been specifically entrusted to the Court of Industrial Relations in resolving industrial disputes as prescribed by the statutes.
7. **Public Officers and Employees: Labor and Labor Relations.** Public employees are generally not entitled to collective bargaining in the sense that private industrial employees are.
8. **Court of Industrial Relations: Jurisdiction.** The authority of the Court of Industrial Relations is carefully circumscribed. Its procedures are prescribed by statute. Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns.
9. **Court of Industrial Relations: Labor and Labor Relations.** The Court of Industrial Relations has power and authority upon its own initiative to make temporary findings and orders as may be necessary to preserve and protect the status of the parties' property and public interest involved pending final determination. That authority does not authorize the Court of Industrial Relations to make findings with regard to unfair labor practices or direct a public

employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved pending final determination of the issues.

10. **Governmental Subdivisions: Labor and Labor Relations.** It shall be presumed, in the case of governmental subdivisions, such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate.

Appeal from the Court of Industrial Relations. Affirmed in part, and in part reversed and remanded.

John C. Gourlay, for appellants.

J. Murry Shaeffer, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

This matter involves two separate appeals from orders entered by the Court of Industrial Relations (CIR) on December 20, 1977. Case No. 41916 is the result of a petition filed with the CIR by the University Police Officers Union, International Brotherhood of Police Officers, Local 567, (University Police Officers), asking the CIR to declare all commissioned police officers and all security officers employed by the University of Nebraska-Lincoln, Department of Police and Security, excluding the director and three immediate assistants holding authority subordinate only to the director, as the appropriate unit for purposes of exclusive representation and bargaining. The petition recited that University Police Officers had on two occasions requested voluntary recognition and that both requests were denied by appellants. For purposes of convenience the appellants in this case will be jointly referred to as UNL.

The petition further recited that there were approximately 37 employees in the requested unit. UNL filed its answer generally denying the claims made in the University Police Officers' petition.

UNL further alleged that the CIR did not have jurisdiction over UNL and even if jurisdiction were present, the proposed bargaining unit was not an appropriate unit.

On October 19, 1977, while the action in case No. 41916 was pending before the CIR and before a hearing was held, a subsequent petition, case No. 41917, was filed by University Police Officers with the CIR. That petition, supported by affidavits, alleged that UNL was harassing and intimidating certain police officers because of their union activity in violation of section 48-811, R. R. S. 1943. The following day an order was entered by the CIR. Said order stated in part: "The Court having convened, and upon the evidence * * *." Our examination of the record does not disclose, however, any hearing having been held or any evidence being introduced. Presumably the order of the court entered on October 20, 1977, was based upon the affidavits filed by University Police Officers the day before. What opportunity UNL was given to respond to the affidavits or to be heard is not made clear by the record.

In any event, the CIR entered a preemptory protective order prohibiting UNL from altering the status quo of any of the members of the University Police Officers. Said order also prohibited UNL from engaging in any action intended to or tending to intimidate plaintiff or its members or to encourage such members to abandon plaintiff as a prospective bargaining agent. The CIR further specifically prohibited UNL from altering the status of, or reclassifying, Officer Barbara McGill and Officer Mary Fleming. It further ordered that if any change in the status quo had been made prior to the receipt of the order, such change was to be voided.

The CIR further ordered UNL to post a copy of its order on each bulletin board or other place regularly used by UNL to communicate with members of the University Police Officers. The CIR consolidated

case No. 41917 for trial with case No. 41916, and hearing was held on both matters.

Thereafter, on December 20, 1977, CIR entered its opinion and order finding that the CIR had jurisdiction over UNL; that UNL had committed what the CIR described as "unfair labor practices;" that the appropriate unit for purposes of bargaining, a unit consisting of all commissioned police officers and all security officers employed by the University of Nebraska-Lincoln, Department of Police and Security, excluding officers of the rank of sergeant and above, be established; and it entered certain orders in connection therewith. The ordered unit was not sought by either party. An election to determine whether the proposed unit should serve as the exclusive collective bargaining agent was also ordered by the CIR.

UNL perfected its appeal to this court assigning as error three basic propositions: (1) That the CIR was without jurisdiction over UNL by reason of the provisions of Article VII, section 10, of the Constitution of the State of Nebraska, and our holding in Board of Regents v. Exon, 199 Neb. 146, 256 N. W. 2d 330; (2) that the unit designated by the CIR as the appropriate unit was inappropriate under the circumstances; and (3) that UNL had not committed any "unfair labor practices." The University Police Officers cross-appealed maintaining that the CIR was in error in excluding, from the appropriate unit, officers of the rank of sergeant and above.

We shall proceed to review these matters individually, turning first to the question of whether the CIR does in fact have jurisdiction over UNL.

Article VII, section 10, of the Constitution of the State of Nebraska provides in part as follows: "The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six nor more than eight regents to be designated the Board of Regents

of the University of Nebraska * * *." In the case of Board of Regents v. Exon, *supra*, this court, in reviewing that section of the Constitution, said, "Thus, although the Legislature may add to or subtract from the powers and duties of the Regents, the general government of the University must remain vested in the Board of Regents and powers or duties that should remain in the Regents cannot be delegated to other officers or agencies." We there further said, "The determination of salary schedules and the compensation to be paid to the employees of the Board of Regents is an integral part of the general government of the University."

UNL argues that the provisions of the Constitution referred to above and our decision in Board of Regents v. Exon, *supra,* foreclose any further discussion in this case. UNL claims that the aforesaid clearly establishes that it is constitutionally empowered to set its own salaries and terms and conditions of employment as an integral part of its governance of the University. Consequently, the Legislature may not interfere in that function by vesting certain authority in the CIR to rule over said UNL matters. If we confine our reading only to Article VII, section 10, of the Constitution of the State of Nebraska, such a result might seem correct. The Constitution, however, contains other provisions which must be read in connection with Article VII, section 10, and which must result in reaching a contrary conclusion.

In Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322, we said: "This court has also recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose. Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction. See, also, School Dist. of Seward Education Assn. v. School

Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752.

In addition to the provisions of Article VII, section 10, of the Constitution of the State of Nebraska, the Constitution contains Article XV, section 9, which provides as follows: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission." No exception is made for UNL thereunder. It is of significance to note that both Article VII, section 10, and Article XV, section 9, of the Nebraska State Constitution were a part of the 1920 Constitutional Convention. Moreover, Article VII, section 10, of the Constitution has been amended twice since its adoption. Yet no language has been inserted which in any way exempts the provisions of Article VII, section 10, from the provisions of Article XV, section 9. We are therefore compelled to read both sections together harmoniously. We do not find it difficult to do so. Article VII, section 10, does indeed grant to the University of Nebraska the *primary* general governance of the University. In essence, UNL is granted the authority in the first instance to govern its operation, including the establishment of the salary schedules and compensation to be paid its employees. It is only when a dispute arises between UNL and its employees that the provisions of Article XV, section 9, and the provisions of sections 48-801 to 48-838, R. R. S. 1943, come into play. There appears to be nothing improper or inconsistent with such a result. To the extent that UNL can without controversy establish schedules of wages, terms and condi-

tions of employment, and hours of labor, neither the Legislature nor anyone else may interfere. If, however, a controversy between UNL and its employees arises, the Constitution grants to the Legislature authority to enact laws to resolve that controversy. This is really nothing other than simply prescribing a forum wherein controversies involving a public employer and its employees may be arbitrated. Certainly UNL would not argue that their authority is so absolute that an employee could have no recourse anywhere if a dispute existed between the employer and the employee.

Further examples of the above are easy to find. While UNL does have primary authority over its own governance, nevertheless, it is by statute bound by the provisions of the Nebraska Workmen's Compensation Law, sections 48-192 to 48-1,109, R. R. S. 1943. Likewise, UNL is subject to the provisions of the Nebraska Employment Securities Law, sections 48-601 to 48-669, R. R. S. 1943. Further examples could be given.

We therefore hold that UNL has primary authority for establishing its own schedules of wages, terms and conditions of employment, and hours of labor; but when an industrial dispute, as defined by section 48-801 (7), R. R. S. 1943, arises, the CIR acquires jurisdiction for the limited purpose of resolving such dispute. Likewise, the CIR acquires jurisdiction for resolving an industrial dispute concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or refusal to discuss terms or conditions of employment. As there was an industrial dispute in existence, the CIR was correct in holding it had jurisdiction over UNL in this case.

We now turn to the next assignment of error. In its order of December 20, 1977, the CIR included the following: "We then turn to the far more difficult

task of evaluating the evidence and determining the issues raised as to illegal practices *or what is known elsewhere in labor law as 'unfair labor practices.'* " (Emphasis supplied.) Further in its order the CIR recited, "We note that the NLRB consistently holds past practice to be the guide in making decisions under Section 8a and 8b of the NLRA as to what is or is not an unfair labor practice. We consider the NLRB practice as sufficient confirmation of our own judgment as to the standard to be applied, and proceed on that basis."

It would appear from reading the order of the CIR that it is of the opinion that it has jurisdiction to determine "what is known elsewhere in labor law as 'unfair labor practices.' " Orders and rulings in connection therewith have thus been entered by the CIR previously. We have heretofore said that decisions under the National Labor Relations Act were helpful but not controlling upon either the CIR or this court. American Fed. of S., C. & M. Emp. v. State, 200 Neb. 171, 263 N. W. 2d 643. That declaration must be carefully understood to mean that decisions under the NLRB are helpful where there are similar provisions under the Nebraska statutes. Decisions under the NLRB are of no help or benefit in attempting to determine actions absent similar provisions under the Nebraska statutes. Nor can common practices under other statutes in other jurisdictions enlarge the statutory power granted the CIR by the Legislature.

In Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172, we said, " 'In the grant of power to an administrative agency to legislate, such power must be limited to the expressed purpose and administered in accordance with standards prescribed in the legislative act.' " Recently, in Nebraska P. P. Dist. v. Huebner, 202 Neb. 587, 276 N. W. 2d 228, we said: "An administrative board has no power or authority other than that

specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act." That authority which is necessary to accomplish the purposes of an act must be narrowly construed.

It is fundamental that in the legislative grant of power to an administrative agency, such power must be limited to the expressed legislative purpose and administered in accordance with standards described in the legislative act. The limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated. They may not rest on indefinite, obscure, or vague generalities or upon extrinsic evidence not readily available. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227; Gillette Dairy, Inc. v. Nebraska Dairy Products Board, 192 Neb. 89, 219 N. W. 2d 214.

Section 8a of the NLRA specifically provides that the doing of certain enumerated acts by an employer constitutes an "unfair labor practice." Likewise, the provisions of section 8b of the NLRA specifically provide that the doing of certain enumerated acts by the union constitutes an unfair labor practice. See 29 U. S. C. 158 (a) and (b). The NLRA grants to the NLRB specific authority to enforce its orders, including the right to direct the employer to take specific action and to enjoin the employer from continuing the commission of unfair labor practices. See 29 U. S. C. 160. Likewise, see, Michigan public sector laws, Mich. Comp. Laws Ann., §§ 423.210 and 423.216; Wisconsin public sector laws, Wisc. Stats. Ann. § 111.84; and New York Civil Service Law, §§ 205 and 209 (a).

No such similar authority can be found in the Nebraska statutes. In the absence of such specific authority the CIR is without jurisdiction to generally find and declare "what is known elsewhere in labor law as 'unfair labor practices.' "

A reading of the applicable provisions of the act clearly establishes that the authority of the CIR is narrowly described and is limited in scope. In the first instance, it is limited to "industrial disputes" as defined by section 48-801 (7), R. R. S. 1943. These include any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment. While this may provide in some limited instances authority for the CIR to act, it does not grant to the CIR the authority to declare unfair labor practices and to take action therefor.

The adoption of sections 48-801 to 48-838, R. R. S. 1943, was not intended to in any way remove the lawful responsibility or the proper prerogative of public employers in the exercise of their recognized management rights, or in the exercise of their lawful duties, except as may otherwise have been specifically entrusted to the CIR in resolving industrial disputes as prescribed by the statutes.

In a similar situation involving a school district, we attempted in some small measure to point out that there are certain areas under the Nebraska public sector laws which are "rights of management" over which no controversy can be created nor any authority vested in the CIR. In School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752, at p. 784, we said, "Without attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of

specialists to be employed. The public policy involved in this legislation is expressed in section 48-802, R. R. S. 1943. With this public policy in mind, school districts and teacher associations should negotiate in good faith within the ambit of their respective responsibilities."

Many of the factors involved in School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra,* are not applicable here. It nevertheless does point up the fact that not all matters about which the public employer and its employees disagree constitute an industrial dispute over which the CIR obtains jurisdiction. This remains so notwithstanding the fact that in the private sector such matters or activities would be properly before the NLRB and elsewhere might constitute an unfair labor practice.

A further reading of the act and the powers specifically granted to the CIR only further strengthens that position. Nowhere within the act can there be found any provisions similar to section 8a or 8b of the NLRA.

We have early held that in the absence of specific statutory authority, public employers do not even have the right to negotiate and bargain with public employees. In International Brotherhood of Electrical Workers v. City of Hastings, 179 Neb. 455, 138 N. W. 2d 822, we said: "Up to the present time, public employees are generally not entitled to collective bargaining in the sense that private industrial employees are. See Annotation, 31 A.L.R. 2d 1142. The generally accepted rule established in other jurisdictions on the issue, which we adopt, is that a public agency or governmental employer has no legal authority to bargain with a labor union in the absence of express statutory authority * * *." Likewise, in the case of Orleans Education Assn. v. School Dist. of Orleans, *supra,* we said, in part: "The authority of the Court of Industrial Relations is carefully circumscribed. Its procedures are pre-

scribed by statute. * * * Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns. §§ 48-801 (7), 48-810, R. R. S. 1943. The Court of Industrial Relations cannot enforce its own orders. That is left to the District Court and to this court. §§ 48-812, 48-819, R. R. S. 1943."

In that regard, it is significant to note that section 48-819, R. R. S. 1943, specifically denies to the CIR authority to enforce its own rules. The statute further requires that "Failure on the part of any person to obey any order, decree or judgment of the Court of Industrial Relations, either temporary or final, shall constitute a contempt of such tribunal in all cases where similar failure to obey a similar order, decree or judgment of a district court would constitute a contempt of such tribunal, and upon application to the appropriate district court of the state shall be dealt with as would a similar contempt of said district court."

The only provisions which can be found in the act concerning activities of the employer are found in section 48-811, R. R. S. 1943, and apply only during the pendency of a petition for recognition. That section provides, in part: "No adverse action by threat or harassment shall be taken against any employee because of any petition filing by such employee, and the employment status of such employee shall not be altered in any way pending disposition of the petition by the Court." The provisions of section 48-811, R. R. S. 1943, do not constitute matters similar to those prescribed in sections 8a and 8b of the NLRA. Thus, the CIR does not, by reason of section 48-811, R. R. S. 1943, have authority to declare unfair labor practices. If, in fact, the evidence discloses that a public employer is threatening or harassing an employee because of any petition filing by such employee, the CIR is limited to entering an order directing the employer to cease and desist such threat or harassment. The CIR has no authority, however, to require any-

thing further. Upon failure of the public employer to cease and desist, action must be brought by the employee in the appropriate District Court seeking to hold the public employer guilty of contempt of court. Other action, which an employee may seek in connection with a public employer's action against such employee, must be sought by other means in appropriate courts and not before the CIR. To that extent, therefore, the ordering of UNL to remove letters from the employee's file, the ordering of the employer to establish certain times for employee evaluation, or the ordering of the reinstatement of employees at certain prescribed salaries for certain short periods was beyond the authority of the CIR. Such action is hereby reversed. Nothing we say herein, however, should imply that an employee may not have a cause of action if in fact the employee's rights have been violated. Nevertheless, that remedy must be sought in the appropriate forum and not in the CIR.

We note that the CIR directed UNL to post a copy of its temporary order, and in its opinion of December 20, 1977, suggested it was considering requiring UNL to post "mea culpa" notices. The CIR is without authority to make such orders. Its authority is limited to the provisions of section 48-818, R. R. S. 1943, wherein it is provided that the CIR's findings and orders may establish or alter the scale of wages, hours of labor, or conditions of employment.

It is true that the CIR has power and authority upon its own initiative to make such *temporary* findings and orders as may be necessary to preserve and protect the status of the parties' property and public interest involved pending final determination. The statute is not so broad as to authorize the CIR to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved

pending final determination of the issues. We will not now attempt to enumerate all the possible circumstances under which the CIR may exercise its authority. We do note, however, that the authority granted to the CIR under the present act in general and section 48-816, R. R. S. 1943, in particular, is limited in nature. We would anticipate that the CIR will exercise that jurisdiction in as narrow a manner as may be necessary.

In view of our holding with regard to the authority of the CIR to find and determine "unfair labor practices" it is not of particular importance that we examine and comment on the entire record. The record consisted of more than 700 pages of which only 16 pages concerned the issue involving the determination of the appropriate bargaining unit. Nevertheless, we have examined the record. We do believe some brief comment may be sufficient to show that the record does not establish threats or harassment against the employees as contemplated within section 48-811, R. R. S. 1943.

One of the complaints made by the police officers was that female employees of the police force were required to wear a particular style of hat. It was alleged that this requirement was motivated by UNL's antiunion feeling and its desire to threaten or harass the employee. The CIR, as a matter of fact, specifically found that the department used the "inefficiency" of its supply operations to harass Officer Citta as union president. Yet a reading of the record discloses that the request for the hat came from two of the four female employees affected herein and was not instituted by Chief Gade.

In regard to Officers McGill and Fleming, the testimony of Mr. Carlbom, Chief Gade, Inspectors Duve and Meyers, and Captain Edmunds clearly established that the proposed reclassification was pursued solely for the employees' benefit, and that their union affiliation was never considered. It is true

that what the department sought to do may not have been permitted under UNL personnel policy. Nevertheless the evidence is clear that the transfers were intended to provide continued employment opportunities on a reduced salary basis for two employees who otherwise would have been required to discontinue their employment and use up leave time which they otherwise might retain. Both officers were advised of the department's options; both were informed as to the reasons why the reclassification was proposed; both were assured repeatedly that this was only temporary in nature; and both officers were guaranteed by the head of the department that they would be reinstated to their original jobs as soon as they were physically able to perform the functions of those positions. Such action hardly amounts to threats or harassment.

That leaves us then with but the final question, the appropriateness of the bargaining unit. It must be kept in mind that actions arising under the provisions of sections 48-801 to 48-838, R. R. S. 1943, concerning appropriate bargaining units are of relatively recent origin and to some extent both the public employers and public employees, the CIR, and this court are seeking to establish appropriate guidelines. In more recent times we have more closely adhered to the legislative admonition contained in section 48-838 (2), R. R. S. 1943, wherein the Legislature provided: "It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate." See American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1; House Officers Assn. v. University of Nebraska Medical Center, 198 Neb. 697, 255 N. W. 2d 258; and Sheldon Station Employees Assn. v. Nebraska P. P. Dist., 202 Neb. 391, 275 N. W. 2d 816.

In order for us, therefore, to find that all commissioned police officers and all security officers employed by the University of Nebraska-Lincoln, Department of Police and Security, excluding either the director and his three immediate assistants holding authority subordinate only to the director, as requested by the police officers or excluding everyone with the rank of sergeant or above as directed by the CIR, are an appropriate unit, we must find some compelling unity of interest as disclosed in the record. At the outset we note that the unit sought by the police officers includes not only commissioned police officers, but also noncommissioned security officers. One of the compelling reasons urged by the police officers for the granting of this particular unit is the fact that certain of the employees are commissioned as deputy sheriffs by the State of Nebraska and special police by the City of Lincoln. It must be noted, however, that the granting of that authority is not by the employer, but by another, over whom the employer has no control. Those commissions could be withdrawn just as easily as they were granted. The record does not indicate to us the great need for those commissions. The evidence indicates that security personnel at UNO and at the Medical Center are not commissioned and do not carry weapons yet provide whatever necessary security is required at UNO and at the Medical Center. The record is totally devoid of any evidence as to the need for the officers at UNL to be so commissioned or to carry weapons. While we do not question what they are doing, the record does not indicate to us any significant reasons why the fact that they have sought commissions from other governmental agencies or the fact that they carry weapons is sufficient to entitle them to be separate and apart from other C-line or B-line employees at UNL.

The evidence further discloses, notwithstanding that some of the police officers carry weapons and

are commissioned, others are not, yet all are subject to the rules, regulations, and employees handbook promulgated by UNL and the state personnel policies and procedures. There is no evidence in the record upon which the CIR could make a rational analysis of those criteria which we have heretofore indicated are relevant in evaluating an appropriate unit and therefore no evidence is present which we can examine or review in this court on appeal. In the absence of such evidence, we are not persuaded that the clear dictates of section 48-838 (2), R. R. S. 1943, should be ignored.

We therefore find a unit consisting of all commissioned police officers and all security officers employed by the University of Nebraska-Lincoln, Department of Police and Security, excluding the director and his three immediate assistants holding authority subordinate only to the director, as requested by the police officers, is not appropriate. We also find a unit consisting of all commissioned police officers and all security officers employed by the University of Nebraska-Lincoln, Department of Police and Security, excluding the rank of sergeant and above, as provided by the CIR, is not appropriate. It would appear to us, in the absence of evidence to the contrary, that the dictates of section 48-838 (2), R. R. S. 1943, should be followed.

For the reasons more particularly set out above, the order of the Court of Industrial Relations is affirmed in part, and in part reversed and remanded with directions in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

NICK CRNKOVICH, APPELLANT, V. CARL SCALETTA ET AL., APPELLEES.

277 N. W. 2d 416

Filed April 10, 1979. No. 41918.

1. **Releases.** A release which is confined to certain claims or demands arising from a particular matter operates to release the particular claim or demand specified but does not necessarily release other claims or demands arising from the same matter, particularly those expressly excepted from its operation.
2. **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. 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.
3. **Property: Negligence: Damages.** An excavating owner is liable, irrespective of negligence, for damages caused by depriving adjoining land, in its natural state, of lateral support even if an independent contractor performed the work, if the damage was a necessary consequence of the excavation.
4. **Property: Negligence: Contracts: Trespass.** Where a trespass is committed by an independent contractor, the other party to the contract is not liable for the trespass unless such other party controls the work or authorizes the specific act.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Clayton H. Shrout, for appellant.

Paul E. Watts, Gerald E. Moran, Robert C. Sigler, and Julianne M. Dunn, for appellee Carl Scaletta.

Robert M. Oberman, for appellee Citta Excavating & Wrecking Co.

Heard before SPENCER, Retired Justice, BOSLAUGH, CLINTON, and WHITE, JJ., and BARTU, District Judge.

BARTU, District Judge.

This is an appeal from a dismissal of the plaintiff

Crnkovich' petition upon motion of the defendants Scaletta and Citta Excavating and Wrecking Co. for summary judgment. Plaintiff's second amended petition alleged that Crnkovich and Scaletta were owners of adjoining lots in Southside Acres Addition in Douglas County, Nebraska; that Citta is an excavation contractor; that Scaletta contracted with Citta to excavate and level Scaletta's lot; and that in the course of doing this work Citta, at the request of Scaletta, drove heavy equipment upon Crnkovich' lot and damaged a driveway and, also at Scaletta's request, trespassed upon the plaintiff's lot and excavated a portion thereof in such a manner as to deprive Crnkovich of access to the back part of the lot and also deprive Crnkovich' lot of lateral support.

The petition purports to state four causes of action, but it is clear it states but one cause which is a trespass continuing over a period of time with various claimed elements of damage, to wit, damage to the driveway, the cost of restoring the lot to its former condition by filling the excavation, the cost of building a retaining wall to compensate for the loss of lateral support, alleged loss of rent from tenants who moved because of loss of parking, and loss of use of the rear portion of the lot for commercial storage of automobiles. The damage to the driveway was enumerated as cause of action No. I; the other elements of damage as causes II through IV.

Both defendants answered by general denial and pled the affirmative defense of release. Citta alleged that for a valuable consideration, on July 26, 1976, the plaintiff executed and delivered to Citta a release for all damage. Scaletta pled Crnkovich' release of Citta and that such release also constituted a release as to him.

At the hearing on the motion for summary judgment, evidence was introduced as follows: (1) The release, which Crnkovich admits to executing and delivering and for which he admits receiving the

stated consideration of $1,250, is admitted; (2) the deposition of Crnkovich; (3) answers of Scaletta to interrogatories; (4) Crnkovich' answers to interrogatories; and (5) the affidavit of Scaletta's attorneys. The affidavit of the attorneys may be disregarded as it contains no evidentiary matter and consists simply of legal or factual conclusions.

The first paragraph of the release recites that in consideration of the sum of $1,250, receipt of which is acknowledged, Crnkovich releases and discharges Northwestern National Insurance Co., its successors and assigns, from any and all claims and demands, actions, and causes of action in any way growing out of or connected with any claims which Crnkovich has or may have under a certain insurance policy issued by the company to Citta Excavating Co. insofar as it relates to any damages to the property at 5705 South 60th Street, Omaha, Nebraska. Crnkovich then agrees to dismiss his first cause of action in his second amended petition.

The release also contains the following: "It is further understood and agreed that this release extends to Northwestern National Insurance Co., and to Citta Excavating and Wrecking Co., Citta Excavating Co. and George Citta, Jr. but only as to the First Cause of Action (damage to driveway) of the undersigned's Second Amended Petition filed in the District Court of Douglas County, Nebraska as aforesaid.

"It is further understood and agreed that the undersigned reserves all his rights to proceed against Citta Excavating and Wrecking Co., Citta Excavating Co. and George Citta, Jr. as to any claims and causes of action not specifically released herein."

Citta argues the release of any portion of the cause of action releases the entire cause and, since Crnkovich had only one cause of action, the release, despite the limiting language, released all claims and demands.

Scaletta argues the plaintiff had but one cause of

action; that despite the limiting language of the release, all of Crnkovich' claims are barred; that the release of Citta releases Scaletta because his liability, if any, is only vicarious and the release of the party for whose acts he is allegedly responsible releases him; and that he is not responsible for the acts of Citta as an independent contractor.

Citta relies upon Fitzgerald v. Union Stock Yards Co., 89 Neb. 393, 131 N. W. 612, for support of the proposition that a release of a portion of a cause of action releases the whole. Fitzgerald does not stand for that proposition. It stands for the following propositions: "If one of several joint wrongdoers makes full payment of damages caused by injury done, there can be no further recovery for the same injury.

"If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers.

"Settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered." Fitzgerald v. Union Stock Yards Co., *supra*, did not deal at all with the question of whether a release, which specifically relates to one element of damage and specifically reserves the right of action on others, necessarily releases the entire cause. One can draw quite a contrary inference from the discussion in the opinion, for it states a release of one joint tort-feasor upon payment of only a portion of the damages claimed does not release the other joint tort-feasor from a claim for the remainder of the damages suffered.

It appears to be the general rule that a release which is confined to certain claims or demands aris-

ing from a particular matter operates to release the particular claim or demand specified but does not necessarily release other claims or demands arising from the same matter, particularly those expressly excepted from its operation. Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661; Wise v. Nu-Tone Co., 148 Colo. 574, 367 P. 2d 346; Summit Constr. v. Yeager, 28 Colo. App. 110, 470 P. 2d 870; Foundry Systems v. Industry Dev. Corp., 124 Ga. App. 589, 185 S. E. 2d 94; Stewart v. No. Carolina Mut. Life Ins. Co., 187 Pa. Super. 270, 144 A. 2d 507; 76 C. J. S., Release, § 51, p. 695.

The release is not ambiguous. It clearly applies only to the claim of damage to the driveway. When considered in the light of the second amended petition to which it refers, it plainly excludes claims for damages resulting from the excavation and removal of earth from a portion of the Crnkovich lot. We hold the release does not bar Crnkovich' claim against Citta for that damage.

We now consider the contention of Scaletta. As already noted, Fitzgerald v. Union Stock Yards Co., *supra*, holds a complete release of a joint tort-feasor releases the other joint tort-feasors. However, Fitzgerald, in the general discussion of the subject of the release of joint tort-feasors, points out that where the release is clearly only a partial release of a claim or cause of action, the release operates to relieve the joint tort-feasor who is not a party to the instrument only to that extent.

If Scaletta is neither a joint tort-feasor with Citta, nor vicariously liable for Citta's acts, he would not be subject to liability at all, for it is not claimed he did any act himself which resulted in the damage. We hold the release does not bar any lawful claims the plaintiff may have against Scaletta other than for the claim of damages to the driveway.

We must next determine whether or not the record discloses the District Court was for some other reason

correct in granting the motion for summary judgment.

"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.

"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." Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508.

Crnkovich' deposition testimony would justify the inference that Citta went upon Crnkovich' lot with earth-moving machinery and, without permission, excavated an area approximately 40 feet by 10 feet to a depth of 20 feet and removed the earth and hauled it away; the excavation was such that Crnkovich was deprived of access to a portion of his lot lying behind the building; and, in order to restore the lot to its former condition, fill would be required and 190 feet of retaining wall would have to be built.

As to Scaletta's part in the transaction, the plaintiff testified: "Q. Mr. Scaletta told you that he had given permission to Citta to take dirt off from Scaletta's property; is that correct? A. Right." In answer to interrogatories, Scaletta stated: "Defendant gave 'Okay' to Citta Excavating and Wrecking Co., to remove some dirt on his property at 5701 South 60th Street. He did not hire or contract with anyone." Also in answer to interrogatories, Scaletta stated he never had any notice of Citta going upon Crnkovich' lot and knew nothing of it, and did not know Crnkovich had been damaged. Crnkovich, in his deposition, testified he had a conversation with Scaletta about the "digging on Scaletta's land or on

your land?" His answer was: "Well, when they dug in there and I approached him on that, and he told me how he was going to build a building and so on, and that he was going to put the block building, and of course the dirt would fill up to the building, which sounded all right." This conversation occurred after the "hole" on his property had been dug. Crnkovich stated he began to get worried when "he [Scaletta] failed to live up to his promising (sic) of filling this." Scaletta told Crnkovich that Citta knew where to dig, indicating he knew where the lot line was, and said, " 'You can go talk to him, I can do nothing for you.' "

Scaletta would be liable for Citta's trespass only if, as alleged in the petition, he either directed or "authorized" him to commit the trespass, or if the damage in the form of loss of lateral support was the necessary result of what Scaletta authorized to be done on his own lot. The rules are: "An excavating owner is liable, irrespective of negligence, for damages caused by depriving of lateral support adjoining land in its natural state, even though an independent contractor performed the work, if the damage was a necessary consequence of the excavation." 2 C. J. S., Adjoining Landowners, § 25, p. 27. McKamy v. Bonanza Sirloin Pit, Inc., 195 Neb. 325, 237 N. W. 2d 865. "Where the trespass is done by an independent contractor, the other party is not liable for it when it is not authorized in any way by the contract unless such other party controls the work or authorizes the specific act." 87 C. J. S., Trespass, § 31, c. (5) (b), p. 989.

It appears there is a disputed question of fact, so far as Scaletta is concerned, as to whether he directed the trespass, whether the damage was the necessary result of work which he authorized to be done on his own property, or whether he retained control of the work.

Citta presented no counteraffidavit or testimony

to deny having done the excavation as alleged.

It appears there are disputed questions of material fact relating to the possible liability of both defendants for damages, other than to the driveway, which must be resolved at trial.

REVERSED AND REMANDED.

DONALD E. MILLER AND NORMA H. MILLER, APPELLEES, V. WESTWOOD HOMES, INC., A NEBRASKA CORPORATION, APPELLANT.

277 N. W. 2d 420

Filed April 10, 1979. No. 41956.

1. **Summary Judgments.** Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment.
2. **Trial: Motions, Rules, and Orders: Pleadings.** A motion for leave to file an amended answer, particularly after the matter is submitted, is addressed to the sound discretion of the trial court.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Affirmed.

Robert C. Doyle of Walsh, Walentine & Miles, for appellant.

A. James McArthur, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and REIMER, District Judge.

BOSLAUGH, J.

This was an action for specific performance of a real estate contract involving the sale of 58 lots in Westridge Knolls, First Addition Replat in Ceresco, Nebraska, to the defendant. The trial court sustained the plaintiff's motion for summary judgment and ordered the defendant to perform. The defendant has appealed.

On August 25, 1975, the defendant purchased the lots from the plaintiffs for the purpose of construct-

ing residences upon them. The contract provided for a downpayment and the "closing" on lots on an installment basis as follows: "a. Buyer agrees to close on two (2) lots on or before April 1, 1976 or whenever lots are available for building but not later that (sic) July 1, 1976. Lots shall be deemed ready for building when water, electrical, paving and sanitary sewer connections, which have been approved by the Village of Ceresco, are available to such lots and available for hookup to the city system.

"b. Buyer shall close on three additional lots within sixty (60) days after closing on the first two (2) lots as set out in sub-paragraph (a) above. Buyer shall close on Five (5) additional lots within ninety (90) days after closing on the first two (2) lots as set out in sub-paragraph (a) above.

"c. That thereafter Buyer must close on at least five (5) additional lots per month, provided however, if Buyer closes on more than five (5) lots in any single month Buyer may be given credit at his option for such closing in excess of five made in any single month to apply toward this minimum requirement in any later month."

The contract further provided: "Buyer's obligation to close on any lots as herein provided shall be contingent and conditioned upon Seller's fulfillment of the following conditions: a. Immediately upon execution of this agreement Sellers shall undertake to install at their own expense the following improvements for each lot: Paving, water, which can be hooked up to the Village system, sanitary sewer, which can be hooked up for discharge to the Village sewer system, and electrical service. That all such installations shall be done in accordance with the law and with the approval of the Village of Ceresco, and the obtaining of all such permits, inspections or approval shall be solely the responsibility of the Sellers. Sellers further warrant that such installations shall be accepted by the Village of Ceresco by July 1,

1976. The cost of the engeneering (sic), installation, permits and inspections for the various improvements herein set out shall be borne solely by the Sellers. Said improvements shall be free of lien or assesment (sic)."

The plaintiffs completed the installation of water and sewer mains to serve the property but problems developed with respect to the capacity of the water and sewer facilities of Ceresco. On November 24, 1976, the plaintiffs and the defendant entered into a supplemental agreement which modified the agreement of August 25, 1975, "by extending the closing date on the lots commencing with ones to be closed on December 1, 1976 by 90 days from and after the date the Village grants to Westwood permits on any lots purchased by Westwood from Miller covered by the above contract, *said extension, however, not to extend beyond March 1, 1977 in any event.*" (Emphasis supplied.)

This action was commenced on May 9, 1977. The defendant's answer alleged that the village of Ceresco had failed and refused to grant permits for the construction of houses on the property not yet closed upon as described in plaintiffs' petition until such time as the village's new water system was completely in operation.

After the plaintiffs' motion for summary judgment had been filed, the defendant obtained leave to take the deposition of the chairman of the village board. The chairman testified that the village water system was not adequate; that the village board had determined not to grant any further building permits or permit new connections to the village water system; and on three occasions requests for building permits by the defendant had been refused. The defendant had been granted building permits since that time but the water problem still existed.

The record indicates the motion for summary judgment was heard on November 18, 1977. On No-

vember 22, 1977, the defendant asked leave to file an amended answer alleging that prior to execution of the purchase agreement the plaintiffs knew or had reason to know that the village had asserted or would assert there were sewer and water problems which would or could prevent the defendant from obtaining sewer and water connections; that the plaintiffs had a duty to disclose these facts to the defendant and failed to do so; and that defendant's plan to construct houses upon the lots to be purchased from the plaintiffs was frustrated by the failure of the village to issue building, water, and sewer construction permits. The record is not clear but, apparently, leave to file the amended answer was refused.

The controlling issue in the case is the interpretation of the contract between the parties. The original agreement was conditioned upon there being water and sewer service to the property. We think this meant water and sewer service that could be used by the purchasers of the lots and not merely the installation of mains that could not be used because the facilities of the village were inadequate to permit new residential connections.

However, the supplemental agreement of November 24, 1976, which was entered into after the problem of inadequate facilities had fully developed and was known to both parties, provided that the extension on closing granted the defendant should not "extend beyond March 1, 1977 in any event." Whatever right the defendant may have had under the original agreement to delay closing was waived by the supplemental agreement which required closing after March 1, 1977.

A motion for leave to file an amended answer, particularly after the matter has been submitted, is addressed to the sound discretion of the trial court. McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512. The record here does not show an abuse of discretion.

There was no genuine issue of material fact and

the plaintiffs were entitled to judgment. The judgment of the District Court is affirmed.

AFFIRMED.

MONARCH CHEMICAL WORKS, INC., A CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

277 N. W. 2d 423

Filed April 10, 1979. No. 41963.

1. **Equity: Appeal and Error.** In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion without reference to the findings of the District Court.
2. **Injunction: Eminent Domain: Damages.** Injunction is a proper form of remedy in which to present the question of unlawful or improper exercise of the power of eminent domain and proof of the attempt to so deprive a private citizen of an estate in his property makes the resulting damage irreparable and the legal remedy inadequate.
3. **Constitutional Law: Eminent Domain: Injunction: Property.** The sovereign nature of the power of eminent domain is such that the function of the courts is limited to a determination of whether constitutional provisions have been violated, and if they have not, the right of the Legislature to exercise it in any manner it sees fit must be sustained. If the property be taken irregularly, or if the taking is not for a public purpose, the owner can proceed against the taker the same as any other trespasser by injunction, ejectment, or any other available remedy.
4. **Municipal Corporations: Statutes: Property.** The taking of substandard or blighted areas by a city for redevelopment and resale in accordance with an approved redevelopment plan which is in conformity with a general plan for the municipality as a whole, all as provided for in the Nebraska Community Development Law, section 18-2101 et seq., R. R. S. 1943, is a proper public use for a municipality.
5. **Municipal Corporations: Eminent Domain: Property.** The acquisition of property whether by voluntary methods or by eminent domain to carry out a redevelopment plan must be provided for in and be in accordance with such plan.

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

Herbert M. Fitle, City Attorney, and James E. Fellows, for appellant.

August P. Ross and Ross & Mason, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and HASTINGS, JJ., and L. W. KELLY, JR., District Judge.

HASTINGS, J.

The defendant, City of Omaha, filed a condemnation proceeding in the county court of Douglas County seeking to condemn certain of plaintiff's property lying north of Woodland Road, east of 23rd Street, South of "J" Avenue, and west of 25th Street, all being within the general area designated as East Omaha. Plaintiff filed an action in the District Court seeking to enjoin this proceeding for the reasons that the property sought to be condemned was to eliminate incompatible land uses and the land to be acquired would be redeveloped for industrial and commercial purposes and that a city is prohibited by Article XIII, section 2, Constitution of Nebraska, from acquiring property for manufacturing or industrial enterprises by condemnation. The defendant alleged as its authority the Community Development Law, sections 18-2101 to 18-2146, R. R. S. 1943, which it claimed specifically authorized the City to proceed in condemnation. After trial, the District Court entered a decree finding that the taking of said property was not for a public purpose within the authority of the City of Omaha, and permanently enjoined the condemnation proceedings. Defendant appeals, assigning as errors the failure of the District Court to find that the taking of plaintiff's lands was for a public purpose and that plaintiff failed to show irreparable harm so as to be entitled to injunctive relief.

"In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon

without reference to the findings of the District Court." Biggerstaff v. Ostrand, 199 Neb. 808, 261 N. W. 2d 750 (1978).

Taking defendant's contentions in reverse order, we examine the claim of no showing of irreparable harm. As stated in Burger v. City of Beatrice, 181 Neb. 213, 147 N. W. 2d 784 (1967): "The rule is: This court is committed to the rule that injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain." Although it has always been assumed that one having title to his land improperly taken suffers irreparable harm, we have never specifically so stated.

In Osborne v. Missouri Pacific R. Co., 147 U. S. 248, 13 S. Ct. 299, 37 L. Ed. 155 (1893), although denying relief because there had been no direct taking of an estate, but only the infliction of damages, the court stated: "Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition.

"Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded ex debito justice."

A similar theory is expressed in Canda Realty Co. v. Carteret, 136 N. J. Eq. 550, 42 A. 2d 859 (1945), where again the injunction was denied, this time because of laches. The court nevertheless laid down this rule: "I acknowledge that in such cases the principle upon which the court interferes does not

rest so dependently upon the destructive and irreparable nature of the threatened or actual trespass or the inadequacy of the legal remedy as it does upon the pre-eminent obligation to support the sacred constitutional inhibition against arbitrary action of functionaries clothed with the power of eminent domain * * *. The courage of judicial tribunals to safeguard constitutional rights and to prevent public authorities from using powers which the constitution has not bestowed upon them is an indispensable constituent of the art of self-government."

We therefore amplify the rule to read that injunction is a proper form of remedy in which to present the question of unlawful or improper exercise of the power of eminent domain, and proof of the attempt to so deprive a private citizen of an estate in his property makes the resulting damage irreparable and the legal remedy inadequate. There is no merit to defendant's second assignment of error.

This litigation arose out of defendant's utilization of Nebraska's Community Development Law, sections 18-2101 to 18-2144, R. R. S. 1943. In a general way, this law authorizes a city to define and acquire substandard or blighted areas and redevelop them in accordance with an approved redevelopment plan which in turn shall conform to the general plan for the municipality as a whole. Section 18-2103 (12), R. R. S. 1943, provides in part as follows: "Redevelopment project shall mean any work or undertaking in one or more urban renewal areas: (a) To acquire substandard or blighted areas or portions thereof, including lands, structures, or improvements the acquisition of which is necessary or incidental to the proper clearance, development, or redevelopment of such substandard or blighted areas; * * * (c) to sell, lease, or otherwise make available land in such areas for residential, recreational, commercial, industrial, or other use or for public use or to retain such land for public use, in accordance with a rede-

velopment plan; * * * (d) to acquire real property in an urban renewal area which, under the redevelopment plan, is to be repaired or rehabilitated for dwelling use or related facilities, repair or rehabilitate the structures, and resell the property; * * *."

Section 18-2103(13), R. R. S. 1943, goes on to say: "Redevelopment plan shall mean a plan, as it exists from time to time for one or more urban renewal areas, or for a redevelopment project, which plan (a) shall conform to the general plan for the municipality as a whole; and (b) shall be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, and building requirements;".

On June 24, 1975, the Omaha city council passed an ordinance adopting a Community Development Master Plan which projected the area within which plaintiff's land is located under the zoning classification of "New In-Town Industrial Parks." Following that, on the 9th day of March 1976, the council by resolution approved the East Omaha Redevelopment Plan. This plan, in accordance with the Master Plan, provided for redeveloping the entire East Omaha area into a nonresidential neighborhood which would "result in retention of the existing job-providing, revenue-producing industries within the area and avoid their expensive relocation costs. It will also provide the city with marketable commercial and industrial sites which, upon their resale, will enable the city to recapture some of its development costs while at the same time ensuring that East Omaha will be a viable, tax producing area in the future." See East Omaha Redevelopment Plan, Report No. 181, p. 00012. Continuing, the plan provides: "It should be noted that not all property located within the East Omaha Study Area will be acquired by the

city. Property owned by resident industries and businesses for their future expansion and vacant property owned by investment corporations will not be purchased." Although the original plan did not specifically authorize the use of the power of eminent domain, it could be assumed that it was contemplated in the future if all land scheduled for acquisition had not been acquired by voluntary means by the end of 1978.

At this point it might be well to refer to the evidence presented in the District Court relating to the present ownership and use of the land sought to be condemned. Marvin Walenz, president of Monarch Chemical Works, Inc., the plaintiff in this action, testified that the land was owned by the corporation, and that although not presently utilized in its refining process, this vacant land was necessary in its continued operation. "It is so necessary that if we don't have it, we have to sell it and move the remaining plant to another location." Presently, there are plans to build two 4,000,000-gallon storage tanks on the particular property to take care of off-season purchase of construction-type asphalt. Although on cross-examination it was brought out that Monarch had neither firm financing nor structural drawings, there seems to be no evidence contradicting the claim that this is "property owned by a resident industry for its future expansion" within the description of property not to be acquired by the City of Omaha as set forth in its East Omaha Redevelopment Plan.

Sometime after approval of the redevelopment plan, the State of Nebraska selected plaintiff's property as the site for the proposed minimum-medium security complex, and commenced negotiations with the defendant to acquire the property by eminent domain proceedings under the East Omaha Redevelopment Plan and sell the same to the State of Ne-

braska. As a consequence of those negotiations, by resolution passed September 28, 1976, the City of Omaha amended the East Omaha Redevelopment Plan to specifically provide for the acquisition of nonvolunteer property, commencing with the year 1979, except that special authorization was given to acquire, by January 1, 1977, if possible, land for the minimum-medium security facility. The resolution made the use of the power of eminent domain for this particular area subject to a written contract with the State of Nebraska proposing to proceed with this site for its project. On March 15, 1977, such a contract was executed which provided for the state to pay to the City of Omaha the total acquisition and relocation costs not to exceed $495,000 and as to any excess requirements, the City agreed to absorb those costs. It might be noted in passing that no other amendment was made to the redevelopment plan, i.e., to change the purpose of the plan to develop a portion of the East Omaha area into a site for a penal complex or to change the provision that "property owned by resident industries for their future expansion * * * will not be purchased."

Some 8 months after the resolution of September 1976, the defendant City of Omaha filed the condemnation action which prompted the present proceedings.

The issue here is not whether a city has the power of eminent domain to acquire real estate for a public use and to later sell portions thereof no longer needed by it, as claimed by the defendant. Clearly it has such power under the provisions of section 14-374, R. R. S. 1943. Nor is there any problem with plaintiff's claim that Article XIII, section 2, Constitution of Nebraska, prohibits a city from using the power of eminent domain to acquire and develop sites for manufacturing and industrial sites. The acquiring of property under the Community Development Law depends upon a very different public pur-

pose than that expressed in the above-quoted constitutional provision. Also, we need not concern ourselves with plaintiff's contention that the condemnation must be for a "public use of the municipality," as stated in Burger v. City of Beatrice, 181 Neb. 213, 147 N. W. 2d 784 (1967), because by the plain meaning of the redevelopment plan and contract with the State of Nebraska, the property is ostensibly being acquired as part of the redevelopment plan and is being sold as "marketable commercial and industrial sites which, upon their resale, will enable the city to recapture some of its development costs while at the same time ensuring that East Omaha will be a viable, tax producing area in the future." See East Omaha Redevelopment Plan, Report No. 181, as amended September 7, 1976. This is as it must be because there is no contention on the part of defendant that it seeks to acquire this property for a public municipal use as a penal complex, but rather as a part of its redevelopment plan.

Although there are no Nebraska cases on the subject, there is no longer any real controversy over the proposition that the acquisition of lands for slum elimination, slum prevention, rehabilitation of substandard areas for low-cost housing, community development, or industrial development are legitimate public uses. In Romeo v. Cranston Redevelop. Agency, 105 R. I. 651, 254 A. 2d 426 (1969), that court said: "We therefore hold that the clearance, replanning, redevelopment, rehabilitation and improvement of an 'arrested blighted area' as that term is set forth in the statute constitutes a public use and is constitutionally permissible." To the same effect is Chi. Land Clearance Com. v. White, 411 Ill. 310, 104 N. E. 2d 236 (1952): "Quite appropriate is this statement appearing in the Zurn case [389 Ill. 114], at page 129: 'The redevelopment of slum and blight areas, * * * constitutes a public use and a public purpose, regardless of the use which

may be made of the property after the redevelopment has been achieved.' "

Although the necessity and expediency of a taking of private property for a public use is a legislative question, whether the intended use is in fact a public use is a judicial question. "The sovereign nature of the power of eminent domain is such that the function of the courts is limited to a determination of whether constitutional provisions have been violated, and if they have not, the right of the legislature to exercise it in any manner it sees fit must be sustained. If the property be taken irregularly, or if the taking is not for a public purpose, the owner can proceed against the taker the same as any other trespasser by injunction, ejectment, or any other available remedy." May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448 (1945). The taking of substandard or blighted areas by a city for redevelopment and resale in accordance with an approved redevelopment plan which is in conformity with a general plan for the municipality as a whole, all as provided for in the Nebraska Community Development Law, § 18-2101 et seq., R. R. S. 1943, is a proper public use for a municipality.

However, it would seem apparent that the acquisition of property whether by voluntary methods or by eminent domain to carry out a redevelopment plan must be provided for in and be in accordance with such plan. As stated in David Jeffrey Co. v. Milwaukee, 267 Wis. 559, 66 N. W. 2d 362 (1954): "The act is directed against areas, and not individual structures. The public, through the municipality, acquires the land in the area and uses it for its own protection against the menace which threatens. It also, by plan, provides for the redevelopment of the area to assure against repetition of blight. It is as much a public purpose to prevent recurrence of blight as to eliminate it. As stated by the learned trial court in its opinion of record herein: '* * * Hav-

ing acquired the lands, it is the municipality, the public, which will use the lands in the construction of streets, the installation of utilities and other site improvements, *all in accordance with an approved redevelopment plan.' "* (Emphasis supplied.)

The authority to acquire plaintiff's land was not provided for in the redevelopment plan in order to carry out the purposes of the plan, but solely as an accommodation to the state to acquire a site for a penal complex which had nothing to do with the redevelopment plan. As a matter of fact, the redevelopment plan itself expressly denied the need or purpose of acquiring land which, like the plaintiff's, fell within the definition of "Property owned by resident industries for their future expansion." The attempted condemnation of plaintiff's lands not being provided for as a part of the redevelopment acquisition plan, its acquisition was not for a public purpose and the trial court was correct in issuing an injunction against the proceedings, and its judgment is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF AMANDA DOROTHY PETERSEN, AN INCOMPETENT. FIRMIN Q. FELTZ, SUCCESSOR GUARDIAN, APPELLEE, V. UNIVERSAL SURETY COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH THE ESTATE OF ARTHUR R. JOHNSON, DECEASED, APPELLEE. FIRMIN Q. FELTZ, GUARDIAN OF AMANDA DOROTHY PETERSEN, APPELLEE, V. UNIVERSAL SURETY COMPANY, A CORPORATION, APPELLANT.

277 N. W. 2d 428

Filed April 10, 1979. Nos. 42005, 42006.

1. **Guardian and Ward: Bonds: Jurisdiction.** The county court has exclusive jurisdiction to determine the state of accounts between the guardian and ward, and no action can be maintained upon a guardian's bond until the amount to be due from the guardian is first ascertained on the settlement of the guardian's final account by the county court.

2. **Guardian and Ward: Bonds: Sureties: Licenses and Permits.** The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties on the guardian's bond, both as to the bond entered into upon his appointment or for any bond he may have been required to give under a license to sell his ward's real estate.

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

James W. Hewitt, for appellant.

Firmin Q. Feltz, for appellee Feltz.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and IRONS, District Judge.

IRONS, District Judge.

By stipulation these two cases were consolidated for hearing in the District Court for Keith County, and were also consolidated for briefing and argument here because identical issues of law and fact are involved.

The first case arose in the county court of Keith County upon an application by Firmin Q. Feltz, successor guardian, (plaintiff and appellee) against Universal Surety Company (defendant and appellant) and the Estate of Arthur R. Johnson, deceased, (defendant) to determine the liability of the original guardian (Johnson) and Johnson's surety, Universal, for defalcations from the guardianship of Johnson's ward, Amanda Dorothy Petersen, an incompetent. Two bonds had been written by Universal for Johnson, one a $5,000 guardian's bond, and the other a $20,000 bond for the sale of real estate belonging to the ward.

The second case arose in the District Court for Keith County, it being a direct action against Universal by Feltz as successor guardian alleging liability of Universal on both bonds.

The first case was appealed to the District Court for Keith County. Thereafter the appeal and the

direct action were consolidated for trial in the District Court.

The county court determined the liabilities of Johnson for defalcation to be in excess of both bonds, found Universal liable both on the guardian's bond and the bond for the sale of real estate, and fixed Universal's liability at $25,000 plus interest. Universal appealed but Johnson did not.

The action in District Court involved only the question as to Universal's liability on its bond for the sale of real estate.

The District Court affirmed the judgment of the county court, found Universal liable on both bonds, and granted judgment in the amount of $28,604.66, which amount included $3,604.66 in interest. We affirm.

The principle assignment of error by the appellant is that the court erred in finding Universal liable under its bond for the sale of real estate. Universal does not deny its liability on the guardian's bond.

Johnson was appointed as guardian in the Petersen estate on September 13, 1973, and acted in such capacity until his death on March 22, 1976. The real estate involved was sold in early September 1975, and proceeds from the sale were received by Johnson on September 17 and October 3, 1975; defalcations were shown to have occurred between May 20, 1975, and December 31, 1975, with some occurring during the process of the sale of real estate.

The bond issued by Universal to sell real estate and section 38-616, R. R. S. 1943, contain some similar language, i.e.: "The principal [guardian] shall sell and truly account for all the proceeds of said sale of * * * Real Estate * * * and dispose of the same according to law * * *." This, the guardian did not comply with.

The appellant has cited some general theoretical propositions and case law from other jurisdictions, but the only case touching squarely on this situation

is found in Langdon v. Langdon, 104 Neb. 619, 178 N. W. 178. This case was decided in 1920 and it has not been modified or reversed.

The controlling principles recited therein were: The application to sell real estate was made in the capacity of the guardian; the statutes required the guardian to give bond to answer for the proceeds of the sale according to law; the bond was for such additional funds as might come into the possession of the guardian by reason of the sale; the right to make the application for sale of real estate was by virtue of the guardianship; and the guardian's accounting for the funds received from the sale must be made to the county court.

The record in these two cases clearly shows that the guardian (Johnson) did not at any time during the period he served as guardian render any accounting of his activities including the monies received from the sale of real estate, and had therefore not acted according to law as required. The judgment of the District Court should be and is hereby affirmed in all respects.

AFFIRMED.

SOUTHWEST BANK OF OMAHA, A BANKING CORPORATION, APPELLEE, V. JOHN J. MORITZ, APPELLANT, AND MERLE NICOLA, TRUSTEE IN BANKRUPTCY, INTERVENOR-APPELLANT.

277 N. W. 2d 430

Filed April 10, 1979. No. 42012.

1. **Appeal and Error.** Where, by stipulation of the parties and order of the court, two lawsuits, having a common issue determinative of both, are consolidated for trial and only one judgment is entered affecting two adverse parties on the common issue, the parties have, in effect, made one lawsuit out of two and the appealing party need file only one notice of appeal to this court.
2. **Uniform Commercial Code: Security Interest.** Under the provisions of section 9-105(1)(d), U. C. C., the owner of the collateral

subject to a security interest is a debtor, and the filing of a financing statement not signed by the owner of the collateral described in the financing statement is not sufficient to perfect the security interest.

3. **Uniform Commercial Code: Sales: Contracts.** Under the provisions of the Uniform Commercial Code, a "sale" consists of the passing of title from the seller to the buyer for a price. Unless otherwise explicitly agreed, where delivery is to be made without moving the goods, if the goods at the time of contracting are already identified and no documents are to be delivered, the title passes at the time and place of contracting.
4. **Equity: Corporations: Fraud: Security Interest.** The equitable principle that the corporate entity may be disregarded to prevent fraud and injustice is intended to prevent corporate owners from using the corporate entity to cloak fraud or justify wrongdoing, and it may not be applied to prefer a creditor of the corporate owner who fails to perfect a security interest to the other creditors of the corporation of whom a trustee in bankruptcy is the representative.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

Maureen Fitzgerald of Thompson, Crounse & Pieper, for appellants.

Michael G. Helms of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and REIMER, District Judge.

CLINTON, J.

This case involves the financial affairs of Verlan J. Rumbaugh, who in 1974 began the operation of a hardware store as a sole proprietorship under the trade name of R & S Sentry Hardware, and in 1975 incorporated the business as R & S Hardware, Inc., which corporation filed a petition for voluntary bankruptcy in 1977. R & S Hardware, Inc., was wholly owned by Rumbaugh.

The appeal arises from two separate actions which were, pursuant to a stipulation of the parties and by order of the District Court, joined for trial in

that court. In one action, Southwest Bank of Omaha sued John J. Moritz for conversion of certain store fixtures, equipment, and machinery on which the bank claimed a security interest by virtue of a security agreement given to the bank by Verlan J. Rumbaugh and his wife, Gladys H. Rumbaugh, to secure a loan of $30,000 made for the purpose of starting the business. Moritz claimed a landlord's lien in the same property by reason of the terms of the lease between Rumbaugh as tenant and S & H Shopping Center, Inc., as lessor, to whose interest Moritz had succeeded. Merle J. Nicola, trustee in bankruptcy of R & S Hardware, Inc., doing business as R & S Sentry Hardware, intervened in that suit, claiming the same property adversely to both the bank and Moritz. In the second action, Nicola, as trustee in bankruptcy, sought a money judgment against the bank for the value of certain inventory of the hardware store which the bank had repossessed and sold and on which it claimed a security interest by virtue of the same instruments earlier described.

A jury was waived and the combined cases were tried to the court. In a single judgment the court found for the bank on the cause against Moritz and rendered judgment against Moritz in the sum of $6,486.88, the net value of the fixtures converted by Moritz. The court, for reasons we later describe, found the trustee had no interest in that property. The court also rendered judgment for the bank on the trustee's claim against the bank for the value of the inventory which the bank had repossessed and sold. Both the trustee and Moritz appealed from orders overruling their respective motions for new trial.

Later, the parties filed the following stipulation in this court: "For good and valuable consideration, the parties hereto stipulate and agree as follows:

"1. Upon full execution of this agreement, Intervenor Merle J. Nicola, Trustee, hereby agrees to dis-

miss the appeal in the above-referenced action as to Defendant John J. Moritz only, to the effect that the judgment of the District Court of Douglas County, Nebraska, at Doc. 721, No. 257, rendered on January 27, 1978, shall be a final judgment as between said Intervenor and Defendant John J. Moritz upon said dismissal.

"2. Upon full execution hereof, Defendant John J. Moritz hereby agrees to dismiss his appeal in the above-referenced action as to all parties hereto, to the effect that the said judgment of the said District Court referred to in paragraph 1 hereof shall be a final judgment as between said Defendant John J. Moritz and the Plaintiff and Intervenor herein.

"3. Plaintiff Southwest Bank hereby acknowledges that it has not filed a cross-appeal against Defendant John J. Moritz and further agrees that it will not file any such cross-appeal against Defendant John J. Moritz and that the said judgment of the said District Court referred to in paragraph 1 shall be a final judgment as between Plaintiff Southwest Bank and said Defendant John J. Moritz.

"4. Each party shall pay its own costs."

The stipulation was executed by all three parties by their attorneys of record. The caption on the stipulation and the docket numbers contained in the first paragraph thereof are those referring to the first cause above described.

One of the issues which the parties raise in their arguments to this court is the effect of the stipulation as between the bank and the trustee.

On this appeal, the appellant trustee attacks the following findings of the trial court: (1) R & S Hardware, Inc., never came into existence as a corporation. (2) The assets of Rumbaugh, doing business as R & S Sentry Hardware, were never transferred to the bankrupt R & S Hardware, Inc., and therefore the trustee has no claim thereon. (3) The financing statement was in proper form and gave

constructive notice to the trustee of the bank's lien.

The matters for decision will be better understood if a chronological statement of events is set forth.

On May 20, 1974, Verlan J. Rumbaugh and his wife, Gladys H. Rumbaugh, borrowed $30,000 from the bank and executed and delivered to the bank a promissory note for that amount. At the same time, a security agreement and financing statement were prepared. The security agreement was signed by both Mr. and Mrs. Rumbaugh. The financing statement described the debtor as R & S Sentry Hardware, 2918 South 84th, Omaha, Nebraska; gave the name of the secured party as Southwest Bank of Omaha, 8800 West Center Road, Omaha, Nebraska; and listed the following collateral: "Inventory in Hardware store, fixtures and accounts receivable owned now and acquired after this date." The box marked proceeds was checked. The financing statement did not bear the signature of Verlan J. Rumbaugh, but in the place for execution by signature of debtor, appeared a signature, "By Gladys H. Rumbaugh." The financing statement was filed in the office of the Douglas County clerk on May 21, 1974. Nothing in the record indicates in what name the financing statement was indexed by that officer.

It is not disputed that Verlan J. Rumbaugh initially operated the hardware store at the address above indicated as a sole proprietor under the trade name of R & S Sentry Hardware. In August of 1975, Rumbaugh took all the steps necessary to create a corporation named R & S Hardware, Inc., and on August 27, 1975, the Secretary of State certified the articles of incorporation and certified the corporation was in good standing. The corporate records indicate that on November 26, 1975, the first meeting of the stockholders was held and the minutes of the meeting recite: "The Chairman noted that Verlan J. Rumbaugh had purchased 400 shares by paying into the Treasury the par value of the shares in cash or the

equivalent thereof in property useful and usable in the business of the corporation pursuant to the terms of the plan for issuance of stock under Sec. 1244 of the Internal Revenue Code (1954)." A stock certificate for 400 shares of the capital stock of the corporation was issued on the same date in the name of Verlan J. Rumbaugh and delivered to him. Rumbaugh was the sole shareholder of the corporation.

On November 26, 1975, the property described in the security agreement and financing statement was located in the store at the address previously mentioned. The business continued with inventory being sold and replaced, debts incurred, and payments made. Rumbaugh, after incorporation, continued to use the trade name R & S Sentry Hardware and was billed by his creditors in that name. Payments for purchases and on indebtedness and other expenses of the business were made by checks which bore the corporate name R & S Hardware, Inc., as payor. The checks were all drawn on the bank and paid from the account standing in the name of R & S Sentry Hardware in Southwest Bank, that account never having been transferred to the corporate name.

The record indicates that Rumbaugh continued to use the trade name of R & S Sentry Hardware in advertising the business. The corporation obtained an employer's federal identification number and the tax deposit account bore the corporate name, as did the unemployment contribution account with the State of Nebraska.

During 1976 Rumbaugh and his wife, on their individual signatures, borrowed additional funds from the bank and apparently placed the proceeds in the business account. Personal property taxes of the business were assessed in the trade name.

The bank called the loan of May 20, 1974, on November 5, 1976, which then had an unpaid and past due balance, demanded and received possession of the collateral at the place of business, and locked

the store. It later sold the inventory and some of the fixtures. Thereafter, before the bank could dispose of the remaining fixtures, Moritz changed locks on the door and took possession of and sold the remaining fixtures for the net value of which judgment was later rendered against him as previously indicated.

On January 21, 1977, "R & S Hardware, Inc., a/k/a R & S Sentry Hardware," filed a petition for voluntary bankruptcy, listing numerous creditors and assets of only $680, consisting of a balance in the business checking account and office equipment. The assets schedule bore the following notation: "Fixtures purchased as proprietorship and never transferred to corporation, worth $10,000, same with inventory of $30,000."

The Effect of the Stipulation

The bank argues that, by reason of the stipulation for the dismissal of Moritz in this court and the concomitant stipulation as to the finality of the bank's judgment against Moritz, the trustee can have no claim as to proceeds from the sale of the fixtures which that judgment, in effect, represents. Its reasoning, as stated in the brief, is: "The trustee had no claim against the Bank, since the Bank did not have possession of the fixtures or their proceeds. The trustee has now stipulated that he is not entitled to recover the fixtures or their proceeds from Moritz, while at the same time stipulating that the Bank is entitled to recover from Moritz. By so doing, the trustee is precluded, by reason of res judicata, from making further claims against either the Bank or Moritz for the value of the fixtures." The trustee's response is: "The trustee, in paragraph 1, agrees to dismiss his appeal against the interest of John Moritz, thereby rendering the judgment of the District Court declaring that John Moritz had no interest in the proceeds of the bankrupt's fixtures, a final judgment. Paragraph 2 is the section in which John Moritz dismisses his appeal against all parties. In

paragraph 3 the Southwest Bank agrees not to file a cross-appeal against Moritz and declares the judgment of the District Court a final adjudication of the rights to the proceeds between those two parties. Clearly, the only remaining question, then, is that of the trustee's and bank's conflicting claims to the proceeds of the fixtures."

We accept the trustee's interpretation. The apparent purpose of the stipulation was to substitute the proceeds of the fixtures sale for the fixtures in the contest between the trustee and the bank. In the District Court the parties stipulated for a consolidation because the trustee's claim as an intervenor in the action against Moritz and its claim to the inventory both depended upon the sufficiency of the financing statement. The parties by agreement have made one lawsuit out of two and the bank will not now be allowed to contend otherwise. This disposes of the bank's other contention that, because the trustee filed only one notice of appeal, only the suit involving the inventory is before this court.

Sufficiency of the Financing Statement

With exceptions not applicable here, a financing statement must be filed to perfect all security interests. § 9-302, U. C. C. An unperfected security interest is subordinate to, among others, a "lien creditor," which term includes "a trustee in bankruptcy from the date of the filing of the petition." § 9-301 (3), U. C. C.

The requisites of a sufficient financing statement are prescribed by section 9-402, U. C. C. Insofar as pertinent, we quote that section: "(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. . . . A copy of the security agreement is

sufficient as a financing statement if it contains the above information and is signed by both parties. . . . (5) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."

Section 9-403(4), U. C. C., provides: "A filing officer shall mark each statement with a consecutive file number and with the date and hour of filing and shall hold the statement for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement."

Section 9-105(1)(d), U. C. C., defines debtor as "the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires."

It is undisputed that Verlan J. Rumbaugh was the owner of the collateral covered by the security agreement. Section 9-105(1)(d), U. C. C., provides that in any provision of the article dealing with collateral, "debtor" means the owner of the collateral. One of the requirements for a sufficient financing statement is that it be signed by the debtor. § 9-402 (1), U. C. C. The few cases which have considered the necessity of signature of the debtor have not held the omission of the signature is a minor error. In re Industro Transistor Corp., 14 U. C. C. Rep. 522 (Bankruptcy Court, E.D.N.Y.); Beneficial Finance Co. v. Kurland Cadillac-Olds., 57 Misc. 2d 806, 293 N. Y. S. 2d 647; Provident Finance Co. v. Beneficial

Finance Co., 36 N. C. App. 401, 245 S. E. 2d 510; In re Murray, 2 U. C. C. Rep. 667 (Bankruptcy Court, D. Ore.). See, also, White & Summers, Uniform Commercial Code, p. 835.

It is not for this court to write the signing requirement of the code out of the statute. We hold the filing of a financing statement which is not signed by the owner of the collateral described therein is insufficient to perfect the security interest. In the light of this holding, it is unnecessary for us to consider or rule upon the trustee's other criticisms of the financing statement.

Transfer of the Property to the Corporation

If the property covered by the security agreement never became the property of R & S Hardware, Inc., the bankrupt, then, of course, the trustee has no claim thereon even if the security interest was not perfected. Again, there is no dispute on the material facts. The question is, did Rumbaugh sell the assets of the sole proprietorship to the corporation?

The applicable provisions of the Uniform Commercial Code are the following: Section 2-106, U. C. C., provides in part: " 'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price (section 2-401). A 'present sale' means a sale which is accomplished by the making of the contract." Section 2-207(3), U. C. C., provides: "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act." Section 2-204(1), U. C. C., provides: "A contract for sale of goods may be made in any man-

ner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Most important in this case is section 2-401(3), U. C. C., which says in part: "Unless otherwise explicitly agreed where delivery is to be made without moving the goods, . . . (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting."

The essential facts are that Rumbaugh and the corporation did contract, as evidenced by the corporate minutes and his acceptance of the stock certificate. At that time the goods were identified and they consisted of the fixtures and inventory then located in the store at 2918 South 84th Street in Omaha, Nebraska. No physical delivery needed to be made. Rumbaugh testified he intended the corporation become the owner of that property. The evidence is not contradicted. The contract did not contemplate the delivery of any document of title. Title passed under the provisions of section 2-401(3)(b), U. C. C., at the time of contracting. The after the fact recital, in the schedule attached to the petition in bankruptcy that the fixtures and inventory had not been transferred to the corporation, cannot change what had occurred before.

The Corporate Entity

The finding of the trial court that R & S Hardware, Inc., never had corporate existence seems to be a reverse use of the equitable principle of disregard of the corporate entity. Appellee argues it is simply a finding of fact by the trial court and must be treated as such. The evidence does not support such a fact finding. We have been cited no authority which holds the continued use of a trade name by a corporation, continued use of printed materials from preincorporation days, or the lending of money to the corporation by a shareholder operates to defeat

what, on its face, is a corporate existence without legal defect.

The ordinary use of the principle of disregard of the corporate entity is in those cases where the corporate existence is used to cloak fraud or justify wrongdoing. Its use is against corporate owners who commit fraud. Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287; 18 C. J. S., Corporations, § 6, p. 378; § 582 et seq., p. 1308. We find no cases where the principle of disregard of the corporate entity has been used to prefer one class of creditors to another. We do not see how the principle may be applied to prefer a creditor who fails to perfect a security interest to the representatives of other creditors of the corporation. The situation here is not unlike that in State ex rel. Sorensen v. Weston Bank, 125 Neb. 612, 251 N. W. 164, where the sole corporate stockholder sought to offset the corporate deposit in the defunct bank against the receiver's claim against him on his personal note. We held there it could not be done.

In this case, had the bank met the simple statutory requirements to properly perfect its security interest it would not be in the position in which it finds itself, for the trustee in bankruptcy would have taken the property subject to that security interest.

REVERSED AND REMANDED.

LOWELL S. SHERWOOD, DOING BUSINESS AS SHERWOOD LUMBER AND CONCRETE COMPANY, TABOR, IOWA, APPELLANT, V. DOLA H. TUCKER AND KATHRYN C. TUCKER, APPELLEES.

277 N. W. 2d 437

Filed April 10, 1979. No. 42082.

1. **Agents: Words and Phrases: Statutes.** The term "attorney," used in section 52-103, R. S. Supp., 1978, means any agent or substitute acting for and in behalf of a lien claimant; it may include an attorney at law but is not limited to that meaning.
2. **Mechanic's Liens: Statutes: Affidavits.** The provisions of section

52-103, R. S. Supp., 1978, as to the making of an affidavit of the giving of notice of mechanic's lien to the landowner, are directory and not mandatory; irregularities in such affidavit will not render the lien void and unenforceable.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded.

Hoch & Steinheider, for appellant.

Wellensiek & Rehmeier, for appellees.

Heard before KRIVOSHA, C. J., CLINTON, and HASTINGS, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an action for the foreclosure of a mechanic's lien filed by Lowell S. Sherwood, doing business as Sherwood Lumber and Concrete Company, Tabor, Iowa, the appellant, against Dola H. Tucker and Kathryn C. Tucker, appellees. The District Court for Otoe County, Nebraska, entered a judgment of dismissal against which the appellant assigns error. We reverse and remand the action.

The portion of the record material to the assignment of error shows that on December 16, 1976, the appellant filed a mechanic's lien against the property of the appellees, together with the affidavit of one Sally A. Kline, which stated that acting for and in behalf of the appellant she had mailed a copy of the lien to the appellees. Appellant's petition alleged the filing and mailing of the copy of the lien to which appellees' answer was a general denial. At the trial, appellant introduced the lien and the affidavit, as exhibits 1 and 2. No further reference to either is found in the testimony. The trial court found that there was no evidence that Sally A. Kline was attorney for the claimant and that the requirement of section 52-103, R. S. Supp., 1978, had not been met as to the affidavit. The action was then dismissed.

We consider, first, the meaning of the term "attor-

ney" as used in the statute. Appellees claim, and the trial court determined, that it referred only to "attorney at law." The first use of the word in this statute appears in the amendment adopted in 1969, when the statute was amended into substantially its present form. Previously, no notice to the landowner of the filing of a mechanic's lien had been required. It is likely it was recognized that many businesses conducted their affairs through agents and substitutes of various kinds and that such agents and substitutes often had the only personal knowledge of business acts. When an act, such as the giving of notice of the filing of a mechanic's lien, is being proved, it is only logical that the person performing such act should make the proof. If the statute referred to the institution or maintenance of legal proceedings, then the word "attorney" would refer only to attorney at law. In People v. Miller, 259 N. Y. S. 2d 647, at p. 650, 23 App. Div. 2d 144, it was stated that "The title 'attorney', in its broad sense, signifies merely an agent or substitute and does not necessarily refer to an attorney at law." In this statute the word "attorney" is used in a broad, generic sense and refers to any agent or substitute acting for and in behalf of a lien claimant; it may include but should not be limited to an attorney at law.

When the lien and the affidavit were introduced into evidence, the appellant made a prima facie showing of compliance with the statutory requirements of filing and notice. This supported the allegations of his petition which had been denied. If the trial court intended to hold that further proof of the identity and authority of Sally A. Kline was needed, it was in error.

Next, we turn to the holding by the trial court that if the affidavit of notice is insufficient, the mechanic's lien becomes invalid and unenforceable. There is only one penalty clause in section 52-103, R. S. Supp., 1978, which reads: "Failure to serve notice

of lien, if required by this section, shall make such lien void and unenforceable." It follows the provision for the giving of notice and the making of the affidavit of mailing. If the Legislature had intended that a defective affidavit should render the lien void and unenforceable, the penalty clause could have and should have so stated. The service of the notice is of primary importance in establishing the lien. The provision for the making of the affidavit is merely directory and substantial compliance with the provision is sufficient. The construction given this provision by the trial court is erroneous.

Other questions argued in the course of this appeal relate to matters as to which the evidence is conflicting and no finding was made by the trial court. If they arise again at the retrial, we assume that the trial court will consider and determine them properly.

The judgment of the trial court is reversed and the cause is remanded for the trial of the remaining issues in the case.

REVERSED AND REMANDED.

DONALD L. HEYNE, APPELLEE, V. MARY ANN HEYNE KUCIREK, APPELLANT.

277 N. W. 2d 439

Filed April 10, 1979. No. 42169.

1. **Custody: Parent and Child.** Generally, visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child or children of the marriage.
2. _____: _____. In determining reasonable visitation rights, the best interests and welfare of the child are the primary consideration, considering age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Paul J. LaPuzza, for appellant.

John J. Respeliers, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and COLWELL and VAN PELT, District Judges.

COLWELL, District Judge.

Mary Ann Heyne Kucirek, respondent custodial parent, appeals from a modification order of the District Court for Douglas County changing the visitation rights of Donald L. Heyne, petitioner noncustodial parent.

The marriage of the parties was dissolved by decree on October 23, 1974. Custody of their three sons, ages 13, 10, and 6, was awarded to respondent, subject to petitioner's reasonable visitation and certain specific holidays and summer vacation visitations. Both parties have remarried; petitioner lives in Sioux City, Iowa, and respondent resides in Omaha, Nebraska. The visitation rights of petitioner were modified and clarified in 1976, providing for visitation away from the family home 1 weekend each month.

On April 17, 1978, petitioner made application to modify the dissolution decree alleging that respondent was not cooperative in allowing visitation privileges and that all visitation rights should be defined by court order. The application also suggested several acceptable terms of visitation in the areas of weekends, holidays, Father's Day, and telephone and U.S. mail communication. These issues were joined by respondent's answer and a hearing was held on May 25, 1978. At the close of petitioner's evidence respondent moved for a dismissal of the application, which was denied. The court ordered the decree modified as to petitioner's visitation rights as follows: (1) Visitation 1 weekend a month at the petitioner's home in Sioux City, and 1 Sunday afternoon a month visitation in Omaha, Nebraska;

(2) Christmas Day in even-numbered years; (3) the 4 days succeeding Christmas with permission for visitation in petitioner's home; (4) Easter Sunday in odd-numbered years and either the 3 days prior or the 3 days succeeding, dependent upon certain conditions here not related; (5) Thanksgiving Day; (6) Father's Day weekend; and (7) 2 calendar weeks each summer between specified times. Respondent was also ordered not to interfere with the petitioner's attempt to communicate with his children either by telephone or U. S. mail, and, further, to keep petitioner informed as to any health problems and special school activities.

Respondent's motion for new trial, claiming that the order was contrary to the evidence and the law, was denied and this appeal followed, assigning as error that there was neither an allegation nor evidence to support a change of circumstances warranting a modification of visitation privileges.

Section 42-364, R. S. Supp., 1976, provides in part: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified * * *. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing."

"In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence." Casper v. Casper, 198 Neb. 615, 254 N. W. 2d 407.

There is no conflict in the evidence as to petitioner's right of visitation; there was conflict in the time and method of visitation, having its roots in

communication between the parties, contrary to the best interests of the children.

During the first year following entry of the dissolution decree there was no visitation problem. Thereafter, respondent remarried and after 1976 problems developed concerning visitation with the children and respondent became uncooperative in arranging such visitation to the extent that for more than a year all of petitioner's communications and arrangements for visitation were carried on with and through respondent's attorney, Paul J. LaPuzza, who appeared as a witness. His role was helpful to both parties, but emphasizes the failure of the respondent to consider and foster the petitioner's relationship with their children. LaPuzza testified that the parties had strained feelings concerning visitation. LaPuzza was not the attorney of record at the trial. Petitioner's request for a particular weekend visitation was often denied as being inconvenient; however, a subsequent visitation was thereafter arranged with a 5 or 6-week delay. At Christmas time in 1977 petitioner by telephone requested permission to visit his sons and deliver Christmas gifts. This request was denied by respondent's husband, who told him that he didn't care if petitioner didn't see his children until the next June. Petitioner did travel to Omaha the same day and made an unsuccessful effort to deliver the Christmas gifts to his children. There is conflict in the evidence concerning petitioner communicating with the children by both telephone and U. S. mail and his being advised concerning the health and general activities of the children.

Respondent argues that the requirements of Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542, were not met in that there was no material change of circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. We do not agree.

Visitation and custody coexist; generally, visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child or children of the marriage.

In determining reasonable visitation rights, the best interests and welfare of the child are the primary consideration, considering age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent. See, Casper v. Casper, *supra*; Miller v. Miller, 196 Neb. 146, 241 N. W. 2d 666; Brisby v. Whitted, 190 Neb. 309, 207 N. W. 2d 696; § 42-364, R. S. Supp., 1976. "It can only be hoped that both parties will extend themselves in the best interests of the children in order to make the arrangement work. With them rest the ultimate responsibility for their children." Braeman v. Braeman, 192 Neb. 510, 222 N. W. 2d 811.

The trial judge found as follows: "It seems rather obvious to me that there is a serious breakdown in communications here affecting the children. My concern is the best interests of the children * * *. Visitation is a key ingredient of raising children, and it is in the best interests to be with their respective parents to the utmost. I have heard nothing in the evidence that would indicate any negative reason for denying Mr. Heyne extensive visitation rights." "In determining * * * the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying." Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866.

There was no abuse of discretion on the part of the trial judge and the modification was clearly supported by the evidence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY SMITH, APPELLANT.

277 N. W. 2d 441

Filed April 10, 1979. No. 42276.

Criminal Law: Confessions. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded for a new trial.

William R. Reinsch, for appellant.

Ronald D. Moravec, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

A 1976 Honda automobile was stolen while parked on the street in Union, Nebraska, on January 20 or 21, 1978. On January 22, 1978, the automobile was involved in a collision in Omaha, Nebraska. The Omaha police, while investigating the accident which is described in the record as a "hit-run," came upon the defendant, Terry Smith, Randy Rettele, and Katherine Kangar in the vicinity of the accident. The officers took their names and addresses and then took them home.

On January 24, 1978, the defendant and Rettele were asked to come to the police station in Omaha. At the station they were interviewed by an officer and admitted that they had taken the automobile in Union and were driving around Omaha when the accident occurred. They were detained at the police station until two deputy sheriffs from Cass County took them into custody and took them to Plattsmouth. They were interviewed at the sheriff's of-

fice in Plattsmouth and a similar statement was obtained.

A complaint was filed in the county court of Cass County charging the defendant with automobile theft. The defendant was 15 years of age at the time of the offense, and on his motion, the proceeding was transferred to the juvenile court. After trial the defendant was found to have violated the statute against the taking of an automobile for wrongful use and to be delinquent as described in section 43-201 (3), R. R. S. 1943. The defendant was placed on probation for a period of 1 year, fined $25, and ordered to make restitution. Upon appeal to the District Court the judgment was affirmed.

The defendant has appealed and contends that the evidence was insufficient to support the judgment, that the venue for the offense was not in Cass County, Nebraska, and that the statements made to the Omaha police and the Cass County deputy sheriff should have been suppressed.

The defendant's evidence consisted of alibi testimony. The defendant's cousin, Richard Hatfield, testified that on the evening the car was stolen he was with Randy Rettele and Jerry Smith, an older brother of the defendant who had been committed to the Youth Development Center at Kearney, Nebraska; that he left Jerry and Randy at Union, Nebraska, at about 11:30 p.m., and returned to Omaha by himself; that earlier that day the defendant had told this witness that the defendant planned to spend the evening with his girlfriend; and that the witness did not see the defendant again that evening after the conversation.

The defendant's mother testified that the defendant was in the company of his girlfriend, Sherry, on the evening that the car was stolen and was home by 12:30 a.m.; and that she believed the defendant was scared of the police and would say whatever the police wanted him to say.

The evidence of the State, if believed, was clearly sufficient to support a finding beyond a reasonable doubt that the defendant was guilty of taking an automobile in Cass County, Nebraska, for wrongful use. The parties stipulated that the owner, if called, would testify as to the taking that occurred in Cass County. A deputy sheriff of Cass County also testified concerning the taking of the automobile and his investigation of the matter. The defendant and Rettele were discovered near the scene of the accident early in the morning and there was no one else in the vicinity. Katherine Kangar testified that she rode around in the stolen automobile with the defendant and Rettele for 3 or 4 hours on January 21, 1978; that the defendant was driving at the time the automobile collided with a building; and that they abandoned the automobile and ran from the scene of the accident but were stopped by the police.

Prior to trial the defendant moved to suppress the statements given to the Omaha police and the Cass County sheriff's office. The county judge suppressed the statement given to the Omaha police but admitted the statement given to the deputy sheriff. Upon appeal the District Court held that both statements were admissible.

The defendant had not been formally arrested at the time he was interviewed at the Omaha police station, but the investigation had focused upon him and Rettele. The defendant was advised of his rights under Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and consented to giving a statement. There was no counsel present and his parents were not there. Before taking the statement the police officer stated that if the defendant cooperated with the police he would attempt to have the matter transferred to juvenile court. This was an inducement which under the circumstances of this case rendered the statement involuntary. In State v. McDonald, 195 Neb. 625, 240 N. W. 2d 8

(1976), we stated: "To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

Determination of the voluntariness of a confession must rest on the circumstances of each particular case. Here, "age and mental condition of the defendant, the role of the defendant's parents, and other factors are merely circumstances to consider in regard to the question of whether a minor's confession is knowing, intelligent, and voluntary." State v. Stewart, 197 Neb. 497, at p. 506, 250 N. W. 2d 849 (1977). See, also, State v. McDonald, *supra.*

Terry Smith was 15 years old and was attending ninth grade at the time. He did not speak to his parents and did not ask to see an attorney before making his initial statement to the Omaha police. These factors do not mandate a finding that his confession was involuntary, but they must be considered in assessing the impact of the interrogator's statements upon the defendant's will. The offer to try to have the case transferred to juvenile court was an inducement to confess in exchange for leniency. The interrogating officer stated it was intended as such and Rettele testified that he accepted it on that basis. In this light, the defendant's statement to the Omaha police was given in the hope of receiving some benefit in return and was inadmissible.

The second statement was given to the Cass County sheriff's office shortly after the statement in Omaha. The interrogating officer knew that the defendant and Rettele had given a statement to the Omaha police admitting they had taken the automobile. The deputy sheriff asked them if they had made a statement to the Omaha police and they admitted they had made an oral statement.

Although there was no inducement for the second

statement, under the circumstances of this case we believe it also was inadmissible. "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always must be looked upon as fruit of the first." United States v. Bayer, 331 U. S. 532, at p. 540, 67 S. Ct. 1394, at p. 1398, 91 L. Ed. 1654 (1947); Harrison v. United States, 392 U. S. 219, at p. 226, n. 14, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1967); People v. McClary, 20 Cal. 3d 218, 142 Cal. Rptr. 163, 571 P. 2d 620 (1977).

Even though the State's evidence was clearly sufficient to sustain the finding of guilt, the admission of the statements at trial requires that the judgment be reversed and the cause remanded for a new trial. State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66 (1965); Gallegos v. Nebraska, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951); Cook, Trial Rights, § 99, p. 367 (1974); Annotation, 31 L. Ed. 2d 921, at pp. 930-34 (1973).

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

JOHN REICHENEKER, APPELLEE, V. RICHARD R. SEWARD, DOING BUSINESS AS "CRAZY DICK'S MARKET," AND QUALITY PETROLEUM COMPANY, INC., A CORPORATION, APPELLANT.

277 N. W. 2d 539

Filed April 17, 1979. No. 41856.

1. **Leases: Contracts: Negligence.** Unless the lease stipulates that a lessor shall inspect the premises to ascertain the need of repair, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given notice of the need for repair.

2. **Juries: Verdicts.** The verdict of a jury will not be disturbed unless it is clearly wrong.
3. **Mistrial: Appeal and Error.** A motion to declare a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion.
4. **Instructions: Juries: Verdicts.** Instructions should be considered together so that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside.

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

Maupin, Dent, Kay & Satterfield and David A. Bush, for appellant Seward.

Tye, Worlock, Tye, Jacobsen & Orr and Patrick J. Nelson, for appellant Quality.

Knapp, State, Yeagley, Mues & Sidwell, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

STANLEY, District Judge.

This is an action for damages brought by John Reicheneker, as plaintiff, against Richard R. Seward, doing business as "Crazy Dick's Market" (Seward), and Quality Petroleum Company, Inc. (Quality). The jury returned a verdict for the plaintiff and against the defendants in the amount of $87,500. Both defendants filed motions for a new trial, with defendant Quality filing an alternative motion for judgment notwithstanding the verdict. The motions were overruled, and both defendants appeal, assigning as errors: (1) The trial court's failure to grant defendant Quality's motion for judgment notwithstanding the verdict; (2) denying both defendants' motions for a mistrial because of a reference to insurance; (3) excessive damages; and (4) error in submitting certain instructions to the jury.

Plaintiff claims that on December 30, 1973, while a business patron of "Crazy Dick's Market" car wash, he was injured when a cable operating the car wash door broke and struck him in his left eye.

At the time of the accident, Seward was leasing the premises and facilities from Quality. The written lease was for a period of 1 year, from January 1, 1973, through December 31, 1973. The lease provided in paragraph five that lessor was to keep the premises in good condition, and in paragraph nine that lessee would indemnify the lessor for any and all damage claims, suits, or judgments arising out of any injury to persons using the leased premises. Plaintiff offered in evidence the lease with paragraph nine obliterated, to which defendants objected. The trial court received the exhibit into evidence and granted leave to defendants to offer the entire lease at the applicable time. The relevancy of the lease was settled when defendant Quality placed in evidence the entire lease. Any complaint of defendants concerning admission of the lease expired with its offer.

Defendant Seward testified, concerning the actual operations under the lease, that Quality representatives came monthly to the station to audit and check on maintenance problems, but seldom made repairs because Seward took care of anything that needed repair and sent Quality the bill which Quality always paid. Seward related that he or his wife checked the car wash every morning because maintenance on the doors was important, and he visually checked the door and generally put a leather glove on and checked the cables and the loop in the cable where it attached to the door, but never made an effort to feel "clear around the loop" end. He further stated that during the term of the lease, if a cable had broken, he, Seward, would have replaced it himself as he had replaced several cables over the past years at his cost. He stated that Quality did not do routine

maintenance on the car wash because keeping the car wash maintained was his responsibility. Jack Ginder, owner of defendant Quality, testified that Quality owned the car wash involved at the time of the accident and the car wash comprised a part of the premises leased to defendant Seward, but Seward was not paying separate rent for the car wash and Seward kept all the profits from its operation. Ginder also stated that Seward made all repairs on the car wash or if the Overhead Door Company made repairs, Quality would pay for it if they were substantial. The *evidence supports a finding* that lessee Seward assumed the responsibility for maintenance on the car wash notwithstanding the provisions of paragraph five of the lease.

With regard to Quality's liability, the following rule, approved by this court in Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648, is applicable here: "Subject to limited exceptions, the general rule is that guests and invitees of a tenant derive their right to enter upon leased premises through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has." The exceptions are: First, whenever the premises are leased for a public purpose and the lessor knows at the time of leasing that a dangerous condition exists which renders the premises unsafe for the public use intended, the lessor is liable for injuries sustained by patrons of the lessee; secondly, whenever the lessor has contracted to keep the premises in good repair and retains control for that purpose.

A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession, if: (a) the lessor, as such, has agreed by a covenant in the lease or

otherwise, to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented. "Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless the contract stipulates that the lessor shall inspect the premises to ascertain the need of repairs, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs." Zuroski v. Estate of Strickland, 176 Neb. 633, 126 N. W. 2d 888; Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

The evidence clearly establishes that the conditions and requirements of these applicable exceptions have not been met in this case since the lessee assumed the maintenance on the car wash, and he did so on many occasions without notifying the lessor of any need for repairs. Thus, there was no duty imposed on the lessor as to the defective cable after commencement of the lease. We, therefore, reach the conclusion that under the facts and circumstances of this case the lessor, Quality Petroleum Company, Inc. was not liable for bodily harm to the plaintiff under the exception to the general rule holding lessor liable for injuries to business visitors of the lessee. The trial court should have granted Quality's motion to dismiss plaintiff's petition as to Quality and to direct a verdict in favor of defendant Quality.

With regard to Seward's liability, plaintiff testified that on December 30, 1973, he went to the car wash to wash his pickup truck. Due to inclement weather the entrance door was closed so he got out of his vehicle, walked over to the buttons by which the door is raised and lowered, and pushed the "up" button. The door went up about 3 feet and stopped. He pushed the "down" button and the door went down.

He then pushed the "up" button and the door opened completely. He proceeded to drive into the stall, pressed the "down" button, and the door closed. After washing his vehicle he walked over to the door and pushed the "up" button; the door came up about 3 feet and stopped. He observed a loop in the cable, where it attached to the door, and bent down to look at it, at which time the cable snapped and struck him in the left eye. Shortly afterwards he was taken to a hospital where he received extensive medical treatment.

William K. Mathews, a professional engineer with a background in the design and use of wire cable, testified that in his opinion the cable broke at the loop where it attached to the door. The break was progressive in nature and did not occur as a single action. It was a gradual progression of wire failure over a period of time. A careful inspection of the cable a week prior to the accident would have revealed broken strands of wire, and an inspection made a month prior to the break would have indicated a deterioration of the cable. This expert witness presented a photographic slide enlargement of the broken cable to confirm his findings. If the jury believed this evidence, as apparently it did, Seward's failure to find the defective cable and to warn the plaintiff of the potential danger constituted actionable negligence. A proprietor must take reasonable precautions to protect invitees from foreseeable dangers in arrangement and use of his premises. Hansen v. First Westside Bank, 182 Neb. 664, 156 N. W. 2d 790. The verdict in favor of plaintiff and against Seward was correct.

Plaintiff was 33 years old, married, and had two children, ages 9 and 12. He is a skilled craftsman engaged in tile and floor installation and had been so employed for 5 years prior to the accident. He testified that his work demanded excellent depth perception vision which he had before the accident, but the

injury left him without this essential ability; that his wage loss and medical expenses to the time of trial exceeded $9,200 and additional medical treatment would be necessary; and that due to his eye injury his future earning ability would be decreased because he could not continue to get top wages.

Two of plaintiff's coworkers testified they had worked with the plaintiff on several jobs prior to and after his accident. They were of the opinion that the quality of his work had deteriorated since he returned to work and that his impaired vision was the controlling reason.

Royal F. Jester, Jr., M.D. and ophthalmologist, testified that plaintiff, as a result of the accident, has lost his depth perception, has contracted a cataract and glaucoma condition, has a definite loss of vision even with a corrective lens, and has suffered permanent damage to his left eye.

Neil H. Joseph, M.D., specializing in ophthalmology, testified that plaintiff has a definite impairment of his left eye and could clinically be considered as essentially one-eyed; that the presence of glaucoma would be a continuing discomfort requiring future medication and treatment; and that his left eye could never be normal and a possibility exists it could become progressively worse. The verdict of a jury will not be disturbed unless it is clearly wrong. Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924; Fleming Realty & Ins., Inc. v. Evans, 199 Neb. 440, 259 N. W. 2d 604.

Counsel for defendant Seward asked the witness, Dr. Joseph, to state what exhibit 46 consisted of without going into detail. The witness replied that it consisted of, in part, a letter from Mr. Knapp, counsel for the plaintiff, dated July 6. Upon persistent further questioning the witness stated he would go into detail only because "you will snarl me otherwise." Plaintiff's counsel, aware of the contents of the letter, cautioned Seward's attorney about going

too far with the letter, but to no avail. The cross-examination continued and the witness made the following answer: "* * * which refers to a copy of a letter of Dr. Jester to Mr. Knapp's office and a letter from Dr. Jester to the office later, a letter from Dr. Smith referring to the stone problem, diamox therapy, and it refers to the attorney representing the insurance company for the petroleum company which owned the car wash, which John had through his car wash, through Mr. Harold Kay, which secured the examination." Defendants' counsel moved for a mistrial because of the reference to "insurance."

It is apparent from the record that counsel for defendant Seward injected the reference to insurance in a situation where the response of the witness was clearly foreseeable or one reasonably to have been anticipated. "* * * defendant [himself] injected the matter of insurance into the case * * * any error committed by plaintiff in making reference to insurance was without prejudice to the defendant." Stephenson v. De Luxe Parts Co., 133 Neb. 749, 277 N. W. 44.

A motion to declare a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. Regier v. Nebraska P. P. Dist., 189 Neb. 56, 199 N. W. 2d 742. In this case the trial court in overruling the motion for a mistrial acted within its discretion and there is no error.

Defendant Seward contends the trial court erred in giving instruction No. 2. This instruction was entitled "Statement of the Case" and set forth the allegations of the parties with specific instructions that the jury was to consider subsequent instructions as to the proof of the allegations. Instructions should be considered together so that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. Beavers v. Christen-

sen, 176 Neb. 162, 125 N. W. 2d 551.

The action of the District Court in entering judgment against Quality is reversed and the cause is remanded with instructions to dismiss as to Quality. In all other respects the action of the District Court in entering judgment pursuant to the verdict of the jury is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

AMERICAN STORES PACKING CO., DIVISION OF ACME MARKETS, INC., A PENNSYLVANIA CORPORATION, APPELLANT, V. WILLIAM E. PETERS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

277 N. W. 2d 544

Filed April 17, 1979. No. 41919.

Property: Taxation: Statutes. Where the primary function of tangible personal property is to aid in the production of goods which are manufactured for ultimate retail sale, the property will not be exempt from the use tax as defined by section 77-2702(20), R. R. S. 1943, merely because some undetermined fraction of the property is absorbed into the retail product during its manufacture.

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

Charles E. Lowe of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The issue in this case is whether cellulose casings used in the manufacture of skinless meat products such as frankfurters is subject to payment of the use

tax prescribed by section 77-2703(2), R. R. S. 1943. The Tax Commissioner had assessed against American Stores, a division of Acme Markets, Inc., a use tax deficiency for the period January 1, 1972, to April 30, 1975. The taxpayer protested and a hearing was held as prescribed by statute. The Tax Commissioner, after redetermining the tax, affirmed a deficiency assessment of $47,976.37. Appeal was then taken to the District Court for Lancaster County under the provisions of the Administrative Procedure Act. The District Court affirmed the Tax Commissioner and appeal was then taken to this court. We affirm.

Section 77-2703(2), R. R. S. 1943, provides in part: "A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased or rented from any retailer on or after June 1, 1967, for storage, use, or other consumption in this state at the rate set as provided in subsection (1) of this section on the sales price of the property . . . ." Subsection (a) of the above section provides in part: "Every person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer or leased or rented from another person for such purpose is liable for the use tax." Use is defined by section 77-2702(20), R. R. S. 1943, as follows: "Use shall mean the exercise of any right or power over tangible personal property incident to the ownership or possession of that tangible personal property, except that it does not include . . . personal property in the regular course of business or the exercise of any right or power over tangible personal property *which will enter into or become an ingredient or component part of tangible personal property* manufactured, processed or fabricated *for ultimate sale at retail.*" (Emphasis supplied.)

The precise issue is whether the casing is used so that it "will enter into or become an ingredient or

component part" of the finished meat product and thus not subject to the use tax.

The evidence pertinent to the issue was introduced by stipulation of the parties and the explanatory testimony of a chemist called by American Stores. The testimony of the chemist was founded upon the facts and evidence contained in the stipulation and his observation of the manufacturing process. He conducted no chemical or other tests.

From the evidence, the Tax Commissioner could arrive at the following as fact. American Stores is a meat packer and manufacturer of finished meat products with a plant located in Lincoln, Nebraska. Its products are sold to retail food markets for ultimate resale to consumers. In the process of manufacturing "skinless" frankfurters and certain luncheon meats, it uses cellulose casings purchased from makers outside the state and brings the casings into this state for use in the process of manufacture of the mentioned meat products. Into the cellulose casing have been "absorbed" (the language of the chemist) glycerine and moisture. When received, the three elements are by weight in the following proportions: Cellulose, 60-70 percent; glycerine, 23-25 percent; and moisture, 6-15 percent.

The casing is in long, tubular form. In the course of manufacture of the skinless meat products, the casing is utilized in the following fashion. It is stuffed mechanically with the prepared meat product. The casing, after being tied in segments, then moves onto a conveyor belt and is subjected to a series of processes, among which are a vinegar shower, liquid smoke shower, cooking, and a series of chill showers. The testimony is that, during the vinegar shower, an undetermined amount of the glycerine with which the casing is impregnated, moves by osmosis from the casing into the meat and penetrates the meat slightly. At the end of the process, the cellulose casing is slit by a device with a

razor-like edge and the casing is blown off. The casing is still recognizable as a casing, but it is without economic value and is discarded.

The glycerine and moisture in the casing serve several functions. In the words of the chemist, they make the cellulose manageable so that it can be stuffed, shaped, and conveyed. The glycerine permits the casing to be peeled easily from the frankfurter or other product after slitting. The glycerine also coats the outer surface of the product, improves its appearance, and inhibits drying out of the product, thus increasing its shelf life. Two and one-tenth percent of the casings contain dye which moves into the meat with the glycerine and improves the coloration of the product. The chemist testified it would be excessively expensive to conduct tests to determine the amount of glycerine moving from the casing into the meat because there is already glycerine in the meat and the testing would be complex.

The position of American Stores, stated in the briefest form, is that "enough [of the glycerine] goes in [to the product] to make a difference" and this should be the test of whether the casing enters into or becomes an ingredient or component part of the product. The Tax Commissioner emphasizes that the casings as such do not enter into or become components or ingredients of the product in any real sense and American Stores is the ultimate consumer of the casings. He points out the general plan of the sales and use tax is that every item of personal property, not specifically excluded, is to be subject to either one or the other of the taxes at some point of the chain of commerce. Pepsi Cola Bottling Co. v. Peters, 189 Neb. 271, 202 N. W. 2d 582. Unless, therefore, the tax is imposed on the use of the casings in the hands of American Stores, the casings escape taxation completely.

We do not propose to discuss in any detail American Stores' highly refined semantic arguments. Nor

do we think it necessary to discuss rules of construction of statutes. We find the precedents cited by the Tax Commissioner the most persuasive.

American Stores argues that this case is governed by State v. United States Steel Corporation, 281 Ala. 553, 206 So. 2d 358; and State v. Southern Kraft Corporation, 243 Ala. 223, 8 So. 2d 886. In State v. United States Steel Corporation, *supra*, the issue was whether the sales of oxygen to a manufacturer of steel were retail sales subject to tax, or wholesale sales not subject to tax. The determination of the issue depended upon language of the Alabama statute defining wholesale sales as including those of tangible personal property " 'which enters into and becomes an ingredient or component part' " of the product which is manufactured for sale. In that case, the oxygen was acquired from a seller in the state. This would be the same situation in our case had American Stores purchased the casings from a supplier in this state. The issue in the two cases is therefore essentially identical although one involves use tax and the other sales tax. In our judgment, however, the difference in facts makes the Alabama precedent inapplicable to the issue here. In the Alabama case, the oxygen was injected into the molten metal in the furnaces. The purpose of putting the oxygen in the steel was to control the carbon content of the steel and contribute to its hardness and smoothness. Clearly in that case the oxygen was an essential component that entered into the chemical process of making steel. The oxygen did not in any degree serve the function of a mold or substitute for any mechanical device. It was in any view an ingredient even though most of the oxygen escaped or remained in the slag which was the waste product remaining after the process was completed. State v. Southern Kraft Corporation, *supra*, involved paper manufacture and the issue was whether or not various chemicals, such as lime, sulphur, and others

used in the process, became " 'ingredient or component part of the finished product.' " The court held as fact that the chemicals did become a substantial "ingredient or component part," even though only a small percentage remained in the finished product. State v. Southern Kraft Corporation, *supra*, in our view, involves essentially the same situation as that in State v. United States Steel Corporation, *supra*.

The Tax Commissioner here relies upon the following precedents: Luer Pack. Co. v. State Bd. of Equalization, 101 Cal. App. 2d 99, 224 P. 2d 744; Briggs and Co. v. District of Columbia, 196 F. 2d 241 (D. C. Cir., 1952); Smith Refining Co. v. Dept. of Finance, 371 Ill. 405, 21 N. E. 2d 292; Traigle v. PPG Industries, Inc., 332 So. 2d 777 (La., 1976); Union Portland Cement Co. v. State Tax Commission, 110 Utah 135, 170 P. 2d 164; American Distilling Co. v. State Board of Equalization, 55 Cal. App. 2d 799, 131 P. 2d 609; Hervey v. Internatl. Paper Co., 252 Ark. 913, 483 S. W. 2d 199. Under the facts of this case, these precedents are more on point than the Alabama authorities.

Briggs and Co. v. District of Columbia, *supra*, and Luer Pack. Co. v. State Bd. of Equalization, *supra*, both involved imposition of use tax upon cellulose casings used in the manufacture of skinless frankfurters by means of a process essentially the same as in the case before us. In Luer it was argued the casings were exempt because, among other reasons, of a food product exemption in the California statute. In that case the court mentions in its opinion that part of the glycerine migrates from the casing into the meat. The fact some of the glycerine migrated did not make the casing a food product. In Briggs the statutory exception was of property " 'in which the purpose of the purchaser is * * * to use or incorporate the property so transferred as a material or part of other tangible personal property to be

produced for sale by manufacturing, assembling, processing . . . .' " The court there regarded the casing as merely an instrumentality or utensil used in the manufacture and not as property being incorporated into the product.

In Smith Refining Co. v. Dept. of Finance, *supra*, the material subject to the tax was "core oil." In that case the statutory exemption was of property purchased " 'for use and consumption and not for resale in any form as tangible personal property.' " The following extract from the opinion gives the essential facts: "The purchasers of the core oil are engaged in the business of making iron castings to be sold by them. In many castings voids or cavities are necessary. In order to make these voids cores are used. The cores are made in the shape and size of the desired void. The core is placed inside the mould and hot metal is poured in the space between the core and the mould. When the metal solidifies, it is the iron casting. The core is composed of sand and core oil. The function of the core oil is to bind the grains of sand together. After the metal has cooled the core is removed. It is conceded the core oil is not resold as core oil. The decisive issue is whether it is resold 'in any form' as tangible personal property." The evidence there showed that "some of the core oil decomposes and that a portion of the carbon formed by such decomposition is absorbed by and becomes a part of the iron casting." The court upheld a determination that the core oil did not in any form become an ingredient or constituent of the molding within the meaning of the pertinent statute. In so doing it relied primarily upon the function performed by the oil and regarded as de minimis that part of the oil which became part of the castings. The other authorities cited by the Tax Commissioner involved comparable situations and statutes and the issue was resolved on a variety of rationales, but all

are supportive of the Tax Commissioner's position. We will not discuss them.

The determination of whether or not tangible property enters into or becomes an ingredient or component part of other property does not ordinarily offer any difficulty. The lumber which goes into the manufacture of a piece of furniture obviously becomes a component part of that furniture, i.e., the function of the lumber is that of being a component and it serves no other purpose. In the case before us, the casing served the apparently indispensable function of a mold. In the end, the casing is discarded. It does not become an ingredient or component in any real sense, as it does not reach the ulitmate consumer of the meat product. If one judges solely by the physical evidence, i.e., a sample of unused casing and a sample of used casing, the answer seems almost obvious. The casing remains after the manufacture. The principal function of the glycerine and moisture is to enable the casing to serve its function. The transfer of some part of the glycerine into meat which already contains glycerine appears incidental.

The Tax Commissioner's determination that the cellulose casing did not enter into or become an ingredient or component part of the meat products within the meaning and purpose of sections 77-2702 (20), R. R. S. 1943, was correct and was properly sustained by the District Court.

AFFIRMED.

EDWIN G. RENTSCHLER AND MILDRED F. RENTSCHLER, APPELLANTS, V. JOSEPH J. WALNOFER AND JOYCE WALNOFER, APPELLEES.

277 N. W. 2d 548

Filed April 17, 1979. No. 42094.

1. **Equity.** It is the duty of the Supreme Court to try the issues of fact de novo on the record without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence.
2. **Adverse Possession: Time.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
3. **Adverse Possession.** To permit tacking of successive adverse possession of grantees of an area not within the calls of a deed, but contiguous thereto, among the ultimate facts to be established is the intended and actual transfer and delivery of such area to the grantee as successor in ownership, possession, and claim.
4. **Adverse Possession: Time.** Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years.
5. **Adverse Possession.** Acts of dominion over the land must, to be effective as against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.
6. **Adverse Possession: Intent.** A person claiming title by adverse possession must occupy and possess the land adversely to the record owners with the requisite intent and purpose to assert ownership.

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

Magnuson, Magnuson & Peetz, for appellants.

Dennis J. Mullin, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and KORTUM and FAHRNBRUCH, District Judges.

FAHRNBRUCH, District Judge.

Edwin G. Rentschler and Mildred F. Rentschler,

as plaintiffs, sought to enjoin defendants from removing an alleged boundary fence and prayed that the title to a small parcel of land in Holt County, Nebraska, be quieted in them. After trial, the District Court dismissed their petition and quieted title to the disputed parcel in the defendants. Plaintiffs appeal to this court. We affirm.

The Rentschlers are record owners of the northeast quarter of the northwest quarter of Section 26, Township 31 North, Range 15 West of the 6th P.M. in Holt County, Nebraska, consisting of 40 acres. As far as relevant here, the 40 acres was originally owned in fee by DeWitt Dexter Cotton. He died in 1952. Mr. Cotton's will devised a one-half interest to the 40 acres to his wife, Audrey Cotton, and granted her a life estate in the other one-half interest. Other of Mr. Cotton's devisees received the remainder interest. In 1976, Audrey Cotton deeded her interest in the 40 acres to plaintiffs. The remaindermen, in 1976, deeded their interest in the 40 acres to Edward F. Walnofer and Darlyne Walnofer and to plaintiffs. Edward F. Walnofer and Darlyne Walnofer then conveyed their interest to plaintiffs as joint tenants with right of survivorship and thereafter the plaintiffs deeded the 40 acres to themselves as tenants in common.

The disputed parcel is contiguous to the east boundary of the Rentschlers' 40 acres and is included in the north half of the northeast quarter of Section 26, Township 31 North, Range 15 West of the 6th P.M. in Holt County, of which the defendants Joseph J. Walnofer and Joyce Walnofer are and have been the record owners since 1963.

More precisely, the boundary of the disputed parcel begins at the north quarter section corner of Section 26, proceeds south along the quarter section line a distance of 216.5 feet; thence left, at an angle of 96° 21′, in a southeasterly direction of 91.2 feet; thence left, at an angle of 87° 52′, more or less in a

northerly direction a distance of 226.8 feet to the north section line; thence westerly along the section line a distance of 107.13 feet to the point of beginning. There is an east-west section line county road along the entire north boundary of Section 26. A portion of the area is wooded and has a stream running through it.

In the early 1930's, a fishing club constructed a dam in the northeast quarter of DeWitt Dexter Cotton's 40 acres. The dam was constructed somewhat diagonally from the southeast to the northwest and was located near the east and north boundary of the 40 acres. The dam and impounded water occupied about 5 of the 40 acres. Water was supplied from springs on the Cotton property. The dam was rebuilt in the early or mid-1940's and was rebuilt again in 1977 by Mr. Rentschler after he and his wife acquired title to the 40 acres.

After the dam was originally built, Mr. Cotton orally leased the resultant pond to the fishing club. Records of the fishing club reflecting payments of rent are spotty. There are no records of rental payments in 1946, 1951, 1954, 1963, and 1964. In 1950, the club discussed repairing a bridge and fence on the pond, but the records do not reveal where they were located. James W. Galyen, who became a member of the club in 1947, testified that the fence was along the north border of the disputed parcel and there was a gate there. He fished the Cotton pond each year until the club ceased using the pond. He further testified that there was a gate on the south border of the disputed parcel, which parcel lies directly east of the dam. Fishing club members used the gate on the north boundary of the disputed parcel but not the south border gate. He and others testified that fishing club members sometimes used a gate west of the dam on the Cotton property to gain access to the pond. Galyen further testified that from 1947 to the early 1960's, fishing was gen-

erally confined to the months of April through June and in the fall of the year, due to weather conditions.

Fishing club members drove into the disputed parcel along a vehicle trail, parked their vehicles off the trial, and walked on a foot trail through a grove of trees to the dam where they fished the pond. At one time an outhouse was build on the disputed parcel and a picnic table was located thereon. Both had disappeared several years before trial.

Willia Havranek, a teacher and a niece of the Cottons who had lived with them from 1929 until 1946, held school picnics on the disputed parcel. She testified that a fence was built along the eastern boundary of the disputed parcel prior to 1940. A photo taken at a school picnic in 1940 reflects posts but reveals no wire fence. Mrs. Havranek further testified that a civic club to which she belonged had also held picnics on the disputed parcel.

Plaintiff Edwin G. Rentschler testified that in 1976 he cleaned out some brush from the disputed parcel. He and the defendant, Joseph J. Walnofer, repaired the fence around the disputed parcel. He testified that at that time there was no gate in the north boundary, only an open space, although at one time there had been a gate. The record is silent as to who supplied replacement fence posts and repair wire in 1976. Mr. Rentschler testified that there was a gate in the north boundary fence on July 5, 1977. He grazed his cattle on the disputed parcel in 1976. Mr. Rentschler further testified that in the fall of 1976, defendant, Joseph Walnofer, requested permission to water his cattle in the disputed area, which was granted. Mr. Walnofer denied that he requested such permission, but testified he did water his cattle in the disputed area in the fall of 1976.

It is on the basis of the above facts that plaintiffs claim ownership of the disputed parcel of land under the doctrine of adverse possession by both plaintiffs and their predecessors in title.

Defendants' evidence reflects that the north half of the northeast quarter of Section 26 was owned by one Catherine Seger until her death in 1962. She had acquired ownership from her grandparents, who acquired it under a tree claim. Catherine Seger's husband died in 1956, and her son, Leo F. Seger, then managed the land until his death, which also occurred in 1962. In 1963, the quarter section was sold to Edward F. Walnofer and defendant, Joseph J. Walnofer. Thereafter, the north half of the quarter was conveyed to defendants in the same year.

Defendants' evidence further reflects that in the mid-1940's there was no fence on the north side of the Seger quarter but that there was a fence on or near the north-south quarter section line between the Seger and Cotton properties and that such fence ran north to the county road. A north-south fence was built by Mr. Cotton generally along the quarter section line between the Cotton and Seger properties after the flood in the 1940's.

In September 1953, the east and south sides of the disputed parcel were fenced and a gate was installed in the south boundary fence. The Segers furnished the fence and posts and supplied the consideration to Marion Davis for constructing the fence. Marion Davis' son, Jim Davis, and Joe Mix actually did the work. Jim Davis testified that between 1952 and 1962 he and his father used the disputed area as access to other portions of the Seger property and that he had trapped mink in the disputed area below the dam. He testified that Mrs. Cotton forbid him to fish in the Cotton pond, but said that he could fish below the dam because nobody would bother him there and she didn't have any jurisdiction over that. He stated Leo F. Seger had the disputed area fenced as he did in 1953 because Mr. Seger didn't like to open gates when he went fishing. Mr. Seger became a member of the fishing club in 1946.

After the disputed area was fenced off, Jim Davis

and his father sharecropped hay with the Segers until the early 1960's when the property was sold. They used the disputed area as access to the Seger meadow, stored machinery, and stacked hay there. Earlier in the 1940's, John Hamik rented the Seger land and used the disputed area as a hay meadow. The Walnofers raised hay on the land south of the Seger property and from the 1940's traveled across the disputed parcel to get to their hay. Defendant, Joseph J. Walnofer, testified that at no time did the parking of fishing club members' cars interfere with his use of the disputed parcel. There was testimony that since the 1960's Mr. Walnofer, during portions of the year, kept hay on an underslung on the disputed parcel. Mr. Walnofer paid taxes on the disputed parcel from 1963 each year until date of trial.

Joyce Walnofer testified that she and her family used the disputed area for picnics from 1959 to 1975. Oliver Horton testified that he and defendant, Joseph J. Walnofer, cut wood in the disputed area in 1969 or 1970 and that Mr. Walnofer gave him the wood. Simon Timmerman testified that he was a tenant of the Cotton land from 1953 until 1976. When he first rented the Cotton 40 acres, Mr. Timmerman observed a north-south fence directly east of the dam and that the fence veered toward the west around the dam. He saw defendant, Joseph J. Walnofer, graze cattle in the disputed parcel.

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Barnes v. Milligan, 200 Neb. 450, 264 N. W. 2d 186; Campbell v. Buckler, 192 Neb. 336, 220 N. W. 2d 248; Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433. Such 10-year period is fixed by statute. § 25-202, R. S. Supp., 1978.

In the instant case the record is devoid of plaintiffs' predecessors in title to the 40 acres personally

occupying the disputed parcel. Willia Havranek held some picnics on the disputed parcel, but that was before she had any interest in the property. Her residual 184th title in the Cotton 40 acres was not established until 1952 when DeWitt Dexter Cotton died, and her possessory interest was not established until Mr. Cotton's wife, Audrey, relinquished her life tenancy in 1976. The Cottons' tenant from 1953 to 1976, Simon Timmerman, was never on the disputed parcel on behalf of the Cottons, nor did he ever do anything with it.

Therefore, to be successful in this action in their claim of adverse possession to the disputed parcel, the plaintiffs must first establish that the Cottons leased the disputed parcel to the fishing club and that, as a tenant of the Cottons, the club had actual, continuous, exclusive, notorious, and adverse possession under claim of Cotton ownership for a full period of 10 years. The evidence is lacking to support such conclusion.

Throughout all of the evidence any reference to a rental agreement between the Cottons and the fishing club refer to leasing the "Cotton pond" or "pond." We can find no evidence in the record that Mr. Cotton or his successors even purported to lease the disputed parcel to the fishing club. Minutes of the fishing club of March 31, 1937, negative any suggestion that the fishing club from the inception of the dam and pond to March 31, 1937, leased the disputed area. The minutes reflect: "Planck reported a camp ground on the east side of Cottons (sic) pond had been obtained." Had the fishing club leased the disputed area prior to March of 1937 from the Cottons, it would not have been necessary to "obtain" a campsite. That the Cottons considered they leased only the pond to the fishing club and not the disputed parcel is evidenced by the testimony of Jim Davis quoting Audrey Cotton as saying the pond was a "private pond," but Davis could fish below the pond

because "she didn't have any jurisdiction over that." At that time, Audrey Cotton was the widow of DeWitt Dexter Cotton, had a life tenancy, and owned one-half of the fee title to the Cotton 40 acres.

In the early 1940's, John Hamik, tenant of the Segers, used the disputed area as a hay meadow. In the early and mid-1940's, the Walnofers used the disputed parcel as access to their hay land south of the Seger land. In the late 1940's, the Segers used the disputed area to camp, park their car, and Paul Seger, grandson of Catherine Seger, used it to fish below the dam.

After the dam went out in the early or mid-1940's, according to Paul Seger's testimony, Mr. Cotton built a quarter section fence between his 40 acres and the Seger land. As it approached the north section line road, the fence veered to the west. At that time Mr. Cotton raised milk cows. The Segers raised no cattle. Paul Seger testified that the fence was still there in 1952 but had deteriorated since then. His testimony is corroborated in part by Simon Timmerman, former tenant of the Cottons, and by Jim Davis.

Between 1952 and 1962, the Walnofers used the disputed area as access to hay land south of the disputed parcel; the defendants used it for picnics as did Jim Davis and his family and a school picnic was held there. Jim Davis trapped mink in the disputed area. He, his father, and Leo F. Seger used the disputed land and no one ever tried to keep Jim Davis out of it. It cannot be said that the fishing club members exclusively possessed the disputed property. In Oliver v. Thomas, 173 Neb. 36, 112 N. W. 2d 525, it was said: "Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years."

Neither the Cotton nor the fishing club members'

activities were so hostile as to give the Segers or defendants notice of adverse possession by another. In fact, neither the Cotton nor the fishing club members' activities ever interfered with the use of the land by the Segers or the defendants. As was said in Dartmouth College v. Rose, 172 Neb. 764, 112 N. W. 2d 256: " '* * * acts of dominion over the land must, to be effective as against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. A mere temporary use of the property by a trespasser at intervals, whether such intervals are remote or frequent, is not enough.' " The mere sporadic parking of cars on the disputed parcel by fishing club members and their walking across the parcel to a fish pond which the club leased from another landowner, all of which did not interfere with the use of the disputed parcel by the title owners, is hardly sufficient under the facts of this case to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. There is no evidence in the record that the fishing club members had exclusive use of the outhouse or of the picnic table when they were located on the disputed property.

Plaintiffs' evidence also fails to show that the Cottons and their successors, other than the plaintiffs, occupied and possessed the disputed parcel adversely to the record owners with the requisite intent and purpose to assert ownership of the disputed parcel. As was said in Barnes v. Milligan, 200 Neb. 450, 264 N. W. 2d 186: "A long line of cases make it evident that intent has always been an element in Nebraska. The intent may be either actual or presumed, or inferred from the circumstances." Here, the facts militate to the contrary. Plaintiffs' intent could not have formed until 1976 and is well short of the 10-year period for adverse possession.

Plaintiffs' adverse possession claim must fail for

yet another reason. There must be privity of possession of the disputed parcel between the plaintiffs and their predecessors in title for the statutory period. Such evidence is lacking in this case. None of plaintiffs' grantors included the disputed parcel in the calls of their deeds. Such omission in and of itself is not fatal, but in the event of such omission, it is necessary for the plaintiffs to establish privity of possession by competent evidence that they and their predecessors actually occupied the disputed parcel for the full 10-year statutory period. It was said in Bryan v. Reifschneider, 181 Neb. 787, 150 N. W. 2d 900: "Successive occupancies alone do not establish privity but only show a succession of independent trespasses."

Thus, to permit tacking of successive adverse possession of grantees of an area not within the calls of a deed or contract, but contiguous thereto, among the ultimate facts to be established is the intended and actual transfer and delivery of such area to the grantees as successors in ownership, possession, and claim. Privity means privity of possession. It is the transfer of possession, not title, which is the essential element. And, the adverse possession must be continuous. Bryan v. Reifschneider, *supra*.

In the case before us, there was no continuous exclusive adverse possession of the disputed parcel by DeWitt Dexter Cotton while he was alive or thereafter by his devisees. Title owner, Catherine Seger, and her successors in title used the disputed parcel as they desired and for the purposes for which the parcel was suited. Any use of the disputed parcel by the fishing club members was not exclusive and did not interfere with the title owners' use. There is not one scintilla of evidence in the record that after the fishing club stopped leasing the Cotton pond in 1970, any of the devisees of DeWitt Dexter Cotton or anyone in their behalf actually occupied or used any portion of the disputed parcel. Neither is there any

evidence, actual, circumstantial, nor inferential, that any of Mr. Cotton's devisees intended to transfer possession of the disputed parcel. The plaintiffs have simply failed to prove by a preponderance of the evidence that there was the necessary privity of possession between them and their predecessors.

This being an action in equity, it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. § 25-1925, R. R. S. 1943; Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433. Such independent conclusions of fact must be determined by this court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Shirk v. Schmunk, *supra*.

In applying those rules, we find that the plaintiffs have failed to prove by a preponderance of the evidence that they have been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership of the disputed parcel for a full period of 10 years.

The judgment of the trial court is in all respects affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FLOYD C. MOORE, APPELLANT.

277 N. W. 2d 554

Filed April 17, 1979. No. 42104.

1. **Criminal Law: Right to Counsel.** An accused person is entitled to counsel at every critical stage of a criminal proceeding.
2. **Criminal Law: Constitutional Law: Right to Counsel.** If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity.

3. **Criminal Law: Right to Counsel: Waiver.** Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
4. **Criminal Law: Constitutional Law: Right to Counsel: Waiver.** The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss.
5. **Criminal Law: Right to Counsel.** No defendant can be completely denied the assistance of counsel absent a determination of his ability to retain counsel or his desire to have counsel appointed.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Judgment and sentence vacated and set aside. Cause remanded for further proceedings.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a post conviction action. The defendant challenges his conviction in the municipal court of Omaha of the misdemeanor offense of refusing to submit to a blood, breath, or urine test, and his sentence of 90 days in jail. After an evidentiary hearing, the municipal court denied the motion to vacate judgment and sentence. The District Court affirmed the judgment of the municipal court and this appeal followed. The defendant alleges that he was denied the right to counsel both at his trial and on an attempted appeal to the District Court.

On May 6, 1977, the defendant was charged with refusal to submit to a blood, breath, or urine test in violation of section 39-669.08, R. R. S. 1943, a misde-

meanor. Defendant was arraigned on the same day and was advised by the court of his right to an attorney and to have an attorney appointed if he was unable to afford one. The defendant told the court that he would get his own attorney. The trial was set for June 14, 1977, and defendant was released on bail. The defendant attempted to obtain an attorney but could not raise enough money. On June 6, 1977, the defendant was arrested and jailed for parole violation. He testified that he was unable to obtain an attorney while he was in jail, and his wife was also unable to obtain counsel for him.

The defendant appeared without counsel at his trial on June 14, 1977. The trial judge was not the same judge who conducted the arraignment. The trial judge inquired as to whether the defendant had been advised of his right to counsel at the time of arraignment in May, and the defendant answered affirmatively. The trial judge then asked whether the defendant had talked to his lawyer and the defendant responded: "I couldn't. I was in jail." The trial court then stated: "All right, but you knew you had a right to a lawyer.", and the defendant responded: "Yes, yes, I knew." The judge then announced that he would take judicial notice that the jail had a telephone and said: "Well, I guess you'll have to go on your own then * * *." This constituted the entire discussion as to defendant's right to counsel. There was no inquiry as to whether the defendant still desired counsel, or was willing to waive his right to counsel, nor as to the indigency of the defendant.

Trial proceeded and the defendant attempted to represent himself. At the conclusion of the testimony the trial court found the defendant guilty of refusing to submit to a blood, breath, or urine test, but not guilty of driving while intoxicated. The court sentenced the defendant to 90 days in jail, a 6-month suspension of operator's license, and a $100 fine.

The court also set a $300 appeal bond.

Following his conviction the defendant attempted to file an appeal. He wrote a letter to one of the municipal court judges telling him that he wanted to appeal and wanted an attorney on appeal. The defendant's wife sent a letter to the same effect to the trial judge and testified that she had also telephoned the trial court and the public defender's office several times in regard to her husband's appeal. The trial judge remembered having received a letter in the case but could not recall if it had anything to do with an appeal. He gave the letter to a bailiff to be attached to the defendant's file. The parties have stipulated that the letter in question was destroyed. At no time before the time for appeal had expired was an attorney ever appointed for the defendant.

On the last day for appeal an attorney in the public defender's office attempted to have the defendant brought before a judge of the municipal court so that the defendant could personally request the appointment of counsel on appeal, but the defendant had been transported to the penal complex that morning. The same attorney then filed an unexecuted appeal bond in order to indicate the defendant's desire to appeal.

On August 5, 1977, the defendant filed a poverty affidavit requesting appointment of counsel. The defendant was found to be indigent, the public defender's office was appointed to represent him, and the motion for post conviction relief here was filed. The municipal court, after an evidentiary hearing, overruled the motion for post conviction relief. On appeal to the District Court, that court affirmed the judgment of the municipal court, and this appeal followed.

There is little or no dispute as to the facts in this case, although there is a substantial dispute as to the inferences to be drawn from those facts. The evidence is undisputed that both the defendant and his

wife requested that counsel be appointed for the defendant on appeal following his conviction. Those requests for appointment of counsel were ignored.

The law is clear that an accused person is entitled to counsel at every critical stage of a criminal proceeding. State v. Journey, 186 Neb. 416, 183 N. W. 2d 494. If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity. State v. Blunt, 197 Neb. 82, 246 N. W. 2d 727.

The remaining issue is whether or not the defendant was denied his constitutional right to counsel at the trial. The State's position is that the defendant's statement at the arraignment that he would obtain his own counsel, and his appearance at trial without counsel, constituted a waiver of his right to counsel at trial in the absence of an assertion of indigency by the defendant. We disagree.

In Argersinger v. Hamlin, 407 U. S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530, the United States Supreme Court said: "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

In Case v. State, 177 Neb. 404, 129 N. W. 2d 107, this court said: "The due process clause of the Fourteenth Amendment guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss."

In the case now before us when the defendant appeared at trial without counsel the trial court did not inquire whether the defendant had counsel or wanted counsel. When the defendant advised the court

that he had not talked to a lawyer because he had been in jail, the court made no inquiry into the reasons for the absence of counsel, nor did it inquire as to the financial circumstances of the defendant, or whether or not the defendant could afford a lawyer. Although the defendant had already affirmatively indicated his intention to exercise his constitutional right to counsel by retaining private counsel, the court interpreted the defendant's appearance at trial without counsel as an affirmative, intelligent, and understanding waiver of his constitutional right to counsel simply because the defendant had been advised of his right to counsel a month before. Under the circumstances here it was wholly unreasonable to assume that the defendant had conclusively rejected an offer of counsel, much less that he had affirmatively waived his right to counsel.

The State seeks to equate the defendant's failure to affirmatively assert indigency at the time of trial with an affirmative, knowing, and intelligent waiver of all right to counsel. There is no dispute that the defendant was actually indigent at time of trial, but the State contends that the trial court had no obligation to provide the defendant with counsel prior to any claim of indigency. We believe the case of People v. Carter, 52 Ill. App. 3d 508, 367 N. E. 2d 791, effectively answers such a claim. The court there held: "[N]o defendant can be completely denied the assistance of counsel absent a determination of his ability to retain counsel or his desire to have counsel appointed, even though the request appears to be an attempt to delay the trial." In the case now before us there was no attempt on the part of the trial court to determine either of those matters, and there was no apparent intent to delay the trial. The defendant here was denied his constitutional right to counsel, both at trial and on appeal.

The judgment of the District Court is reversed and the cause remanded with instructions to the District

Court to vacate the judgment of the municipal court entered on June 14, 1977, and remand the cause for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting in part.

The defendant was arraigned on May 6, 1977, and was advised that he had a right to counsel, and to have counsel appointed for him if he was unable to afford one. The defendant stated to the court that he would get his own attorney. This, of course, was an effective waiver of the right to appointed counsel.

The case was set for trial on June 14, 1977, and defendant was released on bond. He was at large until June 6, 1977, when he was arrested for violation of parole for a prior offense. When the defendant appeared for trial without counsel on June 14, 1977, he admitted that he knew that he had a right to a lawyer. In answer to an inquiry as to whether he had talked to his lawyer, the defendant stated that he couldn't because he had been in jail.

The court now holds that it was the duty of the trial court at that time to inquire into the financial circumstances of the defendant and ascertain whether the defendant could afford a lawyer. It seems to me that it was the duty of the defendant to inform the court that he wanted to be represented by counsel but was financially unable to retain counsel, if his earlier waiver of the right to appointed counsel was to be withdrawn.

When a defendant has been advised of his right to appointed counsel and has made an effective waiver of that right, there should be some responsibility upon the defendant to advise the court if there has been a change in circumstances and the defendant now wants the court to appoint counsel for him.

LINDA SCHLEUTER, APPELLANT, V. BOB R. MCCUISTON ET AL., APPELLEES.

277 N. W. 2d 667

Filed April 17, 1979. No. 42116.

1. **Pleadings: Jurisdiction: Waiver.** An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of the defendant, whether the defendant intended such waiver or not.
2. **Habeas Corpus: Custody: Minors.** The writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error. Thus, where the question of a child's custody has been determined by a court of competent jurisdiction, that disposition will control and cannot be disregarded in subsequent habeas corpus proceedings involving the same parties.
3. _____: _____: _____. The writ of habeas corpus is a proper remedy where a person entitled to custody of a child has been deprived of that custody by reason of a void judgment.
4. **Statutes: Jurisdiction: Custody: Minors.** Section 43-201, R. S. Supp., 1976, which states that nothing in the Juvenile Court Act shall operate to deprive the District Courts of their chancery jurisdiction, does not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Walker, Luckey, Sipple & Hansen and Mark M. Sipple, for appellant.

Joseph A. Shaughnessy, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and HASTINGS, JJ., and KELLY, L. W., JR., District Judge.

CLINTON, J.

The plaintiff, Linda Tucker Schleuter, appeals from the dismissal of her petition for a writ of habeas corpus. The petition alleges Lucille and Bob R. McCuiston are unlawfully and forcibly detaining

Andy Tucker, a minor child and the son of Linda Schleuter. For reasons herein indicated, we do not reach the issue of the child's best interests. However, a summary of the events leading up to this appeal is necessary to an understanding of our holding.

Andy was born September 27, 1972. Lucille McCuiston is his paternal grandmother and Bob R. McCuiston is his stepgrandfather. Andy has an older sister, Amy, whose custody is not at issue in these proceedings.

Nebraska courts have been involved in the question of who should have custody of Andy since June of 1973. At that time, Delbert Tucker filed a petition in the District Court for Platte County, Nebraska, seeking a divorce from Linda Tucker and requesting custody of the two children of their marriage. Linda Tucker filed a cross-petition requesting custody of the children. On December 18, 1973, the District Court entered an order dissolving the marriage and granting physical custody of the children to Linda Tucker and legal custody to the Platte County division of public welfare.

The children had been living with the McCuistons while the divorce was pending. The plaintiff took custody of them on or about December 14, 1973. On about December 26 of that year, she asked the McCuistons to take care of the children until she and Tom Schleuter, her present husband, could marry and settle down. This the McCuistons agreed to do.

On January 4, 1974, the District Court, having been advised by the Platte County division of public welfare that plaintiff no longer had physical custody of the children, placed physical and legal custody of the children in the Platte County division of public welfare and ordered it to take steps to place the children in a foster home. The McCuistons were eventually designated as foster parents.

During 1974, plaintiff traveled with Tom Schleuter, who was a truck driver, for about 6 months. In July,

they married and settled in Colorado. Later that year, the plaintiff began proceedings to regain custody of the children. After a hearing, the District Court for Platte County awarded custody to plaintiff, effective December 27, 1974, subject to supervision by the Laramie County, Colorado, welfare department. This order has never been amended or revoked.

With the aid of police, the plaintiff took custody of the children on December 27, 1974. Amy adapted well to the change in custody, but Andy, who was 2 years old by then, did not. He would not speak to his mother and seemed frightened of her and generally exhibited withdrawn and abnormally infantile behavior.

In January of 1975, the McCuistons made a brief visit to plaintiff's home during a trip to a hospital in Colorado. Some time during that trip, plaintiff asked the McCuistons to take Andy back with them and Andy returned to Nebraska with the McCuistons in late January 1975. The McCuistons claim the arrangement was to be permanent, while plaintiff asserts it was intended to provide an adjustment period for Andy.

In April 1975, the McCuistons attempted to persuade plaintiff to relinquish her parental rights to Andy. Delbert Tucker, at some point, had already relinquished custody of Andy to the McCuistons. On April 17, 1975, the county attorney of Lincoln County, Nebraska, requested and obtained an order from the county court temporarily placing Andy in the care and custody of Lincoln County welfare with Andy to remain in the McCuiston home.

In March 1976, the county attorney petitioned the Lincoln county court to terminate plaintiff's parental rights on grounds of neglect and abandonment. Through her attorney, plaintiff filed a special appearance and a plea in abatement protesting jurisdiction on the grounds of defective service of

process and that exclusive jurisdiction over Andy's custody was already vested in the District Court for Platte County.

A hearing was eventually scheduled for September 30, 1976. In a motion filed September 23, 1976, plaintiff's attorney requested leave to withdraw and moved a continuance to enable plaintiff to secure other counsel. The withdrawal was permitted, but the continuance was not granted. Plaintiff appeared at the hearing and stated she would represent herself. During the hearing, she cross-examined witnesses and testified on her own behalf. After the hearing, the court determined Andy was neglected within the meaning of section 43-202(2)(b) and (c), R. S. Supp., 1976, and set a dispositional hearing for November 2, 1976.

Plaintiff again appeared on her own behalf at the dispositional hearing. At the hearing, the court found the McCuistons were Andy's psychological parents, and it was in Andy's best interests to remain with them, but Andy might need his natural mother at some point and plaintiff's parental rights would therefore not be terminated. Andy was placed in the McCuistons' permanent care and custody and plaintiff was allowed visitation.

At the close of the dispositional hearing, the court informed plaintiff she still had a right to be represented by an attorney and had a right to appeal. Plaintiff asked, "How soon can I bring it back into court?" The court replied, "As soon as you file an appeal."

On November 15, 1976, an attorney entered an appearance on plaintiff's behalf and filed a notice of appeal. On January 4, 1977, that attorney also moved for permission to withdraw from the case. On January 7, 1977, Andy's guardian ad litem filed a motion to quash the proceedings on grounds the notice of appeal was not timely filed, the notice of appeal was not served on the guardian ad litem or the

minor child, no bond or undertaking was posted, and no transcript or bill of exceptions was filed. On January 31, 1977, the District Court granted both motions. No appeal was taken from this order.

In November of 1977, plaintiff brought the habeas corpus action, the dismissal of which is appealed from in this case. At the hearing on the McCuistons' demurrer and motion to dismiss, all the records of the above-described proceedings were introduced as exhibits. At the close of the hearing, the court stated a habeas corpus action was not a substitute for an appeal from the county court action and sustained the motion to dismiss. We affirm.

Plaintiff urges the writ of habeas corpus should have been granted because the county court did not have jurisdiction to award custody of Andy to the McCuistons. Plaintiff apparently claims the county court did not have jurisdiction over her person and clearly asserts the county court did not have jurisdiction over the subject matter because continuing sole and exclusive jurisdiction of matters pertaining to Andy's custody was vested in the District Court for Platte County.

The assertion that the county court did not have jurisdiction over plaintiff's person is patently without merit. Plaintiff's argument that she should not be held to have waived any defects in jurisdiction over her person by virtue of her "mere appearance" at the county court hearing overlooks the fact that any defect in jurisdiction over plaintiff's person was waived when the plea in abatement, alleging the county court did not have jurisdiction over Andy's custody, was filed: "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." State ex rel. Long v. Westover, 107 Neb. 593,

186 N. W. 998; Perrine v. Knights Templar's & Masons' Life Indemnity Co., 71 Neb. 267, 98 N. W. 841.

The argument that the county court did not have jurisdiction over the subject of Andy's custody requires more extended discussion. This court has held habeas corpus is a proper proceeding to determine the right to custody of a minor child. Green v. Green, 178 Neb. 207, 132 N. W. 2d 380; In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294. However, the writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error. In re Application of Schwartzkopf, *supra*. Thus, where the question of a child's custody has been determined in a prior proceeding by a court of competent jurisdiction, that disposition will control and cannot be disregarded in subsequent habeas corpus proceedings involving the same parties. Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783; State ex rel. Wookey v. Elifritz, 100 Neb. 320, 160 N. W. 113; 39 Am. Jur. 2d, Habeas Corpus, §§ 92 & 93, pp. 244-45.

Although the writ of habeas corpus may not be used to unsettle valid legal proceedings, it is always a proper remedy where a person entitled to custody of a child has been deprived of that custody by reason of a void judgment. Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388. Plaintiff's contention that the county court lacked jurisdiction of Andy's custody, if valid, would entitle her to prevail on this appeal for a court which lacks jurisdiction of the subject matter may not obtain jurisdiction even by consent of the parties. Ostler v. City of Omaha, 179 Neb. 515, 138 N. W. 2d 826.

Plaintiff points to ambiguities in the statutes defining the jurisdiction of the juvenile court and those defining the jurisdiction of the District Court in divorce proceedings. In pertinent part, the statutes in effect at the time of the termination of parental

rights proceedings were as follows: "Juvenile court shall mean . . . the county court sitting as a juvenile court . . . . Nothing in this act shall be construed to deprive the district courts of their . . . chancery jurisdiction . . . ." § 43-201(4), R. S. Supp., 1976 (Laws 1975, L.B. 288).

"The juvenile court in each county, . . . shall have jurisdiction as follows: . . . (2) Exclusive original jurisdiction as to any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child . . . ." § 43-202, R. S. Supp., 1976 (Laws 1975, L.B. 288).

"When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires." § 42-364, R. S. Supp., 1976 (Laws 1974, L.B. 1015).

"All proceedings under sections 42-347 to 42-379 shall be brought in the district court of the county in which one of the parties reside. Proceedings *may* be transferred to a separate juvenile court which has acquired jurisdiction pursuant to section 43-230." (Emphasis supplied.) § 42-348, R. R. S. 1943.

The issue raised by plaintiff is whether the "exclusive original jurisdiction" given to the county court sitting as a juvenile court is diminished by sections 43-201 and 42-364, R. S. Supp., 1976, and section 42-348, R. R. S. 1943, to concurrent jurisdiction where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings. If so, where jurisdiction has previously

been assumed by the District Court, the county court might not have authority to interfere with the exercise of that jurisdiction in a collateral proceeding, and any further proceedings concerning the custody and maintenance of the minor child would necessarily be brought in the District Court where the decree was rendered. See In re Estate of Rusch, 89 Neb. 265, 131 N. W. 209.

It is possible to imagine situations, such as when the juvenile court proceedings are part of a continuing custody battle between the parties to the divorce proceedings, where plaintiff's argument should prevail and the limiting language of section 43-201, R. S. Supp., 1976, should apply. However, section 43-201 does not apply under the circumstances present in this case for at least two compelling reasons.

First, the county court decree was rendered pursuant to a petition filed by the county attorney as provided by section 43-205, R. S. Supp., 1978. Where the county attorney, as a representative of the state, determines that it is necessary to act to protect a child in the county, filing a petition in county court is the only procedure available to him. To hold that the county court could not act whenever a District Court has previously determined custody in the course of divorce proceedings would be to frustrate the exercise of the state's power under sections 43-201 through 43-218, R. S. Supp., 1978.

Second, this was a proceeding to terminate parental rights. At the time of these proceedings, a termination of parental rights could only be decreed by a juvenile court in a proceeding brought for that purpose. Sosso v. Sosso, 196 Neb. 242, 242 N. W. 2d 621. It is true that parental rights were in fact not terminated in the county court proceeding. However, if we were to hold that the county court deprived itself of its jurisdiction by electing not to terminate parental rights after a full hearing on the

merits, we would be basing the court's jurisdiction on the outcome of the proceeding, a result which would be patently absurd.

We hold section 43-201, R. S. Supp., 1976, did not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978. Thus, the county court decree was not void for lack of jurisdiction over the subject matter and the petition for a writ of habeas corpus was properly dismissed.

AFFIRMED.

THE SCHOOL DISTRICT OF MURRAY, ALSO KNOWN AS SCHOOL DISTRICT NO. 56 OF CASS COUNTY, NEBRASKA, APPELLANT, V. H. NEAL LANCASTER, COUNTY SUPERINTENDENT OF SCHOOLS OF CASS COUNTY, ET AL., APPELLEES.

277 N. W. 2d 558

Filed April 17, 1979. No. 42131.

1. **Statutes: Intent.** Where the language used in the statute is ambiguous, recourse should be had to the legislative purposes.
2. _____: _____. Where because a statute is ambiguous it is necessary to construe it, the principal objective is to determine legislative intention.
3. _____: _____. Legislative intent is the cardinal rule in the construction of statutes.
4. _____: _____. A fundamental principle of statutory construction is to ascertain the legislative intent and to give it effect.
5. _____: _____. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers.
6. **Statutes: Intent: Legislature.** When the literal wording of a statute leads to an absurdity or to an illogical or unjust conclusion, the intention of the Legislature, as gathered from the entire act, will prevail.

7. **Statutes.** In construing a statute, the court must look to the object to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
8. **Statutes: Schools and School Districts.** Under the provisions of section 79-4,104, R. R. S. 1943, a territory's proportionate share of any balance remaining in the nonresident tuition fund is computed by determining the total amount paid into the fund by the territory and subtracting the amounts paid out of the fund on behalf of the territory. The balance, if any, constitutes the territory's proportionate share in the fund which the territory is entitled to receive.

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

Perry, Perry, Witthoff & Guthery, for appellant.

Ronald D. Moravec, Cass County Attorney, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and KORTUM and FAHRNBRUCH, District Judges.

KRIVOSHA, C. J.

Appellant herein, the School District of Murray, in the county of Cass, in the State of Nebraska, also known as School District No. 56 of Cass County, Nebraska (District 56), appeals from an order of the District Court for Cass County, Nebraska, denying District 56's prayer for an alternate writ of mandamus. For reasons more particularly set out in this opinion, we affirm the judgment of the District Court.

The decision in this case turns on the interpretation of the phrase "the territory's proportionate share of any balance remaining in the nonresident tuition fund" contained in section 79-4,104, R. R. S. 1943. Section 79-4,104, R. R. S. 1943, reads in full as follows: "If any secretary of the school board or board of education of any school district shall fail or neglect to make report of the first semester or first half year attendance separately, he may include the

same with the attendance report of the second semester or second half year, and the county treasurer shall pay for the whole attendance. In all cases where there is not sufficient money to pay the whole amount due any district or districts for the first semester or first half year, the balance due shall be included with the payment for the second semester or second half year. If there shall be any such deficiency, it shall be provided for in making the levy for the succeeding year. If a balance remains in the fund after all claims have been paid, it shall not revert to the county general fund but shall remain in the nonresident high school fund and be deducted from the amount levied for the succeeding year. When any territory not included in a school district offering secondary education becomes a part of such a district, the territory's proportionate share of any balance remaining in the nonresident tuition fund as of September 15 shall be credited to the district of which the territory has become a part."

District 56 maintains that the "territory's proportionate share" is arrived at by computing the ratio of the assessed valuation of the subject territory as it relates to the total assessed valuation of all pertinent territory times the balance in the fund as of September 15. The county, on the other hand, maintains that the "territory's proportionate share" is arrived at by determining the total amount paid into the fund by the territory and subtracting the amounts paid out of the fund on behalf of the territory. The balance, if any, constitutes the "territory's proportionate share" in the fund which the territory is entitled to receive.

Unfortunately for all concerned, the phrase "the territory's proportionate share of any balance remaining * * *" is not a classic example of legislative clarity. Therefore, its meaning cannot be determined from a simple reading of the statute. With

this in mind we now examine the facts and the statutes involved in this case.

School districts in Nebraska are divided into six classes. § 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. Class I school districts do not offer high school education. The laws of Nebraska, however, require that 4 years of nonresident public high school education be secured to all children of the State of Nebraska whose parents or guardians reside in a public school district which maintains less than a 4-year high school course of study. § 79-494, R. R. S. 1943. This is accomplished by contract between the Class I school district and any neighboring district offering high school education. § 79-486, R. R. S. 1943.

To provide the necessary funds for this type of program, the statutes in question were enacted. The parent or guardian of a high school age child living in a school district not offering a 4-year high school education makes application for educational benefits to the county superintendent of schools of the county in which they reside before July 1 of each year. § 79-4,105, R. R. S. 1943. There is no requirement that the application indicate which school district the child will attend. Such option is left to the parent or guardian and the student. Werth v. Buffalo County Board of Equalization, 187 Neb. 119, 188 N. W. 2d 442. Each high school district that will receive nonresident high school students certifies to the superintendent the rate to be charged for education of nonresident high school age students. § 79-4,102(2), R. R. S. 1943.

The superintendent then certifies to the county board of commissioners the following information: (1) The number of qualified pupils from all Class I school districts in the county for which application for nonresident high school education has been made; and (2) a list of school districts which have

been approved by the State Board of Education as schools qualified to grant nonresident public high school education to nonresident high school age pupils. § 79-4,102(1), R. R. S. 1943.

The county assessor then certifies to the county board of commissioners the current valuation of all property subject to the applicable levy in the county. § 23-927.01, R. R. S. 1943.

The county board of commissioners, sitting as the county board of equalization, levies a sufficient tax to pay the nonresident high school tuition, as certified by the county superintendent of schools. § 79-436, R. R. S. 1943. In so doing, the county board excludes from the levy the assessed value of all taxable property of any district in which is maintained an approved 4-year high school, and one-half of the assessed value of all taxable property of any district in which there is maintained an approved 2-year high school.

The county treasurer collects the payment of the tax levied and deposits it into a fund known as the nonresident high school tuition fund. § 79-437, R. R. S. 1943.

During the school year each receiving high school district certifies to the county superintendent of schools the number of nonresident pupils enrolled and the number of days those pupils were enrolled. The superintendent certifies that information to the treasurer. Upon such order the treasurer pays to the appropriate receiving high school districts an amount sufficient to pay the nonresident high school tuition rate previously established. § 79-4,103, R. R. S. 1943.

If there is not sufficient money in the fund to pay the whole amount due any district or districts for the first semester or first half year, the balance is included with the payment for the second semester or second half year. Further, if there is any deficiency, it is made up by including the deficiency

in the levy for the succeeding year. Likewise, if a balance remains, the monies do not revert to the general fund but remain in the nonresident high school fund and are deducted from the amount necessary to be levied for the succeeding year. § 79-4,104, R. R. S. 1943.

District 56 was a Class I school district for a number of years and, as such, maintained only elementary grades. Children residing in District 56 and enrolled in grades 9 through 12 were educated as nonresident high school students in neighboring high school districts. On March 22, 1977, an election was held in District 56 with the voters at that time voting to become a Class II school district. As a Class II school district, District 56 would maintain its own high school or would provide high school education for its students by contract with another district and not under the provisions of the nonresident high school education statutes. The vote to become a Class II school district was made effective May 28, 1977, which coincided with the end of the 1976-77 school year.

In July of 1977 District 56 made application to the Commissioner of Education and State Board of Education and was reclassified as a Class III school district, effective September 1, 1977. The reason for this change is not clear from the record, but is undoubtedly due to a reexamination of the population within the district. § 79-102(2) and (3), R. R. S. 1943. By reason of these changes, high school students whose parents or guardians reside within District 56 were no longer entitled to nonresident high school tuition privileges in other school districts. District 56 itself had to provide for their education. The last payment made out of the fund for the education of children residing in District 56 as nonresident high school tuition students was on June 1, 1977. Evidence in this case discloses that for the year 1976-77 the county treasurer paid out $22,467.90 more

for the education of children residing in District 56 than the district had paid into the fund. Moreover, evidence discloses that for at least the 18 years preceding this action, beginning with 1959-60, District 56 received more money for the education of its nonresident high school students than it paid into the fund.

On September 15, 1977, the nonresident high school tuition fund had a balance of $198,985.09. It is with this background that we attempt to determine what the Legislature meant when it provided that when a territory becomes a part of a district offering secondary education it is to receive "the territory's proportionate share of any balance remaining in the nonresident tuition fund as of September 15 * * *."

We have earlier announced the basic principles to be used in statutory interpretation. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. Wang v. Board of Education, 199 Neb. 564, 260 N. W. 2d 475. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine legislative intention. Equal Opportunity Commission v. Weyerhaeuser Co., 198 Neb. 104, 251 N. W. 2d 730. Legislative intent is the cardinal rule in the construction of statutes. Brown v. Sullivan, 195 Neb. 729, 240 N. W. 2d 51. A fundamental principle of statutory construction is to ascertain the legislative intent and to give it effect. United States of America v. Edmunds, 186 Neb. 271, 182 N. W. 2d 829. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. State v. Jennings, 195 Neb. 434, 238 N. W. 2d 477. When the literal wording of a statute leads to an absurdity or to an illogical or unjust conclusion, the intention of the Legislature as gathered from the entire act will prevail. Ray v. School District of Lincoln, 105 Neb. 456, 181 N. W. 140. In con-

struing a statute the court must look to the object to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592.

While we have indicated that legislative intent and history are important in attempting to resolve these matters, an examination of the legislative history in this case does not provide us with either a wealth of material or a clear answer.

Prior to 1971, section 79-4,104, R. R. S. 1943, was silent with regard to the disposition of any balance remaining in the nonresident school tuition fund should a territory establish its own secondary educational scheme and no longer be eligible to participate in the fund. In 1971, L.B. 447 was introduced and considered by the Eighty-second Nebraska Legislature, First Session. The specific language contained in L.B. 447, as introduced, which sought to amend section 79-4,104, R. R. S. 1943, reads as follows: "When any school district ceases to exist, that district's proportionate share of any balance remaining in the nonresident tuition fund shall be credited to the district of which it becomes a part." The statement of intent prepared by the principal introducer of the amendment provided: "The intent of the bill is to provide that when a school district is merged with another district, its share of the nonresident tuition fund shall follow it, and be credited to the new district."

During a committee hearing Mr. S. H. Brauer appeared before the committee on education in support of L.B. 447 and gave testimony as follows: "S. H. Brauer: Mr. Chairman, members of the Education Committee, my name is S. H. Brauer, Jr., and I would like to appear on behalf of LB 447. I perhaps, for the benefit of some of you who have not been

aware of this problem, the nonresident tuition fund by law, should not develop into a surplus. However, in a number of the counties, quite substantial surpluses have evolved over the years and when a school district joins with a K-12 system or when freeholders transfer their property into a K-12 system * * * the money *which those people have contributed to this surplus fund by law, is locked into this fund.* And, therefore, it is not following them into the district in which they transfer. And so with the amount of reorganization that has taken place, a lot of taxpayers have consequently lost a substantial amount of money *which they contributed in taxes* which was held in this fund. And so what this bill is attempting to do is to devise a means whereby this money would follow them into the high school system which they attach this property to on a pro rata basis." (Emphasis supplied.)

It would appear from that discussion that the proponents of L.B. 447 were concerned about the individuals in the territory who paid money into a fund which continued to increase over time, contrary to the statutes. While the statute does not contemplate the creation of any surplus and requires that if any surplus remains at the end of any given year, it should be taken into account before levying the tax for the succeeding year, a surplus, nevertheless, did develop. It appears clear to us that the Legislature was attempting in L.B. 447 to eliminate a "windfall." This "windfall" accrued to those territories which remained a Class I district when other portions of the territory removed themselves to become a district other than a Class I district. The surplus caused in part by their contributions amounted to a "windfall" for the remaining Class I districts.

If that was the basic intent of L.B. 447, we would be hard pressed to now declare that District 56 should enjoy a "windfall" by reason of its leaving the district and that the remaining territories should

suffer a detriment by reason thereof. Certainly, the provisions of L.B. 447 could not have been intended for that purpose. Prior to the amendment, if any territory left, it likewise left its surplus funds. The purpose of L.B. 447 was to eliminate such a result and to insure that a withdrawing district which had contributed more than it had received could take with it the surplus paid by the withdrawing district. Were we to now support District 56' position, we would not only be providing that District 56 might receive the benefit of all funds contributed by it during the school year, but it would likewise be permitted to withdraw funds contributed by others, thereby increasing the remaining districts' deficit to the benefit of District 56. There is nothing in the history of L.B. 447 to sustain that position.

If, instead of a surplus existing in the fund on September 15, there was a deficit existing at the time of withdrawal, District 56 would not be called upon to make up that deficit. Only the remaining districts would be so burdened. It appears to us that we should interpret this section consistent with the legislative intent to insure that there is an even-handed approach to the surplus. If District 56 does not suffer the burdens by reason of its withdrawal when a deficit exists, it likewise should not enjoy a windfall when a surplus exists. The record indicates District 56 has received more money for the education of its students than in fact it contributed. Yet a surplus remains. This surplus can only be occasioned by reason that other territories within the district have already contributed more to the fund than they received from the fund. To now sustain the district's position appears to us to be adding insult to injury. We do not believe that the legislative intent nor a reading of the statute compels such a result.

District 56 has also directed our attention to a number of other statutes wherein, upon dissolution,

merger, or otherwise, division is made based upon the formula suggested by District 56. The difficulty with such examples, however, is that in each of those instances the statute specifically directs the division to be made in such manner, as District 56 contends is appropriate here. §§ 79-414, 79-415, 79-417, and 79-420, R. R. S. 1943. The Legislature failed to so direct in section 79-4,104, R. R. S. 1943. It can easily be argued that the Legislature knew how to direct a division of funds based upon the formula advocated by District 56. In the absence of that direction we find that the Legislature did not intend such a result.

Several other errors are assigned by District 56. However, in view of our disposition of this issue, consideration of those errors is not necessary. The judgment is affirmed.

AFFIRMED.

FAHRNBRUCH, District Judge, concurs in result.

PAUL B. MORGAN, TRUSTEE, AND JOHN LEE HOICH, BENEFICIARY, APPELLEES, V. SHARMAINE KAY ZOUCHA, APPELLANT, IMPLEADED WITH EUGENE T. ZOUCHA, APPELLEE.

277 N. W. 2d 564

Filed April 17, 1979. No. 42170.

Equity: Foreclosure. Courts of equity will decree a strict foreclosure only under special circumstances where it would be inequitable and unjust to refuse them. Whether or not such a decree will be granted is dependent upon the facts of the particular case being considered and is necessarily addressed to the sound judicial discretion of the court. Where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract.

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

Mrs. Eugene Zoucha, pro se.

A. J. Whalen, for appellees.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and COLWELL and VAN PELT, District Judges.

COLWELL, District Judge.

Defendant, Sharmaine Kay Zoucha, appeals from an adverse judgment in a strict foreclosure suit and the dismissal of her cross-petition for damages.

On May 31, 1977, Eugene T. Zoucha made a written offer to purchase a residence at 3701 South 23rd Street, Omaha, Nebraska, for $13,500, "all carpeting, grading is to be completed by seller." On June 2, 1977, Paul B. Morgan, trustee, seller, and Eugene T. Zoucha and Sharmaine Kay Zoucha, husband and wife, buyers, in writing agreed to sell and buy on a long-term contract the same premises (with legal description) for $13,500 with $900 paid down and the balance in monthly payments. Included in the agreement was the condition, "In the event that Buyers fail to make any payment, as provided in said Purchase Agreement, for a period of 30 days or more, then Buyers agree to vacate said premises and forfeit any and all rights therein." On July 2, 1977, a memo of settlement was signed by Eugene T. Zoucha and Paul B. Morgan. Buyers were credited with $60 for a broken window and $75 for their laying the carpet; monthly payments were to be $142.68, including principal, 9 percent interest, taxes, and insurance; and a provision which stated, "It is hereby agreed that seller, John L. Hoich is to pay for sidewalk required by the City of Omaha and for replacing back basement door and buyers assure sellers there are to be no more repairs required by seller or agent."

About this time defendants occupied the premises, made periodic payments and credits totaling

$1,559.68, the last payment having been made November 17, 1977. Defendants, during this time and during these proceedings, experienced separation and domestic problems.

On January 6, 1978, plaintiffs filed their petition in the District Court for Douglas County, Nebraska, alleging that Paul B. Morgan, trustee, is the owner of the legal title to the real estate described in this proceeding, holding the same for the benefit of John Lee Hoich, beneficiary, and also alleging the execution of the agreements and defendants' default. The prayer is for an accounting and strict foreclosure. Defendant Eugene T. Zoucha does not answer and his default is entered. Appellant filed several pleadings variously denominated as answer, counterclaim, cross-petition for breach of contract, fraud, estoppel, and sex discrimination. Her theory of defense and recovery is not clear; she seeks neither specific performance nor rescission and damages. We give the pleadings a liberal interpretation and treat them as an answer and a cross-petition for damages. The prayer is for damages and return of the $900 downpayment.

Trial was had on March 28, 1978, with appellant appearing pro se. Judgment was entered April 14, 1978, on plaintiffs' petition generally in favor of plaintiffs and against defendants, including the finding, "* * * no special circumstances have been shown that make it inequitable to refuse strict foreclosure * * *;" hearing was continued to April 25, 1978, on appellant's cross-petition to give her an opportunity to engage counsel and produce additional evidence in support of that cause. On April 25, 1978, no counsel appearing of record and nothing further produced, judgment was finally entered for plaintiffs on their petition finding due $13,021.44, ordered strict foreclosure, and gave defendants 20 days from May 1, 1978, to pay the amount due or their right, title, interest, and equity of redemption would be

forever barred. The court further found that appellant had failed to sustain her burden of proof on her cross-petition which was dismissed. Appellant's motion for new trial was overruled and this appeal followed.

The law is well settled in this state that "Courts of equity will decree a strict foreclosure only under special circumstances where it would be inequitable and unjust to refuse them. Whether or not such a decree will be granted is dependent upon the facts of the particular case being considered and is necessarily addressed to the sound judicial discretion of the court * * *. But where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract." Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217; Patterson v. Mikkelson, 86 Neb. 512, 125 N. W. 1104; Ruhl v. Johnson, 154 Neb. 810, 49 N. W. 2d 687. The function of a strict foreclosure proceeding is to confirm legal title in plaintiff. Foster v. Ley, 32 Neb. 404, 49 N. W. 450.

The evidence is undisputed that Paul B. Morgan, trustee, was the owner of the fee title to the real estate; that John Lee Hoich was the owner of the beneficial interest; and that the defendants had breached the agreement in that no payments had been made for more than 30 days after the last payment on November 17, 1977. Appellant stated she did not want the house, only a fair settlement. The house was vacated in May 1978. Plaintiffs did install a sidewalk, repair the basement door, and did some grading; however, there is conflict in the evidence concerning this work. In determining the weight thereof we consider the trial judge observed the witnesses and must have accepted one version of the facts rather than the other. See Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131. Appellant's claim for damages generally relates to a claim for a setoff against the amount due on the contract and her offer to make a

fair settlement. Her claim that plaintiffs prevented her from listing and selling the premises for $16,000 was speculative.

Appellant contends that the $1,460 in money paid on the contract by defendants should have been returned to her. This sum was about 11 percent of the contract price, and the contract clearly provides for its forfeiture in the event of default. Defendants' possession of the premises for about 10 months compares with $150 monthly rental value shown by the evidence.

Appellant claims that the court should have appointed counsel for her at public expense. Originally, she insisted on proceeding pro se; she did not request counsel until the day of the trial. There is no statute, rule of court, or other authority in this state to appoint counsel at public expense under the circumstances here.

A large part of the appellant's pleadings, evidence, and brief includes material not relevant to the issues, approaching an abuse of the judicial process. Frequent reference is made to sex discrimination, her rights under city ordinances, the Uniform Residential Landlord and Tenant Act, Real Estate Brokers Act, mortgage foreclosure statutes, and Protection From Domestic Abuse Act. Plaintiffs' counsel afforded appellant unusual professional courtesy under the circumstances. The trial judge displayed an abundance of restraint and patience during all of the proceedings in keeping with his long and distinguished career as a trial judge.

After considering those errors claimed in the motion for new trial and those assigned in appellant's brief that are meritorious, we conclude the judgment of strict foreclosure and dismissal of the cross-petition were correct; the title to the premises should be confirmed in Paul B. Morgan, trustee, and John Lee Hoich, beneficiary; and defendants' equity of redemption is barred.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD F. WEINACHT, APPELLANT.

277 N. W. 2d 567

Filed April 17, 1979. No. 42172.

1. **Criminal Law: Miranda Rights.** The general rule applicable to custodial interrogations by the police is that if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.
2. _____: _____. "Interrogation" occurs when the subject is placed under a compulsion to speak.
3. **Criminal Law: Miranda Rights: Waiver.** Where during a custodial interrogation the individual being questioned indicates he does not wish to talk without the presence of an attorney, and the officer, seeking only clarification of the individual's intention not to talk, asks an additional question for that purpose, and the individual then answers the questioning officer by agreeing to talk, his answer constitutes an explicit, clear, and unequivocal waiver of his prior request for assistance of counsel.
4. **Evidence: Motions, Rules, and Orders.** When the evidence is conflicting regarding a motion for the suppression of evidence the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion.
5. **Criminal Law: Statutes: Sentences.** It is the general rule that where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
6. _____: _____: _____. Under the new Nebraska Criminal Code, sections 28-101 to 28-1335, R. S. Supp., 1978, effective January 1, 1979, offenses committed before that date shall be construed and punished according to the provisions of law existing at the time of the commission thereof, in the same manner as if the new criminal code had not been enacted.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, Stanley A. Krieger and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Defendant below, Ronald F. Weinacht, appeals to this court from his conviction of the offense of robbery under section 28-414, R. R. S. 1943, and his sentence of 3 years imprisonment in the Nebraska Penal and Correctional Complex which was imposed by the trial court. His sole assignment of error as set out in his brief on appeal is that the District Court committed reversible error in failing to sustain the defendant's motion to suppress statements made by the defendant to the police during police interrogation. However, in his supplementary brief, he raises the additional issue that under sections 28-324 and 28-105(1), R. S. Supp., 1978, effective January 1, 1979, the statutory minimum sentence for the offense of robbery was reduced to 1 year imprisonment, as distinguished from the minimum statutory sentence of 3 years imprisonment for robbery under section 28-414, R. R. S. 1943, and that therefore his sentence under the latter section should be vacated and the cause remanded to District Court for resentencing. We affirm the conviction and sentence of the trial court.

We note at the outset that the bill of exceptions filed in this appeal consists of 41 pages devoted to the hearing on defendant's motion to suppress the confession he had given to the police, and 5 pages with reference to defendant's sentencing at a later date. Nowhere in the bill of exceptions is there set forth the proceedings of the trial itself, although it appears that at the sentencing which occurred on June 13, 1978, the court, in its opening remarks, made reference to the fact that defendant had appeared on April 27, 1978, and had submitted evidence by *stipulation* and that the court had found him guilty of the charge of robbery. There also appears

in the transcript the judge's docket sheet for the case, under date of April 27, 1978, showing that a Miranda hearing was held and testimony adduced, following which there is a notation that trial by jury was waived, the case submitted to the court on *stipulation*, and the court finds the defendant guilty as charged. The nature and contents of the stipulation referred to with reference to the trial itself is not shown in the record. However, in his brief on appeal defendant states that after the motion to suppress, the court admitted the statements made by the defendant "and the matter was stipulated to the court on that basis." Nowhere in its brief or in its oral argument does the State contradict or take exception to defendant's statement as set out above, and we shall therefore assume that the evidence upon which defendant was convicted by the trial court, pursuant to the stipulation referred to, was, primarily, the confession of the defendant which he had unsuccessfully attempted to have suppressed at the prior hearing on the same date.

We first turn to a consideration of defendant's claim that the District Court erred in failing to sustain defendant's motion to suppress the statements made by him to the police during police interrogation. Defendant contends that his statement made to the police should have been suppressed and not received in evidence because it was obtained in violation of his constitutional rights as declared in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966). In that case the Supreme Court of the United States laid down the rule with reference to custodial interrogation as follows: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. * * * If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." See, also, State v. Krueger, 194

Neb. 304, 231 N. W. 2d 364 (1975); and State v. Moore, 189 Neb. 354, 202 N. W. 2d 740 (1972). Weinacht contends that he was subjected to continued interrogation by the police after he had indicated that he did not wish to talk without the presence of an attorney, and further that he did not make a valid waiver of his right to the presence and assistance of an attorney. The resolution of this issue necessitates an examination of the record. It appears that on Friday, March 10, 1978, the defendant was arrested in connection with the robbery of a Little King's restaurant on February 21, 1978, and was placed in the Douglas County jail. On Monday, March 13, 1978, Officer Pavel of the Omaha police took the defendant to the police station for questioning. There is a conflict in the evidence given by Officer Pavel and that given by the defendant as to what then transpired. Officer Pavel testified that at arriving at the police station he took the defendant to an interrogation room and commenced filling out a rights advisory form, later received in evidence, by asking the defendant each of the questions which appear on the exhibit. The defendant answered "yes" to the first five questions; but when he asked the defendant No. 6: "Knowing your rights in this matter, are you willing to make a statement to me now?", the defendant replied, "I would like to have an attorney present." Officer Pavel was then asked: "Q. Okay And what was your response or reaction when he told you that he wanted to have an attorney?" Officer Pavel responded: "As soon as he made that statement, I went over it again. I says, 'Does that mean you do not want to say anything without an attorney present?' And immediately the party says, 'I'll — I've changed my mind. I'd like to tell you about it.' Q. And how long did it take for him to verbalize to you that he had changed his mind? A. About three or four seconds. Q. So it happened almost instantaneously? A. Yes, it did." Officer

Pavel was then asked: "Okay. Okay, all right. Did You — At the time you talked to Mr. Weinacht, did you have in your possession a statement from Michael Owens? A. No. I knew it by heart because I took it from him. I did not have the statement there with me, no. Q. Okay. Did you — Before Mr. Weinacht changed his mind about having an attorney, did you ever confront him or continue to talk to him about what Michael Owens had told him — or — excuse me — what he had told you? A. No. Right after when I read that statement, I stood up, and I re-asked him that. I says, 'Does that mean that you do not want to say anything about this statement?' And I stood up to leave because I was just going to go in there and book him. And right then and there, he stated, 'No. I'd like to talk to you about it.' " Officer Pavel was also asked: "Q. All right. Did — At any time during the course of the interview, other than when he initially stated that he wanted to have his attorney and then changed his mind right away, did he ever state that he wanted to have an attorney? A. No, just that statement there. And then, when I came forth — As soon as he said that, I says, 'Does that mean that you do not want to say anything without your attorney?' That was just simultaneously."

It appears that the defendant was an accomplice or aider and abettor of Michael Owens, whose prior statement was referred to in the questioning, and that Owens had done the actual robbing of the restaurant, while the defendant remained outside in an automobile. Defendant's version of what transpired at the police station varies considerably from that testified to by Officer Pavel. He testified that after Officer Pavel had read him his rights and had asked him if he wanted to make a statement, he had replied: "No, not without an attorney present," and Officer Pavel had then stated: "Well, what would you say if I was to show you a statement handwrit-

ten by Michael Owens implicating you in the robbery?" Defendant testified that Pavel then showed him Owens' statement, and that defendant then said: "Well, I'll change my mind. I'll talk." Defendant was then asked: "Q. All right. So is what you are telling the Court today is that you're disagreeing with Officer Pavel's testimony, as far as it relates to your advising him that you didn't want to make a statement or not without an attorney; and then he turned around and said, 'Does this mean you're not going to make a statement?' And then you said, 'Okay. I'll change my mind.' A. No. He said — He turned — He got — He opened the drawer, I think, and he pulled out this statement; and he said 'Well, what would you think if I showed you this statement by Michael Owens implicating you?' And I said, 'Well, I'll talk.' I started getting all shook up and everything. Q. All right. So you're disagreeing with at least that portion of his testimony? A. Yes sir." Later, defendant again testified that there is no question that he saw Michael Owens' statement in between his request for an attorney and his change of mind.

At the conclusion of the evidence the court stated: "Well, I think that obviously the issue of the credibility of the witnesses is one that has to be resolved by the jury. Taking Officer Pavel's testimony on the surface, he didn't see the defendant until such time as he advised him of his rights, and that he started to leave immediately, and within three seconds the defendant changed his mind. And he's got his constitutional rights, and he also has a kind of unwritten right to change his mind. And if you take Officer Pavel's testimony at its face value, he did immediately change his mind. * * * And the use of the confession during an interview, a confession of a co-defendant, does not in itself render the confession involuntary. So I think, even without resolving the issue of the credibility of the witnesses, which I

think is fundamentally for the jury, that the statement was freely and voluntarily given by the defendant after he was fully advised of his constitutional rights under the Miranda decision, and he made an intelligent, knowing waiver of those rights when he chose to make the statement. The Court makes a finding that the motion to suppress the confession is denied."

While it is true, as stated in Miranda and repeated in Nebraska case law, that when, during a custodial interrogation, the defendant indicates he does not wish to talk without the presence of his attorney, questioning must cease; yet there is serious question whether his statement that he did not want to say anything without an attorney present, constituted continued interrogation. "Interrogation" occurs when the subject is placed under a compulsion to speak. Miranda v. Arizona, *supra*; State v. Godfrey, 131 N. J. Super. 168, 329 A. 2d 75 (1974). In the instant case, we do not believe that merely asking the defendant again about his refusal to talk without the presence of an attorney constituted a "compulsion" to talk. A similar situation was presented in United States v. Rodriguez-Gastelum, 569 F. 2d 482 (9th Cir., 1978). In that case the defendant was convicted in the United States District Court for the District of Arizona for an offense arising out of transporting marijuana. He appealed. The Court of Appeals held that: (1) A per se rule prohibiting a suspect in a criminal investigation from waiving his right to counsel after having initially made known his desire to have the assistance of counsel is neither necessary nor appropriate; and (2) under the circumstances, including the absence of any badgering, pressure, or coercion on the part of the customs officer, the defendant's answer to a question put by the customs officer in an attempt to clarify whether the defendant intended to talk to the officer constituted an explicit, clear, and unequivocal

waiver of defendant's prior request for assistance of counsel. The court held that even assuming that defendant's initial response to the customs officer was sufficient to invoke the protection of the Fifth and Sixth Amendments, where the officer asked a subsequent question in an attempt to clarify defendant's intention, and in the absence of any coercion, badgering, or pressure on the part of the officer, the defendant's answer — "That's fine." — to the officer's question — "Do you want to talk to me now without any attorney?" — constituted an explicit, clear, and unequivocal waiver of defendant's prior request for assistance of counsel and, therefore, incriminating statements which the defendant thereafter made were admissible in the narcotics prosecution. In that case the court stated: "Under *Miranda*, all questioning must stop once counsel has been requested. While we have little difficulty with that basic principle, the situation is more complex when the interrogation ceases, only to be resumed after an alleged reconsideration by the suspect.

"The factual patterns vary. At times the accused talks to the same officer who gave him the *Miranda* warnings. Or he may talk to another officer who has a different style, personality, and approach. Sometimes the suspect talks to an undercover agent believing him to be a fellow in crime. Or the *Miranda* warnings are forgotton or ignored both by the prisoner and the officer.

"The question is not quite so difficult when the interrogating officer is uncertain as to the intention of the suspect, as was Officer Brown, and seeks only a clarification." That is the situation now before us. To argue that Officer Pavel's second question constituted "further impermissible interrogation" is simply not true, as the question went to defendant's understanding of his rights, and not to his involvement in the robbery.

However, even assuming that the question did con-

stitute further interrogation, we do not believe the result in this case would be changed, even considering defendant's allegation that he was induced to change his mind and give his statement to the police by virtue of the fact that he was allegedly shown a prior confession or statement given by Owens. Officer Pavel testified he did not confront the defendant with Owens' statement, nor did he talk to him about what Owens had told him. The trial judge was faced with conflicting evidence upon this point, and made the determination that the statement was freely and voluntarily given by defendant after he was fully advised of his constitutional rights, and after he made an intelligent, knowing waiver of those rights. We have held that when evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Harig, 192 Neb. 49, 218 N. W. 2d 884 (1974); State v. Batchelor, 191 Neb. 148, 214 N. W. 2d 276 (1974). We find no abuse of discretion here, and the decision of the trial judge must be sustained.

We now consider defendant's contention that he is entitled to be sentenced under the provisions of sections 28-324 and 28-105 (1), R. S. Supp., 1978, which became law on January 1, 1979, rather than under section 28-414, R. R. S. 1943, which was in effect at the time of the commission of the crime. He bases his contention upon the case of State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225 (1971), in which we held that where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act "* * * unless the Legislature has specifically provided otherwise." We have reiterated the above rule in many subsequent cases. See, for example, State v. Goham, 187 Neb. 34, 187 N. W. 2d 305 (1971); State v.

Roberts, 188 Neb. 209, 196 N. W. 2d 118 (1972); State v. Patterson, 192 Neb. 308, 220 N. W. 2d 235 (1974). We point out, however, that our Legislature *has* specifically provided otherwise. In section 28-103(1), R. S. Supp., 1978, it is specifically provided: "The provisions of this code shall not apply to any offense committed prior to January 1, 1979. Such an offense shall be construed *and punished* according to the provisions of the law existing at the time of the commission thereof in the same manner as if this code had not been enacted." (Emphasis supplied.) We believe the foregoing language is clear, unequivocal, and not subject to interpretation. At the time of the commission of the offense of which the defendant was convicted, the penalty for robbery was imprisonment from 3 to 50 years. The defendant received the minimum sentence under that statute.

There appearing to be no error requiring reversal of this case, the judgment and sentence of the trial court must be affirmed.

AFFIRMED.

DALE ELECTRONICS, INC., APPELLEE, V. FEDERAL INSURANCE COMPANY, APPELLANT.

277 N. W. 2d 572

Filed April 17, 1979. Nos. 42441, 42612.

Appeal and Error: Time. A notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Motion to strike and

motion to dismiss in case No. 42441 overruled. Appeal in case No. 42612 dismissed.

Bruce D. Vosburg and Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

James J. Holmberg, for appellee.

On motion for the court.

BOSLAUGH, J.

This is a suit on an insurance policy issued by the defendant insuring an airplane owned by the plaintiff against loss or damage. After trial to the court on December 14, 1977, the matter was taken under advisement. On August 30, 1978, the trial court wrote a letter to counsel for the parties stating the court "finds generally for the plaintiff and against the defendant in the sum of $245,905.53, plus the costs and interest." The letter also requested counsel for the plaintiff to "prepare a proper journal." On September 6, 1978, the defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. On September 18, 1978, an order was entered which recited that upon stipulation of the parties a hearing on the defendant's motion "based on the decision of the Court dated August 30, 1978" was continued until after a journal entry had been entered and a hearing set for determination of the costs which had been allowed.

A journal entry awarding judgment to the plaintiff in accordance with the August 30, 1978, letter of the trial court was filed on September 21, 1978, and an entry made in the trial docket.

On September 28, 1978, the defendant filed a second motion for judgment notwithstanding the verdict or in the alternative for a new trial.

The motion for new trial was heard on October 20, 1978, and the matter taken under advisement. On October 25, 1978, the trial court wrote a letter to

counsel for the parties stating that the "motion for new trial is overruled;" that a remittitur was ordered in the amount of $3,640; that interest was awarded from February 1, 1975; and that attorney's fees were allowed in the amount of $39,560 plus $15,453.14 expenses. The letter also requested the attorney for the plaintiff to "journalize."

Signed orders overruling the defendant's motion, allowing attorney's fees and costs, and modifying the journal entry of September 21, 1978, in accordance with the October 25, 1978, letter of the trial court were filed on November 20, 1978, and an entry made in the trial docket. On the same day a notice of appeal, a praecipe for a transcript, and a request for a bill of exceptions were filed by the defendant. The appeal was docketed in this court as case No. 42441. A second notice of appeal filed February 15, 1979, has been docketed as case No. 42612. The plaintiff has moved to dismiss the appeal in case No. 42441 on the ground that the notice of appeal was premature, there having been no final order entered at the time the notice of appeal was filed.

An affidavit of the clerk of the District Court, which has been filed in this court, indicates that the notice of appeal was received in the clerk's office on the morning of November 20, 1978, and a filing stamp was affixed at that time. The signed orders overruling the motion for new trial and modifying the judgment rendered on September 21, 1978, were received on the afternoon of the same day. Entries in the appearance docket recording the filing of the orders and the notice of appeal were not made until some time later. This affidavit would sustain a finding that the notice of appeal was not premature because the filing was not completed until after the orders had been filed and an entry made in the trial docket. In other words, the notice of appeal was not premature because the judgment to which it related was rendered before the filing of the notice of appeal

had been completed. It further appears that a notice of rendition of judgment as required by section 25-1301.01, R. R. S. 1943, was not sent to counsel although conformed copies of the amended judgment and orders were mailed. See Simmons v. Lincoln, 176 Neb. 71, 125 N. W. 2d 63. We do not, however, rest our decision on these grounds.

It is fundamental that there must be a judgment or final order before there can be an appeal to this court. § 25-1911, R. R. S. 1943; Essay v. Essay, 180 Neb. 291, 142 N. W. 2d 337. The appellant must also file a notice of appeal within the time limited by statute before this court can acquire jurisdiction. § 25-1912, R. R. S. 1943; Giangrasso v. Eagle Distributing Co., 185 Neb. 406, 176 N. W. 2d 16. A notice of appeal filed after the time limited by statute is ineffective to confer jurisdiction on this court. Diedrichs v. Empfield, 189 Neb. 120, 201 N. W. 2d 254.

The question is what effect should be given to a notice of appeal filed after the trial court has announced its decision by letter or otherwise, but before there has been a rendition or entry of judgment. A number of courts now hold that a premature notice of appeal is continuing in nature and becomes effective upon rendition or entry of judgment. See, Williams v. State, 324 So. 2d 74 (Fla., 1975); State ex rel. Shevin v. Rawls, 326 So. 2d 173 (Fla., 1976); Haverstick v. Banat, 331 N. E. 2d 791 (Ind. App., 1975); Evola v. Wendt Construction Company, 323 P. 2d 158 (Cal. App., 1958). See, also, Lemke v. United States, 346 U. S. 325, 74 S. Ct. 1, 98 L. Ed. 3; Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222.

We are unable to determine any compelling reason why a notice of appeal filed after the trial court has announced its decision should be held to be ineffective if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in ac-

cordance with the decision which was announced and to which the notice of appeal relates.

Within the limits stated, and subject to the conditions expressed, we hold that a notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates.

The motion to strike the supplemental transcript and the motion to dismiss the appeal in case No. 42441 are overruled. The appeal in case No. 42612 is dismissed.

MOTION TO STRIKE AND MOTION TO DISMISS IN CASE NO. 42441 OVERRULED. APPEAL IN CASE NO. 42612 DISMISSED.

DORIS J. PFEIFFER, APPELLEE AND CROSS-APPELLANT, V. BEN C. PFEIFFER, APPELLANT AND CROSS-APPELLEE.

277 N. W. 2d 575

Filed April 17, 1979. No. 41974.

1. **New Trial: Motions, Rules, and Orders: Time.** A motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.
2. **Divorce: Alimony: Property.** The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable.

3. _____: _____: _____. The fixing of alimony or distribution 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.

Philip M. Kneifl of Kneifl, Kneifl & Forrest, for appellant.

Michael J. Mooney of McCormack, Cooney & Mooney, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and WHITE, JJ., and KELLY, L. W., JR., District Judge.

MCCOWN, J.

This is an action for dissolution of marriage. The District Court dissolved the marriage, divided the property of the parties, and awarded alimony to the wife. The husband has appealed and the wife has cross-appealed.

The parties were married on October 14, 1944. At the time of trial in October 1977, the husband was 59 years old and the wife was 55. They had four children, all of whom had attained their majority prior to trial. In 1970 the wife left the family home and on September 3, 1970, filed a petition for divorce from bed and board. On September 10, 1970, the trial court entered an order granting custody of the two minor children still at home to the husband, and directing the payment of temporary support for the wife. On October 5, 1970, the husband answered and filed a cross-petition for a decree of absolute divorce. No further action was taken until 1977. All support payments were made. The husband filed an amended answer and cross-petition on April 12, 1977, in which he alleged that all the children had attained their majority and renewed the prayer for absolute divorce. Trial was held in October 1977.

From the time of the marriage in 1944 until 1946, when the husband returned from active military duty as a pilot in World War II, the wife continued to work as a registered nurse. After 1946 she worked only occasionally until 1961, and not thereafter. Upon return from active duty, the husband operated an appliance business in South Omaha until he was recalled to active duty in the Korean War in 1951. He served as a pilot in Korea until 1953. In 1953, he again retired from active military duty. At that time he and another individual organized a corporation known as Majors, Inc., whose principal business is the manufacture and distribution of custom-designed plastic products. The corporation is a closely-held corporation in which the husband owns 160 of 265 shares. He is the president and chief operations officer of the corporation. The operation of the corporate business has been the sole business activity of the husband since 1953.

Sometime in the mid-1950's the wife became an alcoholic and was hospitalized several times between 1961 and 1967 for alcoholism. In 1968 the wife fell down the basement steps at the family home and fractured her skull. She suffered an organic brain syndrome and depressive neurosis, and is not employable. Since she left the family residence in 1970, she has lived alone in an apartment, while the husband continued to occupy the family residence.

The parties filed separate income tax returns after 1970. In addition to support payments from the husband the wife receives income as a life beneficiary of a testamentary trust. In 1976 her income tax return shows an adjusted gross income of $8,827, of which $3,600 was support payments received from the husband. Her living expenses in 1977 were $669 per month, including medical expense.

The husband's salary as president of his corporation from 1970 to 1976 varied from $43,000 to $45,000 per year. He also received a variable bonus from

year to year, and in 1976 his combined salary and bonus was $62,300.

At the time of trial the marital assets in the possession of the husband consisted of the residence valued at $38,850, against which there was a mortgage of $6,500; a tract of desert property worth $1,200; $5,000 cash value of life insurance; savings accounts of $6,299; and miscellaneous stocks, other than the Majors, Inc., stock, valued at $5,725. The principal asset was the 160 shares of Majors, Inc., which had a net book value of $350,385.44. There was some evidence that the stock was worth more than that amount and there was also evidence that it was worth less and that the business was declining. The husband also had a bank indebtedness of $8,000.

The assets in the possession of the wife consisted of certificates of deposit in the amount of $17,000; a checking account in the amount of $3,073.20; and savings accounts of $1,456.08.

On November 28, 1977, the court announced its findings and decision and directed that a decree be submitted. On December 5, 1977, counsel for the wife submitted the form of decree to the court and filed a motion for new trial. The decree was signed by the court and entered on the trial docket on December 6, 1977.

The decree awarded the wife, as a property division, all personal property and belongings in her possession and the sum of $39,000 payable over a period of 6 years, with payments to commence on or before June 1, 1978, with interest on the unpaid principal balance at 7½ percent per annum. The wife was also awarded alimony in the amount of $475 per month for a period of 121 months, commencing December 1, 1977. The husband was awarded the residence subject to the mortgage, and all personal property and personal belongings in his possession, including the stock of Majors, Inc., subject to any indebtedness, and directed the husband to pay attor-

ney's fees of the wife in the amount of $7,250.

On December 8, 1977, the husband filed a motion for new trial. On January 11, 1978, a hearing was held on both motions for new trial and the husband orally objected to the wife's motion for new trial as being prematurely filed. On February 7, 1978, after a further hearing, the court granted the wife's motion for new trial, overruled the husband's motion for new trial, and modified the decree by vacating the portion of the December decree awarding $39,000 to the wife and substituting instead the sum of $60,000. In all other respects the December decree was confirmed. The husband has appealed and the wife has cross-appealed.

The husband's principal contention on appeal is that the wife's motion for a new trial filed on December 5, 1977, was premature, and a nullity, and there was, therefore, no jurisdiction to modify the December decree. Although the motion for new trial and the form of decree were both delivered to the clerk of the District Court on December 5, 1977, the decree was not signed and entered on the trial docket until December 6, 1977. The husband relies on the cases of Spanheimer Roofing & Supply Co. v. Thompson, 198 Neb. 710, 255 N. W. 2d 265, and State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113, 200 Neb. 525, 264 N. W. 2d 422. Those cases both held that no judgment is rendered until the pronouncement thereof is entered on the trial docket, and that a motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity.

The court has reconsidered the basic issues involved in those holdings as applied to a notice of appeal. See Dale Electronics, Inc. v. Federal Ins. Co., *ante* p. 133, 277 N. W. 2d 572. We now hold that a motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not consti-

tute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates. To the extent that Spanheimer Roofing & Supply Co. v. Thompson, 198 Neb. 710, 255 N. W. 2d 265; State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113, 200 Neb. 525, 264 N. W. 2d 422; and similar cases are inconsistent with this holding, those cases are overruled.

Both husband and wife contend that the division of property was inequitable. The wife contends that generally speaking the wife should receive from ⅓ to ½ of the value of the property involved, depending upon the facts and circumstances, but not less than ⅓ in any event. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. Hanisch v. Hanisch, 195 Neb. 204, 237 N. W. 2d 407.

The fixing of alimony or distribution 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. Phillips v. Phillips, 200 Neb. 253, 263 N. W. 2d 447. There was no abuse of discretion here.

The husband contends that the attorney's fees awarded to the wife were excessive. An award of attorney's fees in an action for dissolution of marriage involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty

and difficulty of the questions raised, and the customary charges of the bar for similar services. Morris v. Morris, 201 Neb. 479, 268 N. W. 2d 431. The record establishes that the services involved here extended over a period of more than 7 years and involved extensive consultations, depositions, and interrogatories. The trial court was fully aware of the nature and extent of the services and carefully considered the evidence. We cannot say there was any abuse of discretion in setting the fees for the wife's attorney.

The judgment of the District Court is affirmed. The wife is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED.

TERESA WAGNER, APPELLANT, V. DUANE MINES, APPELLEE.

277 N. W. 2d 672

Filed April 24, 1979. No. 41964.

1. **Motor Vehicles: Guest Statute: Negligence: Minors.** The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence.
2. **Motor Vehicles: Guest Statute: Negligence: Words and Phrases.** Gross negligence within the meaning of the Nebraska guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
3. **Motions, Rules, and Orders: Verdicts: Negligence: Evidence.** When the evidence viewed most favorably for plaintiff fails to disclose the existence of gross negligence, the trial court is obligated to sustain a motion to direct a verdict for the defendant.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Lawrence H. Yost of Yost, Schafersman, Yost, Lamme & Hillis, for appellant.

Ray C. Simmons, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, BRODKEY, and HASTINGS, JJ., and WHITEHEAD, District Judge.

KRIVOSHA, C. J.

This is an appeal from the action of the District Court for Dodge County sustaining a motion for directed verdict or, in the alternative, a motion to dismiss made by the defendant-appellee at the close of the plaintiff-appellant's case-in-chief. Upon sustaining the motion, the trial court dismissed plaintiff's action. We have reviewed the record in this case and conclude that the trial court was correct in sustaining the motion and dismissing the case. We therefore affirm.

The record in this case discloses that the plaintiff suffered significant personal injury while riding as a guest in an automobile owned by the defendant and then being operated by defendant's 14-year-old daughter, Mary Lou Mines.

Defendant and his family, including his minor daughter, lived at Hooper, Nebraska. The plaintiff and defendant's daughter were both students at Logan View High School, where both were also cheerleaders. On the evening of the accident an athletic meet at the Scribner High School between Logan View High School and Scribner High School was scheduled. Both girls were on their way to the meet when the accident occurred.

The record discloses that plaintiff's mother had brought her to the home of defendant at Hooper, and there left her to ride to the Scribner meet with defendant's daughter. Also riding with the plaintiff and defendant's daughter was Terri Dallman, a fellow student.

The evidence further discloses that because of her

age Mary Lou Mines held a restricted-type operator's permit issued pursuant to section 60-407(2), R. R. S. 1943. The permit limited her driving from home to school and back. In order to obtain a permit of this type it is necessary for one to appear before an examiner and demonstrate that one is capable of successfully operating a motor vehicle.

The vehicle being driven by defendant's daughter at the time of the accident was a two-seat British Triumph sports car. Defendant's daughter was driving and occupied the left front seat. Plaintiff occupied the right front seat, and Terri Dallman occupied a space inside the sports car to the rear of the two seats.

There was testimony that before defendant's daughter left for the school event, defendant gave her some instructions on how to use the standard shift in the automobile.

There was no evidence that defendant's daughter experienced any difficulty in operating the vehicle once she left the front yard.

The accident occurred a short distance east of Scribner as the automobile of defendant proceeded west toward Scribner.

Plaintiff did not call as a witness defendant's daughter, and plaintiff herself had no recollection of the accident. The facts concerning the accident were supplied by Terri Dallman. According to witness Dallman, as the vehicle approached Scribner, she saw red lights on both sides of the road. It appears from the evidence that a plane had crashlanded earlier close to the site where the accident subsequently occurred. Emergency vehicles were in the area as a result of the plane crash. There was no evidence that the defendant's daughter was driving at an excessive speed either as posted or under the circumstances. Nor was there evidence that she was in any other manner improperly operating the motor vehicle prior to the accident. As the vehicle

approached the downed airplane, the car in front either slowed down or made an abrupt stop, and defendant's daughter ran into the rear of that vehicle. Upon impact, plaintiff was thrown through the windshield and unquestionably suffered serious and permanent facial injuries.

At the close of plaintiff's evidence, defendant moved the court to direct a verdict for defendant and against plaintiff or, in the alternative, to dismiss the action. The court sustained the motion and dismissed the action.

Appellant assigns two errors: (1) The trial court erred in holding that the Nebraska guest statute applied to a nondriving owner's liability for negligent entrustment; and (2) the trial court erred in holding the evidence was insufficient to establish a question of gross negligence which could be submitted to the jury.

We turn to appellant's first assignment of error. There appears to be little question from the record that the defendant in this case was negligent in entrusting his automobile to his daughter. In Gertsch v. Gerber, 193 Neb. 181, 226 N. W. 2d 132, we said: "* * * an owner of a motor vehicle, who knowingly entrusts it to an under-age, unlicensed minor in violation of statute, is guilty of negligence and liable for damages proximately resulting from the negligent operation of the motor vehicle." Likewise, see Keller v. Wellensiek, 186 Neb. 201, 181 N. W. 2d 854.

However, the fact that the owner of a car may be negligent in entrusting a vehicle to a minor does not dispose of the issue. In addition to being negligent in entrusting the vehicle, a plaintiff must likewise plead and prove that such negligent entrustment was the proximate cause of the accident and injury. To establish that proximate causation, a plaintiff must allege and prove that the driver operated the automobile negligently and that his negligence was a proximate cause of the accident. The act of allow-

ing a person to operate a vehicle, knowing the driver to be inexperienced or incompetent, is negligence. It becomes a proximate cause of the injury when it combines with the negligent acts of the driver causing the damage. Gertsch v. Gerber, *supra*; see, also, Hardwick v. Bublitz, 254 Iowa 1253, 119 N. W. 2d 886.

Were this simply a case of defendant's daughter causing injury to a third party not a guest, the issue would simply be as described in Keller v. Wellensiek, *supra,* or Hardwick v. Bublitz, *supra.* There is, however, the further factor we must consider in this case, namely, that plaintiff was a guest.

Stated simply, the issue herein is: Before a guest may recover against the owner of an automobile for negligent entrustment, must the guest plead and prove gross negligence on the part of the operator, or is ordinary negligence sufficient?

There appears to be two lines of authority in this regard. See 91 A. L. R. 2d 323. The majority view holds that before a guest may recover from the owner of an automobile for negligent entrustment, the guest must plead and prove that the operator of the motor vehicle was guilty of gross negligence. See Hardwick v. Bublitz, *supra*; McAllister v. Calhoun, 212 Ark. 17, 205 S. W. 2d 40; Graham v. Shilling, 133 Colo. 5, 291 P. 2d 396; Farrey v. Bettendorf, 96 So. 2d 889 (Fla., 1957); Theriault v. Pierce, 307 Mass. 532, 30 N. E. 2d 682; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581; Cunningham v. Bell, 149 Ohio St. 103, 77 N. E. 2d 918; Ortman v. Smith, 198 F. 2d 123 (8th Cir., 1952) cert. den. 344 U. S. 856, 73 S. Ct. 95, 97 L. Ed. 664; Eckols v. Anderson, 27 Utah 2d 74, 493 P. 2d 304; Tucker v. Fitzgerald, 247 So. 2d 459 (Fla., 1971); Forgus v. Hodnett, 401 S. W. 2d 104 (Tex. Civ. App., 1966); Holbrook v. Ramsey, 254 F. Supp. 94 (N. D. Ind., 1966). It appears that California, Kansas, and perhaps Georgia have taken a contrary view. It

does not appear that we have directly ruled on this question before.

We have, however, recently had occasion to review the basis of the Nebraska guest statute, section 39-6,191, R. R. S. 1943. See Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121. In upholding the constitutionality of the Nebraska guest statute, we noted that there is inherent justice in the requirement that one who undertakes to perform a duty gratuitously should not be under the same obligation as one who enters upon the same undertaking for pay. We said in Botsch v. Reisdorff, *supra*, " 'It seems to us that the legislature was acting well within the limits of the police power in making a distinction between the degree of care to be exercised by the owner or operator of a motor vehicle toward a guest and that to be exercised toward one who pays for his transportation.' The legislative and judicial minds in the past 50 years have consistently held that this distinction between a paying and a gratuitous guest could rationally take precedence in the legislative mind over and above the social engineering notion of shifting liability for negligently inflicted injuries to a guest on to hosts or to the general motoring public's liability insurance."

It would bring about a strange and improper result if defendant could be free of liability if only guilty of ordinary negligence while operating a motor vehicle, but could be held liable when a member of his family operated the same motor vehicle and still was guilty of only ordinary negligence. Likewise, we would have a strange result if the operator who caused the accident necessary to create the proximate cause was relieved of liability because of the provisions of the guest statute while the owner was held liable. We think the more consistent rule is that which has found favor in the majority of the jurisdictions; the rule being that the owner of a motor vehicle who entrusts it to an underage minor

is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. We see nothing in the language of the Nebraska guest statute which would justifiably compel a contrary view. The language in the statute clearly points out that the "owner" of the vehicle is not to be liable to a guest unless such damage is because "of the gross negligence of the owner or operator *in the operation* of such motor vehicle." (Emphasis supplied.) § 39-6,191, R. R. S. 1943.

Having therefore held that before the plaintiff in this case could recover against the defendant, defendant's daughter must be guilty of gross negligence in the operation of the motor vehicle, we look to appellant's second assignment of error.

The only evidence of negligence by defendant's daughter in the operation of the motor vehicle was her apparent failure to stop the motor vehicle within her range of vision. There was no other evidence of negligence established by the record. While the failure to stop within one's range of vision may and often does constitute negligence, it does not necessarily constitute gross negligence. Gross negligence, within the meaning of the Nebraska guest statute, means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. See Luther v. Pawling, 195 Neb. 679, 240 N. W. 2d 42; Toth v. Bacon, 190 Neb. 344, 208 N. W. 2d 271. In the Toth case, we specifically held that failure to maintain a proper lookout alone does not ordinarily constitute gross negligence. When the evidence viewed most favorably for plaintiff fails to disclose gross negligence, the trial court is obligated to sustain a motion to direct a verdict for the defendant. See Johnk v. Scanlon, 136 Neb. 187, 285 N. W. 488.

On the basis of the evidence presented by the record in the instant case, we believe it would have been error for the trial court to submit the case to the jury. Therefore, the trial court had no alternative but to sustain the motion to dismiss. For those reasons we find the action of the trial court in dismissing plaintiff's case at the close of plaintiff's evidence was in all respects correct, and the action of the trial court is affirmed.

AFFIRMED.

FABRICATORS, INC., APPELLEE, V. FARMERS ELEVATOR, INC., APPELLANT.

277 N. W. 2d 676

Filed April 24, 1979. No. 41984.

1. **Uniform Commercial Code: Notice: Time.** Under the Uniform Commercial Code rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
2. **Uniform Commercial Code: Time.** Under the Uniform Commercial Code acceptance of goods occurs when the buyer fails to make an effective rejection if the buyer has had a reasonable opportunity to inspect the goods.
3. **Trial: Judgments: Evidence: Witnesses.** In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
4. **Trial: Judgments: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong.

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

Moodie & Moodie, for appellant.

Golby C. Uhlir of Ryan, Scoville & Uhlir, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and HASTINGS, JJ., and KELLY, L. W., JR., District Judge.

MCCOWN, J.

This is an action by plaintiff, Fabricators, Inc., to recover money due on an oral agreement for the sale of certain equipment to be constructed and installed in the grain elevator of the defendant, Farmers Elevator, Inc. Jury was waived and the District Court found for the plaintiff and against the defendant and entered judgment for the agreed amount of $6,138, plus interest and costs. The defendant has appealed.

The defendant, Farmers Elevator, Inc., a corporation, operates a grain elevator at Beemer, Nebraska, in which the defendant stores grain and mixes and sells livestock feeds. One of the ingredients used in the feeds mixed by defendant was high urea protein, which is available in either a meal or pellet form. Defendant had been using pellets which are more expensive than the meal. Ralston Purina, a supplier of products for the defendant, recommended that the defendant switch from the pellets to meal. Ralston prepared drawings and specifications for equipment to enable the defendant to handle high urea protein meal in preparing and mixing livestock feeds in the defendant's elevator. The drawings and specifications were delivered to the plaintiff, Fabricators, Inc. The plaintiff reviewed the drawings and specifications with representatives of Ralston and of the defendant and submitted a formal quotation and bid for the construction and installation of the equipment for a total of $5,960, plus tax. The defendant accepted the plaintiff's bid and ordered the equipment. Plaintiff and defendant both understood that the equipment was to be used for handling and mix-

ing high urea protein meal in livestock feeds. The equipment was designed specifically for the defendant's elevator and would be useless in any other installation.

Plaintiff built the equipment for handling the high urea protein meal in accordance with the drawings and specifications. Installation of the equipment was begun on January 9, 1970, and completed sometime prior to April 14, 1970. At unspecified times between January 9, 1970, and April 14, 1970, various problems developed. The plaintiff adjusted the equipment and corrected the various problems as they occurred up to and including the installation of an inspection hole to check the flow of meal, which was installed on April 2, 1970.

The plaintiff's evidence was that the installation was completed on April 14, 1970, when the plaintiff billed the defendant for the purchase price of $5,960, plus tax of $178.80, for a total of $6,138.80. Plaintiff's evidence was that from April 2, 1970, until July 14, 1970, there was no communication from the defendant regarding the installation.

On July 14, 1970, the defendant discovered that the auger in the equipment system was putting out too much feed. The plaintiff agreed to remedy the problem and ordered a reducing gear on July 17, 1970. The gear was never installed. On July 23, 1970, the elevator building and equipment were destroyed by fire. At no time did the defendant pay for the equipment or notify the plaintiff that the equipment had been accepted or rejected. The trial court found generally for the plaintiff and entered judgment in the sum of $6,138, plus interest and costs.

The defendant contends that the equipment was unsatisfactory and did not conform to the contract, and that title to the equipment therefore remained in the seller. Defendant argues that the equipment never worked satisfactorily and that it was under-

stood that the title would not pass until the equipment worked properly. It is also argued that the provisions of previous written contracts made by defendant for purchase of elevator equipment from different parties should be read into the oral contract here. These contentions all involve factual issues which were resolved by the trial court and decided adversely to the defendant.

This case is governed by the provisions of the Uniform Commercial Code. When goods are tendered or delivered, the buyer has a right to inspect them before payment. § 2-513(1), U. C. C. If the goods do not conform to the contract, the buyer has the right to reject them. § 2-601, U. C. C. Section 2-602, U. C. C., provides: "(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." Section 2-606, U. C. C., also provides that acceptance of goods occurs when the buyer fails to make an effective rejection under subsection (1) of section 2-602, U. C. C., if the buyer has had an opportunity to inspect the goods.

In the present case the evidence of the plaintiff is that the equipment was completely installed and delivered in the possession and control of the defendant on April 2, 1970, and defendant was billed for the purchase price on April 14, 1970. Essentially, it is undisputed that delivery was not later than April 14, 1970. The plaintiff's evidence is that it received no communication of any kind from the defendant regarding the equipment from April 14, 1970, until July 14, 1970. The defendant's evidence was that there was a communication from the defendant to the plaintiff on April 29, 1970, but the evidence is undisputed that the defendant never at any time rejected the goods, nor notified the plaintiff of any rejection.

The District Court found that there was no rejection of the goods within a reasonable time. Under

the Uniform Commercial Code, rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. § 2-602, U. C. C. Acceptance occurs when the buyer fails to make an effective rejection if the buyer has had a reasonable opportunity to inspect the goods. § 2-606, U. C. C.

In the case at bar jury trial was waived and the case was tried to the court. In determining whether the evidence supports the findings of the trial court in an action at law where the jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. J. P. Theisen & Sons v. Aksarben Contracting Corp., 197 Neb. 19, 246 N. W. 2d 720.

The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. McDowell Road Associates v. Barnes, 198 Neb. 207, 252 N. W. 2d 151.

The evidence here supports the findings and judgment of the trial court.

AFFIRMED.

VIRGIL STARK, DOING BUSINESS AS STARK ELECTRIC, APPELLANT, V. GRANGE MUTUAL INSURANCE COMPANY OF CUSTER COUNTY, APPELLEE.

277 N. W. 2d 679

Filed April 24, 1979. No. 41999.

1. **Contracts: Insurance: Public Policy.** An insurance policy is a contract, and where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, it will be enforced as it is made.

2. _____: _____: _____. A provision in an insurance policy reciting that failure to pay the premium due on a specified date will suspend the policy and relieve the company of liability for losses occurring during the period of suspension is a valid and enforceable provision.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

Steven O. Stumpff and Luebs, Dowding, Beltzer & Leininger, for appellant.

Carlos E. Schaper, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and CANIGLIA, District Judge.

CANIGLIA, District Judge.

Plaintiff, Virgil Stark, doing business as Stark Electric, brings this action against the defendant, Grange Mutual Insurance Company of Custer County, for breach of contract. Specifically, the action was brought to impose liability on the defendant for a fire loss sustained by the plaintiff, and insured by the defendant under a policy of insurance. The trial court dismissed the petition at the conclusion of the trial, and the plaintiff appealed. We affirm.

The policy of insurance was written for a period of 5 years commencing on December 5, 1973, and ending on December 5, 1978. Annual premiums on the policy were due on the 5th day of December of each year. The plaintiff did not pay the premium due on December 5, 1974, until December 18, 1974. Inasmuch as no loss occurred between December 5, 1974, and December 18, 1974, the date the premium was paid, the defendant reinstated the policy even though the premium had been paid after the due date. On or about November 1, 1975, more than 30 days before the next due date of December 5, 1975, the defendant mailed to the plaintiff a notice of premium due specifying a due date of December 5, 1975. The premium due pursuant to this notice was

not paid on December 5, 1975. On December 13, 1975, a fire loss occurred which destroyed the building and the contents.

The issue presented to the trial court was: Did the acceptance of the late premium payment on December 18, 1974, reinstate the policy for 1 year prospectively as of the date that the premium payment was accepted? The plaintiff contends that it did, and that the acceptance of the premium by the defendant on December 18, 1974, provided the plaintiff with a full year's coverage from December 18, 1974, to December 18, 1975, and, accordingly, the policy was in force on December 13, 1975, the date of the fire. The defendant argues that the premium paid on December 18, 1974, paid the policy for the period commencing December 5, 1974, to December 5, 1975, and therefore, since the premium had not been paid on December 5, 1975, the policy stood suspended and there was no coverage on the plaintiff's building and contents on the date of the fire, December 13, 1975.

The trial court, in finding for the defendant, held that there was no insurance coverage in effect at the time of the fire because the policy was suspended for failure to pay the premium due December 5, 1975, and that the acceptance by the defendant of the premium on December 18, 1974, provided the plaintiff with coverage for 1 year retrospectively from the premium due date, that is, from December 5, 1974, to December 5, 1975. This appeal followed.

In making its findings and entering judgment for the defendant, the court considered a provision in the policy which provides as follows: "This policy shall stand suspended if any default shall be made in the payment of any assessment on or before the date specified in a written or printed notice, or partly written and partly printed, requiring payment of such assessment and mailed to the insured and directed to his last known address not less than thirty days prior to such suspension date. * * * The

company shall in no event be liable for any loss or damage occurring during such period of suspension. This policy may be reinstated and placed in full force according to its terms to cover losses thereafter occurring and insured against under this policy, upon payment to and acceptance by the Company of such delinquent premium or assessment, but acceptance by the Company of such delinquent premium or assessment shall in no event make this Company liable for any loss or damage occurring during such period of suspension, nor shall such acceptance waive any of the rights provided for in this section."

This provision is not ambiguous, nor is its meaning uncertain; its meaning is clear and since it is not illegal or opposed to public policy, it will be enforced as it is made. See Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721.

This provision provides that the policy shall stand suspended if any default in the premium payment occurs on a certain date and the company shall not be liable for any loss occurring to the insured during the period of suspension. This provision is valid and enforceable. See Olson v. Agricultural Mut. Ins. Ass'n. of Des Moines, 234 Iowa 715, 13 N. W. 2d 673. Again referring to that part of the provision of the policy relating to delinquent payment of premiums and reinstatement of the policy, the provision provides, "This policy may be reinstated and placed in *full force according to its terms* to cover losses thereafter occurring and insured against under this policy, upon payment to and acceptance by the Company of such delinquent premium * * *." It is clear from these terms that the coverage of the policy extended from the 5th day of December of each year to the 5th day of December of the following year, and that the policy coverage would terminate and expire on December 5, 1978. Any other interpretation of this provision would stretch the policy period beyond

December 5, 1978, and in effect make a new contract for the parties. The plaintiff was aware of this provision when he paid the premium on December 18, 1974. He was under no obligation to reinstate the policy. If he had desired coverage for a full year from December 18, 1974, he could have bought a new policy or made a new contract with the defendant. He chose instead to reinstate the policy according to its terms and thus when he paid the premium on December 18, 1974, he acquired coverage from December 5, 1974, to December 5, 1975, and when he did not pay the premium due on December 5, 1975, the policy stood suspended. Accordingly, he had no coverage on December 13, 1975, the date of the fire, and the decision of the trial court was correct and is affirmed.

AFFIRMED.

JOHN S. SCHWARTZ, APPELLANT, V. DONALD DEAN SELVAGE AND SHARON LEE SELVAGE, HUSBAND AND WIFE, APPELLEES.

277 N. W. 2d 681

Filed April 24, 1979. No. 42016.

1. **Invitor-Invitee: Negligence: Evidence.** Negligence is never presumed but must be proved by a preponderance of the evidence. The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner.
2. **Invitor-Invitee: Negligence.** There is no liability on the part of an invitor-owner to protect a business invitee against hazards which are known to the business invitee and are so apparent that he may reasonably be expected to discover them and be able to protect himself.
3. _____: _____. If the invitee has knowledge of the conditions and circumstances in advance, or should have knowledge comparable to that of the invitor, then it may not be said that the invitor is guilty of actionable negligence.
4. **Negligence.** A person who is capable of understanding and discre-

tion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.

5. **Invitor-Invitee: Negligence.** A mail carrier is treated as a business visitor or invitee, to whom the premises owner owes a duty of exercising reasonable care to keep the premises reasonably safe for their contemplated use or to give adequate warning of dangers of which the owner knew or should have known, and which were not reasonably apparent to the invitee.
6. **Motions, Rules, and Orders: Verdicts: Evidence.** A motion for a directed verdict is 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.
7. **Verdicts: Evidence.** Directing a verdict is proper only when there is a complete absence of probative facts to support a judgment or verdict in favor of the party against whom the verdict is directed.
8. **Appeal and Error: Trial: Evidence.** Error may not be predicated upon a ruling excluding evidence without making an offer of proof as to what the excluded evidence may have been.

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

William M. Berlowitz, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellees.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and COLWELL and MARTIN, District Judges.

MARTIN, District Judge.

In this case plaintiff, a mailman, went up the front porch steps of defendants' residence on a normal summer day to deliver mail. He came down the same steps. Plaintiff's testimony shows he saw clutter on the steps going up and coming down, but did not use the handrail on either occasion. His evidence further indicates he slipped on some unknown object on the steps.

The lower court directed a verdict for the defendants at the close of plaintiff's evidence for the reasons: (1) The plaintiff's evidence failed to show negligence on the part of the defendants; (2) that as

a business invitee, plaintiff assumed the obvious risk and was contributorily negligent; (3) that there was no evidence to support the contention defendants could have known of the hazard, or that it was created by them.

The principal assignment of error on appeal is that the trial court erred in directing a verdict for the defendants.

Plaintiff also assigns error to the ruling on defendants' motion in limine. Since no offer of proof was made under section 27-103(1)(b), R. R. S. 1943, this is not error.

The principles of law upon which the District Court for Lancaster County directed the verdict are basic. In this action, the evidence shows that plaintiff was a business invitee on the premises. In such instances, this court has held that the mere fact that an invitee falls does not raise a presumption of negligence. Thompson v. Young Men's Christian Ass'n., 122 Neb. 843, 241 N. W. 565; Brandert v. Scottsbluff Nat. Bank & Trust Co., 194 Neb. 777, 235 N. W. 2d 864.

To argue, as does appellant, that inference could have been drawn by the jury that defendants knew of or, in the exercise of reasonable care, could have discovered the object on which plaintiff slipped, is contrary to the principle long established by Thompson v. Young Men's Christian Ass'n., *supra*, which states, "* * * the facts that go to show negligence must be established by evidence and not left to inference."

Further, plaintiff's evidence failed to establish that the hazardous condition was known to or created by the defendants so as to give rise to the duty of a warning on their part to him; and that his going up and down the steps, when the condition of the steps was obvious to him, was an assumption of risk on his part and was contributory negligence, as a matter of law, barring recovery. Nance v. Ames Plaza, Inc., 177 Neb. 88, 128 N. W. 2d 564.

The lower court obviously treated as an admission of truth all the material and relevant evidence submitted on behalf of the plaintiff and decided that there was a complete absence of probative facts to support a judgment or verdict in favor of the plaintiff. Hurlbut v. Landgren, 200 Neb. 413, 264 N. W. 2d 174.

The judgment of the District Court is affirmed.

AFFIRMED.

SHARIAN I. BRUS, APPELLEE, V. WAYNE B. BRUS, APPELLANT.

277 N. W. 2d 683

Filed April 24, 1979. No. 42029.

1. **Divorce: Alimony: Child Support: Property.** Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion.
2. **Divorce: Trial: Witnesses.** In an appeal from a decree of dissolution of marriage, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
3. **Divorce: Property.** The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be determined.
4. _____: _____. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
5. **Divorce: Child Support.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court which will not be disturbed on appeal unless it appears that the court abused its discretion.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Affirmed as modified.

John W. McClellan, Jr., for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and CASE and FUHRMAN, District Judges.

FUHRMAN, District Judge.

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 to this court objecting to the child support award and the division of the property.

The record shows the parties were married at Davenport, Iowa, on September 3, 1967. Three children were born to the parties: John Wayne, on June 14, 1970; Scott Eric, on May 28, 1972; and Joseph Michael on December 29, 1974. Suit for dissolution was filed by the wife on December 3, 1976. Trial was had in the District Court for Madison County on February 16, 1978.

The wife, a college graduate, was certified to teach in Iowa and later in Illinois. She taught school for the year prior to the marriage. During the first year of marriage she did substitute teaching and was employed by the Iowa State Highway Commission, while her husband attended college. She taught school in Illinois for the next year and a half, leaving her employment due to pregnancy. At the time of trial the wife was operating a nursery school, with a net annual income of $1,200. The wife is not certified as a teacher in Nebraska, and would need one or two semesters of schooling to become certified.

The husband, a civil engineer, graduated from Iowa State University in June of 1968. He has been employed since his graduation, most recently employed by Ebasco Services, Inc., since May 1975. His gross salary at the time of trial was $1,850 per

month, with a net salary of $1,345.58. His salary is reviewed yearly, in the month he began employment, for bonus or salary purposes. Additionally, he has interest and dividend income from investments of the parties. In 1976 the parties had dividends of $392, interest of $151.35, and a 1975 state tax refund of $338.55. The federal tax refund for the year of 1976 amounted to $724.76.

The family debts are a paving assessment of $1,706, the past year's real estate taxes of $1,180, and the sum of $17,000 owed to the mother of the husband on a mortgage on the family home. The home has a value of approximately $57,500. The monthly payments on the mortgage, with amortized real estate taxes, are $290. There is a life insurance policy on the life of the husband with a cash value of $2,000, less a loan in the amount of $1,200. This loan is not payable monthly.

The evidence showed the husband claimed a need for the monthly sum of $685 as living expenses, with the wife claiming a need for the monthly sum of $1,047 as living expenses for her and the three minor children.

In the decree the trial court awarded the wife no alimony, child support in the sum of $200 per month per child or the total sum of $600 per month, and personal and real property of a value of $4,450. The husband was awarded personal and real property of a value of $19,197 and was required to pay the family bills incurred prior to July 5, 1977. The wife was awarded use and possession of the family home until the youngest minor child reaches 19 years of age or none of the minor children reside in the residency, at which time the house is to be sold and the wife is to receive one-half of the gross sale price less only the expenses of the sale. The husband was ordered to pay all present encumbrances against the property and all future taxes and assessments, keep the residence insured for its full value, and pay for main-

tenance of the exterior of the premises. The wife was ordered to pay for all interior maintenance.

It is apparent the husband cannot make the child support and house payments solely from the net salary he was receiving at the time of trial. This causes him some problems. The interest payments and the dividend payments are not paid monthly. Also, the income tax refunds, the annual bonus, and salary review come only once a year.

The husband also contends that the division of property was unreasonable. The wife received, in addition to her use of the residence as a home for herself and children, a half-interest in the residence and other property valued at $4,450. The husband received a half-interest in the residence and other property valued at $19,197, less the amount of the house mortgage payable to his mother, real estate taxes, and paving assessments. The wife was to pay for maintenance to the residence interior and the husband to the exterior.

The following principles are applicable. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Jackson v. Jackson, 197 Neb. 27, 264 N. W. 2d 722 (1976); Van Cleave v. Van Cleave, 201 Neb. 211, 266 N. W. 2d 900 (1978). In an appeal from a decree of dissolution of marriage, 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. Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466 (1978). The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Blome v. Blome, *supra*. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Blome v. Blome, *supra*. In de-

termining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court which 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).

The ability of the husband to make the child support payments is one element which must be considered in determining whether the award was excessive. The evidence here indicates that the award of the child support should be reduced to $165 per month per child.

Since support and property settlement issues should be considered together, we determine that the evidence further indicates that the Florida property should have been awarded to the wife.

The judgment of the trial court is modified so as to provide an allowance for child support in the amount of $165 per month per child and to award the Florida real estate to the petitioner, Sharian Brus. The judgment as so modified is affirmed. The appellee is allowed an attorney's fee in this court of $350.

AFFIRMED AS MODIFIED.

FOXLEY & CO., A CORPORATION, APPELLEE, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, A MARYLAND CORPORATION, APPELLANT.

277 N. W. 2d 686

Filed April 24, 1979. No. 42076.

1. **Insurance: Damages: Contracts: Words and Phrases.** Where one intentionally does damage to the property of another in the mistaken belief that the property belongs to him, the property damage is not, within the meaning of an insurance policy, an "acci-

dent" neither expected nor intended from the standpoint of the insured.

2. **Insurance: Damages: Contracts: Trespass.** A policy of insurance undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another when the damage is the natural result of the intentional act of the policyholder.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and dismissed.

Pilcher, Howard & Dustin, for appellant.

Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

Heard before BOSLAUGH, WHITE, and HASTINGS, JJ., and HENDRIX and BUCKLEY, District Judges.

WHITE, J.

This is an appeal from judgment on a petition filed by appellee Foxley & Co. in the District Court against appellant United States Fidelity and Guaranty Company for alleged wrongful refusal to defend a suit brought against the appellee in the District Court for Saunders County by American Savings Company. The petition of Foxley & Co. prays for the amount of the judgment rendered against Foxley & Co. in the District Court for Saunders County plus the costs of defense, including attorney's fees and certain nonrecoverable court costs. The District Court entered judgment for the appellee Foxley & Co. The United States Fidelity and Guaranty Company (hereinafter U.S.F. & G.) appeals.

In the action by American Savings Company against Foxley & Co. in the District Court for Saunders County, both American Savings Company and Foxley claimed ownership of a water-line system and hydrants in certain lands in the northern part of the existing water distribution system of the former Nebraska ordnance plant in Mead, Nebraska.

Each claimed under a quit claim deed from the United States.

It is undisputed that Foxley & Co., acting under its understanding of its legal rights, caused a number of water hydrants to be severed from the water system and caused damage to the remainder of the water system by the method in which the hydrants were severed from the water system. At trial, the court determined, as a matter of law, that the American Savings Company's ownership was paramount since it was based on a deed prior in time from the United States Government. It directed a verdict on liability in favor of American Savings Company and determined the damages for the injuries to the water system. That judgment was not appealed. Foxley & Co. then instituted this suit against its insurer for its failure to defend the American Savings Company action or to satisfy the judgment therein.

In the trial court and in this court the appellant denied coverage. Under the relevant portions of the contract of insurance, the insurer agrees to "pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of * * * (B). property damage to which this insurance applies, caused by an occurrence." "Occurrence", as defined in the policy, means "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the Insured * * *."

It is the position of the insurer that the actions of Foxley & Co. resulting in damage to the water system were intentional and therefore not an "accident" within the meaning of the policy provision. Appellee relies on our statement made in State Farm Fire & Cas. Co. v. Muth, 190 Neb. 248, 207 N. W. 2d 364, that: "We hold on the basis of the authorities which we hereinafter cite that, under the language of the exclusion in question, an injury is either

expected or intended if the insured acted with the specific intent to cause harm to a third party." There is some dispute as to whether it could more properly be said that Foxley "tore out" or "removed" the hydrants. However, Foxley does concede that, as to the physical consequences of its actions, the result which was brought about was precisely that which it intended to bring about. Contrast that situation with the one in State Farm Fire & Cas. Co. v. Muth, *supra*. There, the plaintiff was injured by a B-B pellet fired by the young defendant from his position in a slowly moving car. The finding by this court that the shooting was accidental relied on the finding by the trier of fact that the defendant aimed the gun at plaintiff's feet, and intended only to "scare somebody" and not to injure the plaintiff in any way. This court said in Muth: "We do not, however, adopt the holding in that case (Lumbermen's Mut. Ins. Co. v. Blackburn (Okla.), 477 P. 2d 62) insofar as it appears to hold that the exclusion does not apply unless the intention is to inflict the injury actually inflicted and unless the act is directed specifically against the party injured."

While we are aware of cases to the contrary, we hold that a policy undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another when the damage is the natural result of the intentional act of the policyholder. See Thomason v. United States Fidelity & Guaranty Co., 248 F. 2d 417 (5th Cir., 1957). The court said in that case: "Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended. There was no insurance against liability for damages caused by mistake or error. The cause of the injury was not an accident within the meaning of this

policy." See, also, Argonaut Southwest Ins. Co. v. Maupin, 500 S. W. 2d 633 (Tex., 1973); Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla., 1953). We decline to adopt the rule in cases cited by the appellee. Gray v. State Department of Highways, 191 So. 2d 802 (La. App., 1966); McAllister v. Hawkeye-Security Ins. Co., 68 Ill. App. 2d 222, 215 N. E. 2d 477; Haynes v. American Casualty Co., 228 Md. 394, 179 A. 2d 900.

Since the injury resulted from a mistake of law and was not an accident within the meaning of the policy, the decision of the trial court must be reversed and the petition dismissed. It is unnecessary to consider other assignments of error.

REVERSED AND DISMISSED.

SHELDON GALLNER AND DAVID GALLNER, APPELLANTS, V. SWEEP LEFT, INC., A CORPORATION, APPELLEE.

277 N. W. 2d 689

Filed April 24, 1979. Nos. 42120, 42121.

1. **Contracts: Rescission.** Where contractual promises are mutual and dependent, the failure of one party to perform authorizes the other to rescind the contract.
2. _____: _____. The failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Michael O. Johanns of Peterson, Bowman, Larsen & Swanson, for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KNAPP, District Judge.

BOSLAUGH, J.

These cases arise out of a dispute concerning an agreement for the purchase of stock in the defendant corporation, Sweep Left, Inc. Since they involve similar issues they were consolidated for trial in the District Court and consolidated for briefing and argument in this court.

The defendant, which was organized by Mark Steven Doak and Dennis Pavelka, operates a restaurant and bar business in Lincoln, Nebraska. Doak and Pavelka had become acquainted with the plaintiff, Sheldon Gallner, when he had represented them in regard to professional football contracts. In October 1975, Doak talked with Sheldon Gallner about the possibility of forming a corporation to operate a lounge. Later, when there was difficulty in arranging for financing, Sheldon Gallner offered to arrange a loan through his father, David Gallner.

The loan transaction was completed on February 19, 1976. Doak and Pavelka, doing business as Sweep Left, Incorporated, executed and delivered a demand promissory note in the amount of $50,000 payable to David Gallner and Sam Guidici. Guidici, a stockholder in the defendant, executed and delivered a note in the amount of $25,000, payable to David Gallner. David Gallner delivered $50,000, the proceeds of a personal loan he had obtained, to the corporation. As a part of the transaction, Doak and Sheldon Gallner executed a stock purchase agreement which provided as follows: "AGREEMENT made and entered into this *19th* day of February, 1976, by and between Sweep Left, Inc., a corporation duly organized and existing under the laws of the State of Nebraska, and having its principal place of business at Lincoln, Nebraska, party of the first part hereinafter referred to as 'Sweep Left'; and Sheldon Gallner of Council Bluffs, Iowa, party of the second part hereinafter referred to as 'Buyer', W I T-

N E S S E T H: Sweep Left agrees to sell to Buyer and Buyer agrees to purchase from Sweep Left *100* shares of the common stock of Sweep Left, Incorporated, which represents ten percent (10%) of the authorized common stock of Sweep Left, Inc., at *$10* per share, payment to be made as follows, to-wit: Sweep Left agrees immediately upon the signing of this agreement to place in escrow with First National Bank of Council Bluffs, Iowa, the stock hereinbefore mentioned, subject to the payment of *$1000*, said sum being considered payment in full."

A similar agreement for the purchase of 125 shares was executed by Doak and David Gallner.

Doak testified that as a part of the transaction, Sweep Left, Inc., agreed to look for other financing and pay off the loan from David Gallner as soon as possible.

No stock was ever placed in escrow and the money due from the plaintiffs was never paid or tendered to the escrow agent.

On May 21, 1976, Donald H. Bowman, as counsel for Doak, Pavelka, and the defendant, wrote to Hugh Finerty, the plaintiffs' counsel, inclosing a check in the amount of $49,765.82, the balance due on the loan, and stating that the check was tendered in full payment of all obligations of Doak, Pavelka, and the defendant to the plaintiffs and Guidici.

On June 1, 1976, Finerty returned the check to Bowman stating that the terms under which it was tendered were not acceptable. On June 2, Bowman returned the check to Finerty. The check was then endorsed by David Gallner and Guidici and cashed.

On June 8, 1976, Finerty wrote to the First National Bank of Council Bluffs, Iowa, stating that payment was tendered as required by the two stock purchase agreements and requesting the bank to demand that the defendant deposit the stock in escrow as provided in the agreements. Although the letter stated that payment was tendered, in fact no money

was ever tendered to the bank or the defendant by the plaintiffs.

These actions were commenced on September 9, 1976, to compel specific performance of the stock purchase agreements.

The trial court found there had been no performance of the agreements by any of the parties within a reasonable time prior to the repudiation of the agreements by the defendant and dismissed the actions. The plaintiffs have appealed.

Although each agreement provided that the defendant was to deposit the stock in escrow immediately upon the signing of the agreement, performance by the defendant was "subject to the payment" of the purchase price for the stock. The plaintiffs never performed the condition precedent set out in the agreements and had no right to demand performance by the defendant.

Since the plaintiffs were in default the defendant could elect to rescind. Where contractual promises are mutual and dependent, the failure of one party to perform authorizes the other to rescind the contract. The failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof. 17 Am. Jur. 2d, Contracts, § 503, p. 979. See, also, Olson v. Pedersen, 194 Neb. 159, 231 N. W. 2d 310; Restatement, Contracts, § 397, p. 750.

The defendant elected to rescind and repudiated the contract by the letter from Bowman to Finerty on May 21, 1976. The plaintiffs' attempt to perform by the letter to the bank on June 8 was of no effect because the contracts had been rescinded and payment was never tendered.

The judgments of the District Court dismissing the actions were correct and are affirmed.

AFFIRMED.

FRITZ E. STRUEMPLER, JR. AND BONNIE J. STRUEMPLER, APPELLANTS, V. JOSEPH E. PETERSON AND BEULAH E. PETERSON, APPELLEES.

277 N. W. 2d 691

Filed April 24, 1979. No. 42134.

Contracts: Property: Specific Performance: Severance: Homesteads. Where a contract for the sale of real estate includes both homestead and nonhomestead property, but is not duly executed and acknowledged, specific performance may be obtained of the nonhomestead land only if the contract is clearly severable as to the homestead and nonhomestead property.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed.

Tedd C. Huston, for appellants.

Carlos E. Schaper, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and CANIGLIA, District Judge.

CANIGLIA, District Judge.

The plaintiffs, Fritz and Bonnie Struempler, bring this action against the defendants, Joseph and Beulah Peterson, for damages for nonperformance of a real estate contract. The contract provides for an option to purchase 320 acres of defendants' land, 160 acres of which was the homestead of the defendants, and 160 acres which was not homestead property. The contract was not acknowledged by either of the defendants. The trial court sustained a demurrer to plaintiffs' amended petition and the plaintiffs have appealed. We affirm.

This case was previously before the court; Struempler v. Peterson, 190 Neb. 133, 206 N. W. 2d 629, dated April 20, 1973. In that case, plaintiffs sought specific performance of the contract involved in this action. In denying specific performance, this court held that a contract to sell land constituting a homestead is void when not executed and acknowledged by both

husband and wife as required by section 40-104, R. R. S. 1943.

The opinion further holds that where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property, but is not executed and acknowledged as required by the section of the statute above, specific performance may be obtained of the nonhomestead land with an abatement of the total purchase price where the contract, under its provision, is clearly severable as to the homestead and the nonhomestead property. This is not the case in the contract involved in this litigation. This contract describes the land only as a full half section; it does not indicate any basis for allocation of the consideration to anything except the entire tract. Under these circumstances, therefore, the court will not make a new contract for the parties nor impose new conditions not contemplated by the parties.

The plaintiffs now bring an action for damages based on the defendants' refusal to convey the land, which is the subject of the contract. The defendants demurred first to the petition and then to an amended petition, and the trial court sustained the demurrer. Plaintiffs refused to plead further and this appeal followed. The sole issue in this appeal is: Did the trial court err in sustaining the demurrer to plaintiffs' amended petition? An examination of the plaintiffs' petition discloses the plaintiffs' claim for damages is based on two causes of action. The first involved the nonhomestead land. Although specific items in the claim for damages could possibly be included as a basis for an unjust enrichment claim, the petition does not make any such allegation or claim. Under these circumstances, therefore, we hold that the decision of the trial court in sustaining the demurrer was proper and correct.

Counsel for plaintiffs has submitted the case of Solt v. Anderson, 63 Neb. 734, 89 N. W. 306, as

authority for his contention that, even though a contract for the sale of a homestead is not acknowledged and therefore not subject to an action for specific performance, yet it may nevertheless entitle the vendee to recover damages for failure to fulfill the contract. We do not agree that the Solt case is authority for such a proposition. On page 738 of the Solt case, the opinion reads: "It would seem that while the contract was not enforceable specifically, it was not void. There is no public policy against the free disposition of the homestead. Probably some amendment of pleadings will be necessary, but otherwise we do not see why the action may not proceed as one for damages. Possibly it may be claimed that the decisions of this court, under the statute above cited, made the contract in question absolutely void. In that case it would not support an action for damages. That question, however, is not before us and is not decided. We are entitled to have the assistance of counsel in solving it. If we were not apparently compelled to hold otherwise in this very case, we would say we were entitled to the help of the trial court."

The contract in the case before the court is not severable as to the homestead and nonhomestead property and is therefore unenforceable. As such it can not be the basis for an action in damages and the trial court was correct in sustaining the defendants' demurrer. See, also, Horseth v. Fuglesteen, 165 Minn. 38, 205 N. W. 607; Lamb v. Cooper, 150 Iowa 18, 129 N. W. 323; 40 C. J. S., Homesteads, § 151, p. 616.

AFFIRMED.

JOE AND AL'S IGA, INC., APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLANTS, AND CHARLES H. ROGERS ET AL., INTERVENOR-APPELLANTS.

277 N. W. 2d 693

Filed April 24, 1979. No. 42138.

1. **Administrative Law: Licenses and Permits.** The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically nor capriciously.
2. **Administrative Law: Evidence.** Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.
3. **Administrative Law: Licenses and Permits: Municipal Corporations.** In a proceeding to obtain a liquor license, a resolution of the governing body of a municipality recommending approval of the application, which fails to receive the required number of votes to pass, is ineffective to constitute any official action of that governing body, amounts to no recommendation at all, and does not furnish competent evidence upon which to base a denial of a liquor license application by the Nebraska Liquor Control Commission.
4. **Licenses and Permits.** Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license.

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

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

Edward F. Carter, Jr., of Barney & Carter, P.C., for intervenor-appellants.

Mark M. Sipple of Walker, Luckey, Sipple & Hansen, for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

HASTINGS, J.

This is an appeal from an order of the District Court setting aside the order of the Nebraska Liquor Control Commission denying the application of plain-

tiff-appellee for a retail package liquor license, and in such order of reversal the District Court ordered the Commission to issue such license. The appellants are the Commission and certain protestors at the original Commission hearing who joined as intervenors in the District Court.

Plaintiff is, as the name implies, an IGA grocery store operating as a corporation which has been doing business at 23rd Street and U. S. Highway No. 30 in Columbus since April of 1967. The corporation consists of two equal stockholders, Joe Gdowski and Alfred Dolezal, both Columbus residents. All parties concede they are proper persons to hold a license under the Nebraska Liquor Control Act.

The application was filed on August 15, 1977, and, as required by statute, was first referred to the Columbus city council for recommendations. On September 7, 1977, a motion was made by that body to recommend the granting of the license, which motion was defeated with three councilmen voting in the affirmative and four in the negative. One councilman was absent. A report of this action was forwarded to the Commission. Also contained in the Commission's file were written protests of seven citizens of Columbus plus the written protest of an agent for the Commission. The protests generally related to what they considered to be an overabundance of licenses in Columbus, and that it would not be in the public interest to sell alcoholic beverages in a grocery store or to grant this particular license. According to the Commission itself, the only reason for the agent's protest was a formality because of the citizen protests.

A formal hearing was had before the Commission on October 18, 1977. The two stockholders for the plaintiff testified that they operated a full-line meat and grocery business; that they had a good clientele, "business people and everything;" that residential structures bordered their place of business to the

south, but the remainder of the area was devoted to business places. One of the witnesses described the present building and explained that they were planning a 60 foot by 60 foot addition to one end which would house the liquor section and a proposed bakery section. This proposed construction differed from the plan submitted at the time of the original application which called for a somewhat different addition which the landlord declined to consider. Petitions containing approximately 250 signatures of persons, mostly plaintiff's customers, favoring the issuance of the liquor license to the plaintiff, were identified by the witness Dolezal and received into evidence. He gave as reasons for wanting a liquor license the fact that many of his customers had asked why liquor was not available in the store, and that it would give the plaintiff another source of income so as to permit it to be more competitively priced in grocery items with its major competition, three large grocery store chains.

The evidence related that there was one other grocery store possessing a liquor license, technically not within the city limits of Columbus because it was a part of an industrial tract, but more or less surrounded by a residential neighborhood within the city limits. However, two drugstores held package licenses. There were 58 liquor licenses held by grocery stores throughout the State of Nebraska during the year 1977. Without reference to whether they are retail package licenses or Class C licenses which permit sale by the drink, one of the protestants claimed that there are 50 alcoholic beverage outlets within the city of Columbus which has a population of 17,000. Eighteen liquor licenses are located in downtown Columbus, and on a portion of highway 30 approximately 2½ miles long where plaintiff's place of business is located there are 21 alcoholic beverage outlets. Within 3 blocks on either side of plaintiff's location there are presently four package liquor out-

lets. The license which plaintiff seeks is an existing Class C license presently held by a downtown Columbus bar which would be downgraded to the proposed package license.

Four other witnesses testified in favor of the granting of the license: Richard Gdowski, who is a real estate broker and a brother of Joe; an operator of a fast-food restaurant; a contractor who is also mayor of Columbus; and a manager of a local radio station. They gave no particular additional reasons for their support of the issuance of the license. Appearing at the hearing but not testifying were 7 protestants, all involved in the liquor business in Columbus, and 11 supporters of the application, 2 of whom were involved in the liquor business.

As previously indicated, the Commission denied the application, assigning as reasons that the city of Columbus made no recommendations; two separate citizen protests were filed; a protest was filed by an agent of the Commission; no other grocery stores in Columbus had a liquor license; the only grocery store with a liquor license is located outside the city limits; there are 42 licenses in Columbus (not 50 as claimed by one of the protestants), of which 38 possess package sale privileges; and there is no need for such a package liquor license. On appeal, the evidence introduced at the Commission hearing was received as well as evidence of the number of grocery stores in the state holding liquor licenses, and the District Court found that the Commission's order of denial was arbitrary and capricious and reversed the same and ordered the license to issue.

The respective motions for new trial filed by defendant and intervenors were overruled and their appeals were perfected. The errors assigned were that the District Court found the order of the Commission to be unreasonable, arbitrary, and capricious, and particularly in: (1) Finding that the Commission's sole basis for denial was that plaintiff was a

grocery store; (2) not finding that the order of the Commission was reasonable because the evidence lacked a showing of need for a license in the area; and (3) not finding that plaintiff would not operate, if granted a license, from the premises described in the application.

"The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically nor capriciously. As in the case of other administrative bodies, the Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary." Hadlock v. Nebraska Liquor Control Commission, 193 Neb. 721, 228 N. W. 2d 887 (1975).

In order to judge whether the action of the Commission was arbitrary or unreasonable, it is necessary to examine each assigned reason for denying the application.

First, that the city of Columbus made no recommendation. In this case, the situation that existed was opposite that in Hadlock v. Nebraska Liquor Control Commission, *supra*. There, a motion was made before the Kearney city council to recommend denial of the license which received two affirmative votes, one negative vote, and one abstention; one councilman was absent. This court found that under the statutes and rules applicable to the city of Kearney a resolution, recommending either issuance or denial of a license, required for adoption a majority vote (3) of all elected members of the city council. The court stated that: "The vote here was clearly

ineffective to constitute any official action of the governing body." In this case, a resolution recommending approval failed to receive a majority vote; it was clearly ineffective to constitute any official action of the governing body; amounted to no recommendation at all; and does not furnish competent evidence upon which to base a denial of a liquor license application by the Commission.

The second reason for denying the application was that two separate citizen protests were filed. Admittedly, such protests afforded the basis of a mandatory hearing before the Commission. "(1) The commission shall set for hearing before it any application for a retail license relative to which it has received: * * * (b) * * * objections in writing by not less than three persons residing within said city, village, or county, as the case may be, protesting the issuance of the license * * *." § 53-133, R. S. Supp., 1978. However, upon such hearing, the protests to be effective must be of some substance. Here, stripped of form, they were all authored and signed by citizens involved in the liquor business, competitors if you will, who simply didn't want any competition. The claim that there were too many licenses in Columbus has a hollow ring to it because this was a replacement, not an addition. Also, neither the Legislature nor the Commission has ever established any definitive policy relating to population-license ratios such as was done by the city of Lincoln in its recommendation to the Commission and approved by this court in Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413 (1966): "Upon the foregoing reasoning the court concluded: 'Such discretion (of the licensing board) extends to limiting the number of licenses which it will issue for the sale of liquors within the city, as well as the number that will be granted for any particular locality.' " However, the Commission did not in its findings embrace protestants' ratio theory

which was condemned in J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694 (1975). "It seems clear that *if such a policy* [limiting licenses by population] *had been earlier determined and announced,* the burden would, under the doctrine of Allen v. Nebraska Liquor Control Commission, *supra,* have been upon the applicant to show that it was arbitrary and unreasonable." (Emphasis supplied.) There had been no such "earlier determination" in this case.

The next reason given by the Commission for its order related to the finding that no other grocery stores in Columbus have a license except one which was outside the city limits. All policy decisions aside, with the record showing 58 licenses possessed by grocery stores throughout the state, it is difficult to perceive the nature of plaintiff's present business as furnishing any basis for the license denial. This is especially true when one considers that except for the fact of some apparent gerrymandering there is a grocery so licensed in Columbus.

The final reason given by the Commission was that there are 38 package licenses in Columbus, therefore there was no need for this license. This is suggestive of a requirement that there be a showing of public convenience and necessity such as is necessary to obtain permits and licenses in the public utility and service area. Nowhere in the statutes relating to the liquor laws is there any such requirement. As stated in Hadlock v. Nebraska Liquor Control Commission, *supra*: "In an administrative hearing on an application for a retail liquor license not required by subsection (1) of section 53-133, R. R. S. 1943, where the evidence fails to establish any valid grounds for denial of the application, the provisions of section 53-132(1), R. R. S. 1943, require the Nebraska Liquor Control Commission to cause a license to be issued in the manner provided by law as a matter of course." Absence of need alone is not a

sufficient reason to deny an otherwise proper application for a liquor license.

Intervenors' last assignment of error states that the District Court failed to find the plaintiff, if granted the license, would not operate from the premises described in its application, contrary to the holding of this court in O'Connor v. Nebraska Liquor Control Commission, 191 Neb. 436, 215 N. W. 2d 635 (1974). However, that was a case involving a suspension of a licensee who had permitted gambling on the premises, stored liquor in a place other than indicated on his license, and who had failed to show a basement on the diagram of his original application upon which his license had been issued. This is a much different case. Plaintiff here was forced to change its building plans because of a refusal of the landlord to go along with the original plans. This fact was brought to the attention of the Commission as soon as it was known and presented as an amendment to the application at the time of the hearing. There is no claim of bad faith and certainly this is not the type of failure to "submit a truthful application" mentioned in O'Connor v. Nebraska Liquor Control Commission, *supra*.

From an examination of all the evidence there does not appear to be any valid reason for the Commission denying this application, and its action is therefore arbitrary and unreasonable. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

MARY M. SWILER, APPELLEE, V. BAKER'S SUPER MARKET, INC., APPELLANT.

277 N. W. 2d 697

Filed April 24, 1979. No. 42141.

1. **Trial: Evidence: Negligence.** In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled

to have all conflicts in the evidence resolved in her favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for the jury.

2. _____: _____: _____. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with a reasonable certainty the negligent act charged.
3. **Juries: Instructions: Evidence: Pleadings.** A litigant is entitled to have the jury instructed only on those theories of the case which are presented by the pleadings and which are supported by competent evidence.
4. **Negligence: Evidence.** Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently is generally competent evidence.

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

Ronald H. Stave and Lee H. Hamann of the Law Offices of Emil F. Sodoro, P.C., for appellant.

Michael J. Mooney and Michael McCormack of McCormack, Cooney & Mooney, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and IRONS, District Judge.

IRONS, District Judge.

This is an action to recover damages for personal injuries sustained by plaintiff on March 15, 1976, when she tripped upon a floor mat and fell in the defendant's store while there to make a purchase. The jury returned a verdict for the plaintiff in the amount of $45,000. The defendant appeals.

The principal issues raised in this appeal are: (1) Was the evidence sufficient to submit the case to the jury; (2) did the instructions contain specifications of negligence not supported by the evidence; (3) did the court err in allowing testimony of the past

practice of the defendant relative to taping or securing the mat to the floor; and (4) was an instruction which permitted the jury to consider loss of enjoyment of life in determining damages erroneous in that it allowed duplication of elements of damage?

The evidence shows that plaintiff entered the store at one of two main entrances controlled by automatic door opening devices which operate when pressure is exerted by stepping on a rubber mat in front of the door. Immediately inside the door was another mat or carpet which had been placed upon the floor of the store to keep the floor from becoming wet and slippery because of the wet and rainy conditions on that particular day. Evidence also shows the defendant had used this procedure on wet and rainy days previous to plaintiff's fall, that it was defendant's usual practice to tape this mat to the floor to keep it from slipping, and that defendant had not done so on the day of plaintiff's fall. Plaintiff testified she tripped over this mat upon entering the store and that she had not noticed anything unusual about the mat until after her fall when she saw the bunching or bulging of the end of the mat just inside the door. Other witnesses testified as to the condition of the mat after plaintiff's fall. There was other testimony that the mat had a tendency to slide if not fastened. It could be inferred that the bulge in this instance was caused by the movement of the mat against the post of the rails at the doors.

The plaintiff sustained serious injury requiring medical care, hospitalization, and permanent injury with undisputed special damage of approximately $15,000. Plaintiff was 75 years of age on the date of the fall and 77 at the time of trial. We affirm.

We conclude that from all the evidence adduced by the plaintiff, including defendant's employees, that a prima facie case was made by the plaintiff and that this then became a matter for the jury to determine. In determining the question of whether

the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in her favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for the jury. Pearson v. Richard, 201 Neb. 621, 271 N. W. 2d 326. This court said in the Pearson case that: "Negligence is a question of fact and may be proven by circumstantial evidence and physical facts."

A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Vistron Corp. v. Scoular-Bishop Grain Co., 194 Neb. 696, 234 N. W. 2d 906. Again, the record clearly shows that sufficient evidence appears to instruct the jury, in the court's instruction No. 2, on all elements pleaded by the plaintiff. The court further cautioned the jury in instruction No. 5 that both the plaintiff and defendant's pleadings were merely their statements and contentions and were not to be considered by the jury as evidence.

The trial court allowed the plaintiff to introduce evidence, over the defendant's objection, relative to the defendant's past practice of taping or securing the mat in question to the floor in order to prevent bulging.

In Wilbur v. Schweitzer Excavating Co., 181 Neb. 317, 148 N. W. 2d 192, the court said that: "Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently is generally competent evidence."

The defendant contends the court erred, in including as a part of its general instruction on damages for personal injury, a statement that the jury could "take into consideration" the "loss of enjoyment of life experienced and reasonably certain to be experienced in the future." The argument is that this part of the instruction represents a duplication of the elements of permanent disability and of pain and suffering, and thus the jury was permitted to award double damages for the same loss. There was evidence introduced to support the plaintiff's diminished capacity to enjoy life with respect to activities formerly enjoyed, deprivations of pleasure, and inconvenience.

The defendant points out the Nebraska pattern jury instructions relative to damages for personal enjoyment include no instruction related to loss of enjoyment of life and that no precedent of this court authorizes such an instruction. It cites and relies upon Winter v. Pennsylvania R. R. Co., 45 Del. 108, 68 A. 2d 513; and Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978. A majority of courts, however, have approved inclusion of loss of enjoyment of life as a consideration that may be instructed upon in a proper case and be considered by the jury in determining the amount of damages suffered by the plaintiff because of personal injury for which the defendant is liable. See the cases cited at 15 A. L. R. 3d 514, and Powell v. Hegney, 239 So. 2d 599 (Fla. App., 1970); Pierce v. New York Central Railroad Company, 409 F. 2d 1392 (6th Cir., 1969); and Hildyard v. Western Fasteners, Inc., 522 P. 2d 596 (Colo. App., 1974).

Loss of enjoyment of life may, in a particular case, flow from a disability and be simply a part thereof, and where the evidence supports it, may be argued to the jury. A separate instruction therein may be redundant. We do not recommend such an instruction be given, but find that under the facts of this

particular case, where there is evidence from which the jury could find the injuries and resulting disability did cause loss of enjoyment of life, there was no error in giving the instruction, and we do not believe the jury was in any way misled.

The judgment of the District Court is affirmed.

AFFIRMED.

S & T MOTORS ET AL., APPELLANTS, V. GENERAL MOTORS CORPORATION, APPELLEE.

277 N. W. 2d 701

Filed April 24, 1979. No. 42159.

1. **Motor Vehicles: Franchises.** The Motor Vehicle Industry Licensing Act regulates and restricts the termination of dealer franchises and creates rights in franchisees which would not exist independent of the statute.
2. **Motor Vehicles: Franchises: Statutes.** Under section 60-1429(2), R. R. S. 1943, change of ownership of a franchisee's dealership is not good cause for termination of the franchise unless the franchisor proves that the change of ownership will be substantially detrimental to the distribution of franchisor's motor vehicle in the community.
3. **Motor Vehicles: Franchises: Statutes: Licenses and Permits.** Under section 60-1430, R. R. S. 1943, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business, the franchisor shall give effect to such change in the franchise unless the transfer of the franchisee's license under the act is denied or the new owner is unable to obtain a license.
4. **Motor Vehicles: Franchises: Words and Phrases.** The essential concept involved in the term dealership, as used in the Motor Vehicle Industry Licensing Act, is the "business" of the dealer.
5. **Motor Vehicles: Franchises.** The real estate on which the business is operated is not necessarily an integral part of a dealership.
6. **Motor Vehicles: Franchises: Statutes.** The term "motor vehicle" as used in section 60-1429(2), R. R. S. 1943, refers to the motor vehicles covered by the franchise and does not refer to all of the motor vehicles which a franchisor may distribute through various divisions and separate franchises.

Appeal from the District Court for Lancaster

County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded with directions.

Raymond, Olsen & Coll and Knudsen, Berkheimer, Endacott & Beam and Wright & Simmons, for appellants.

Stephen H. Nelsen of Cline, Williams, Wright, Johnson & Oldfather and Otis M. Smith and Lawrence R. Sessoms, for appellee.

Heard before BOSLAUGH, BRODKEY, CLINTON, and HASTINGS, JJ., and HICKMAN, District Judge.

BOSLAUGH, J.

This is an appeal from an order of the District Court affirming an order of the Nebraska Motor Vehicle Industry Licensing Board granting the application of the defendant, General Motors Corporation, to terminate the franchise of the plaintiff, S & T Motors.

S & T Motors is a partnership that has been an Oldsmobile dealer in Scottsbluff, Nebraska, for the last 27 years. On May 4, 1977, an explosion and fire partially destroyed the building in which S & T Motors had been operating the business. For several days after the fire S & T Motors attempted to operate the business from the used car lot. This proved to be unsatisfactory, and on May 10, 1977, S & T Motors entered into a contract with Kizzier Chevrolet Company, Inc., the other plaintiff, for a sale of the assets of S & T Motors, except the real estate, to Kizzier Chevrolet Company, Inc.

On May 11, 1977, Robert R. Slie, the managing partner of S & T Motors, and Dwayne Kizzier, the owner of Kizzier Chevrolet Company, Inc., went to Denver, Colorado, to discuss the contract with Charles J. Bretz, the Denver zone manager for Oldsmobile. Bretz was not pleased with the contract between S & T Motors and Kizzier and stated that the Buick dealer in Scottsbluff, Dalton Buick, had made

an application for the Oldsmobile franchise in Scottsbluff.

General Motors Corporation refused to approve any transfer of the Oldsmobile franchise from S & T Motors to Kizzier Chevrolet Company, Inc., and on August 22, 1977, filed an application with the Nebraska Motor Vehicle Industry Licensing Board for permission to terminate the dealer agreement or franchise of S & T Motors.

The application alleged that General Motors was entitled to terminate the franchise of S & T Motors because S & T Motors had violated its dealer's agreement by failing to maintain dealership operations open for business for more than 7 consecutive business days, since May 4, 1977; that S & T Motors had not had an established place of business since May 4, 1977; that S & T Motors had attempted to conduct partial dealership operations at the Kizzier garage; that S & T Motors had entered into a sale agreement with Kizzier without Oldsmobile approval; and that S & T Motors had entered into a contract for the sale of the principal assets required by it for its dealership operations.

S & T Motors filed a protest alleging that it had entered into the contract for sale of its dealership and business to Kizzier within 7 business days of the explosion on May 4, 1977, and that the dealer's agreement was subject to section 60-1430, R. R. S. 1943, which required General Motors to give effect to the sale to Kizzier unless the change of ownership would be substantially detrimental to the distribution of the franchisor's motor vehicle.

After an evidentiary hearing the board found there had been no transfer of a dealership from S & T Motors to Kizzier; that it would be substantially detrimental to the distribution of the franchisor's motor vehicle in the community if General Motors were required to grant an Oldsmobile franchise to Kizzier; and that the application for permission to

terminate the franchise of S & T Motors should be granted.

From the order of the board granting the application, S & T Motors and Kizzier appealed to the District Court where the order was affirmed. S & T Motors and Kizzier have now appealed to this court.

The case turns on the question of whether the sale from S & T Motors to Kizzier was binding upon General Motors. In the absence of any statute the rights of S & T Motors would be limited by its agreement with General Motors. S & T Motors relies upon provisions of the Motor Vehicle Industry Licensing Act, sections 60-1401.01 to 60-1435, R. R. S. 1943, which regulates and restricts the granting and termination of dealer franchises. There is no issue in this case concerning the validity of any provision of the act.

Section 60-1429, R. R. S. 1943, provides in part as follows: "Notwithstanding the terms, provisions or conditions of any agreement or franchise, the following shall not constitute good cause for the termination or noncontinuation of a franchise, or for entering into a franchise for the establishment of an additional dealership in a community for the same linemake: * * * (2) The change of ownership of the franchisee's dealership or the change of executive management of the franchisee's dealership, unless the franchisor, having the burden of proof, proves that such change of ownership or executive management will be substantially detrimental to the distribution of franchisor's motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer products in the community; or * * *."

Section 60-1430, R. R. S. 1943, provides: "Notwithstanding the terms, provisions or conditions or [sic] any agreement or franchise, subject to the provisions of subdivision (2) of section 60-1429, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business or by stock transfer or in the event of change in

the executive management of the franchisee's dealership the franchisor shall give effect to such a change in the franchise unless the transfer of the franchisee's license under this act is denied or the new owner is unable to obtain a license under this act as the case may be."

These sections create rights in franchisees which would not exist independent of the statute. Under section 60-1429(2), R. R. S. 1943, change of ownership of a franchisee's dealership is not good cause for termination of the franchise unless the franchisor proves that the change of ownership will be substantially detrimental to the distribution of franchisor's motor vehicle in the community. And, under section 60-1430, R. R. S. 1943, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business, the franchisor shall give effect to such change in the franchise unless the transfer of the franchisee's license under the act is denied or the new owner is unable to obtain a license.

It is apparent from the record that sections 60-1429(2) and 60-1430, R. R. S. 1943, are directly applicable to the transaction between S & T Motors and Kizzier in this case. Unless some condition of the statute has not been satisfied, General Motors is bound to recognize and honor the sale of the Oldsmobile dealership from S & T Motors to Kizzier.

General Motors makes two main contentions in support of the order granting its application for permission to terminate the franchise of S & T Motors. General Motors argues that there was no transfer of a dealership, and that a transfer of the franchise would be substantially detrimental to the distribution of its motor vehicles in the community.

The first contention is based largely on the fact that there was no transfer of real estate between S & T Motors and Kizzier. "Dealership" is not defined in the statute and there is no basis on which to say

that the real estate on which the business is operated is necessarily an integral part of a dealership.

Webster's New Collegiate Dictionary (1973) defines dealership as "an authorized sales agency." The World Book Dictionary (1976) defines dealership as "the business, franchise, or territory of a dealer." We think the essential concept involved in the term dealership is the "business" of the dealer. This would include the personal property used in the operation of the business and the franchise. Real estate might or might not be properly included. Here, the real estate could no longer be used for the operation of the business so there was a logical basis for it not to be included as a part of the dealership. There was nothing unique about the real estate that would prevent the business from being operated successfully at any other suitable location.

The contract between S & T Motors and Kizzier Chevrolet Company, Inc., provided for the sale of the usable assets of the franchisee. This was sufficient to constitute a sale of the dealership or business. The fact that property damaged in the fire was not included in the sale was not controlling.

Under section 60-1429(2), R. R. S. 1943, the burden was on General Motors to prove that the change of ownership from S & T Motors to Kizzier would be substantially detrimental to the distribution of its motor vehicle in Scottsbluff, Nebraska. The evidence in regard to this issue shows that there are more than 70 Chevrolet-Oldsmobile dealerships in the Denver zone. Kizzier has been a satisfactory dealer and has adequate facilities to handle the Oldsmobile business in addition to his Chevrolet dealership. The defendant's witnesses testified they anticipated there would be as many Oldsmobile automobiles sold by Kizzier, if the franchise were granted to Kizzier, as had been sold by S & T Motors, and there would be no reduction in the number of Chevrolet automobiles sold by Kizzier.

There was evidence that the Buick dealer in Scottsbluff was in a borderline profit situation and it was necessary that he acquire additional sales opportunities if "a viable Buick operation" was to continue in the area. There had been no plan by General Motors to create a dual dealership with Buick in Scottsbluff prior to May 4, 1977, but when the S & T Motors Oldsmobile franchise became available, General Motors decided it should be awarded to Dalton Buick rather than transferred to Kizzier.

On rebuttal Dwayne Kizzier testified that his profit situation had been satisfactory due only to the mobile home business that he operated in connection with the Chevrolet dealership. Since January 1977, Kizzier had been looking for another automobile line to add to his Chevrolet dealership. An additional automobile line was necessary because the increase in fixed costs and overhead had made the automobile portion of the business unprofitable with only the Chevrolet line available.

The evidence will support a finding that there would be some benefit to the Buick dealer if he were allowed to obtain the Oldsmobile franchise. If the Buick dealer were denied the Oldsmobile franchise because the Oldsmobile dealership had been sold to Kizzier by S & T Motors, there might be some detriment to General Motors because the Buick dealer might then be forced out of business because of the inability to survive economically with the sales opportunity provided by the Buick line alone. The same might be said of Kizzier if he is limited to only the Chevrolet franchise.

Section 60-1429(2), R. R. S. 1943, requires proof that the change in ownership will be substantially detrimental to the distribution of franchisor's *motor vehicle*. We think the statute refers to the motor vehicles covered by the franchise and does not refer to all of the motor vehicles which a franchisor may distribute through various divisions and separate

franchises. Under this interpretation of the statute, the evidence was not sufficient to establish the substantial detriment requirement set out in section 60-1429(2), R. R. S. 1943.

In the absence of evidence that Kizzier would not be able to operate the Oldsmobile franchise successfully, and that the distribution of Oldsmobile automobiles in the community would be adversely affected, General Motors did not satisfy its burden of proof.

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.

STATE OF NEBRASKA, APPELLEE, V. DONALD D. HERZOG, APPELLANT.

277 N. W. 2d 705

Filed April 24, 1979. No. 42221.

Criminal Law: Presentence Reports: Probation and Parole. Whether successive presentence investigations are necessary before the revocation of an order of probation is entered rests in the sound discretion of the sentencing judge.

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

Duane A. Burns of Mayer, Burns & Mayer, for appellant.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from an order revoking probation. The defendant was placed on 3 years probation on November 3, 1975, after a plea of guilty to a

charge of breaking and entering an automobile. At both the arraignment and the hearing on revocation of probation, the charge involved the excessive use of alcohol. As part of the defendant's order of probation, he was ordered to undergo psychiatric treatment and he did so. At a hearing on June 22, 1978, the defendant admitted violation of the conditions of probation, to wit: The operation of a motor vehicle while under the influence of intoxicating liquor. The defendant further admitted that he had violated the terms and conditions of probation on a number of occasions and that he had been engaged in drinking alcoholic beverages for at least 1 year prior to the date of hearing. The trial court took evidence offered by the defendant with respect to his work record and his efforts at obtaining an education, but nevertheless found that the violations merited a sentence in the penal complex. The sole and only error claimed is the failure of the trial court to order a new presentence investigation in view of the fact that 2 years 7 months had passed from the time of the plea of guilty to the hearing on the revocation. We affirm.

The defendant at the revocation hearing freely admitted his violation of probation and was extended an opportunity to present extended evidence as to extenuating circumstances and the efforts of rehabilitation. The trial court took into consideration the fact that the incident of which the defendant pled guilty was one of a number of incidents involving drinking and driving and another incident involving the malicious destruction of property by firearm. At the motion for new trial, the defendant offered by affidavit the testimony of a physician to the effect that the defendant would suffer physical and mental hardship if he were confined in the penal complex. All other evidence favorable to the defendant was presumably introduced at the probation hearing. "It is to be noted that section 29-2261, R. R.

S. 1943, does not by its literal terms require a multiple presentence investigation in situations such as is before us. * * * [W]hether successive presentence investigations are necessary before the revocation of an order of probation is entered rests in the sound discretion of the sentencing judge." State v. Snider, 197 Neb. 317, 248 N. W. 2d 342. We note that as in State v. Stroud, 200 Neb. 27, 261 N. W. 2d 777, the facts of the case were presented and the violation of probation was apparent. We find no abuse of discretion by the trial judge.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MONTE R. MEADOWS, APPELLANT.

277 N. W. 2d 707

Filed April 24, 1979. No. 42252.

1. **Criminal Law: Evidence.** A person charged with a crime may be convicted on circumstantial evidence only.
2. **Criminal Law: Trial: Evidence: Verdicts.** A court will not interfere on appeal with the 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 Douglas County; JOHN T. GRANT, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, 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.

KRIVOSHA, C. J.

This is an appeal from a jury's verdict finding de-

fendant guilty of the crime of burglary. Defendant assigns as error the trial court's refusal to direct a verdict in favor of defendant maintaining that the evidence was insufficient as a matter of law to prove the essential elements of the crime of burglary. We have reviewed the record and are of the opinion that the evidence was sufficient to permit the jury to render a verdict of guilt. The trial court was correct in denying the motion for a directed verdict. We therefore affirm.

Defendant was charged with having participated in the burglary of a Texaco service station late in the evening of May 28, 1975. Just before 1 a.m., on May 29, 1975, Deputy Sheriff Richard Lubash, a member of the Douglas County sheriff's department, observed a 1970 green Dodge Charger traveling westward on Maple Street near its intersection with 108th Street. Deputy Lubash recalled having seen the car earlier in the evening when it had been stopped by Deputy Sheriff Robert J. Tramp. Deputy Lubash then saw the car turn around at the intersection of 112th Street and Maple and proceed east on Maple. Deputy Lubash positioned his car in a parking area near the Texaco station and watched the defendant's car turn north on 108th Street. Visual contact with the car was lost for a few minutes. The car was then spotted by Deputy Lubash backed up to a secluded section on the north side of the gas station. Lubash approached the car, asked defendant and his companion to step out, and then saw what appeared to be a battery charger and other items stacked alongside the building. It was then determined that a bay door window on the south side of the station had been broken, and that a number of items belonging to the station had been stacked outside the station in the area of the broken window. In addition, certain items from the station were found on the north side of the building next to defendant's car. Three Texaco road atlases of the type sold by

the station were found near the car. In addition, three Zippo tape measures of the type sold by the station were found in the possession of defendant and his companion. Further, paper towels were found in the service station that matched paper towels found in the defendant's car.

Defendant denied having anything to do with the burglary. In May of 1975 defendant was working for a Mr. Kenny Trout, doing basement waterproofing. Defendant maintained that he was in the area of the service station because he was trying to reach Mr. Trout, who resided in the adjacent apartment complex, to find out about leaving early for a job at Norfolk, Nebraska, the next day. Defendant further maintained he did not go home when he could not find Mr. Trout, because he was having family problems, and he just parked the car at the gas station to sleep. Defendant was arrested by Deputy Lubash, taken into custody, and ultimately charged with the burglary.

The evidence in this case was largely circumstantial. That does not, however, prevent a jury from finding a defendant guilty. A person charged with a crime may be convicted on circumstantial evidence only. State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. State v. Williams, 183 Neb. 257, 159 N. W. 2d 549. In jury cases the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. State v. French, 195 Neb. 88, 236 N. W. 2d 832.

After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilt, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Eickmeier, 187 Neb. 491, 191 N. W. 2d 815. It is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence. When there is substantial evidence sustaining the jury's finding it will not be set aside. State v. Kelly, 193 Neb. 494, 227 N. W. 2d 848. A court will not interfere on appeal with the 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.

A review of the evidence viewed most favorable to the State discloses that there was sufficient evidence to submit the case to the jury and sufficient evidence upon which they could return a verdict of guilt. There is no question but that a burglary occurred at the Texaco station. After the deputy arrested the defendant, the deputy seized three Zippo tape measures from the pants pocket of defendant's companion. The owner of the Texaco station testified that his station sold Zippo tapes of an identical type both in size and shape as those which were taken from the defendant's companion. The owner further testified that there was no difference whatsoever between the tapes in the possession of the defendant's companion and those which he sold. The owner of the station further testified that two or three of his tapes were missing from his display at the station. These particular tapes were ordered from a catalog and the owner knew of no other station in the area which sold them.

Deputy Lubash also found four Texaco road atlases

alongside the defendant's car. The owner of the station testified as to where they were found and that they were of the type sold by his station. Upon further investigation the sheriff's office found a number of paper towels scattered throughout the bay area of the station. The owner of the station testified that these towels were not of the type he used in his station and that they were not in the station when he closed earlier in the evening. However, a roll of paper towels of the same type as those found scattered in the station were also found in defendant's car. The investigation further showed that there was wet mud inside of the station after the burglary. The defendant's companion was found to have muddy boots at the time of his arrest.

In light of all of this evidence we cannot say that as a matter of law there was a total want of proof to support a material allegation of the information or that the testimony was of so weak or doubtful a character that a conviction based thereon could not be sustained. In the absence of our being able to make such a statement a directed verdict of not guilty would not have been justified. See State v. Edmonds, 182 Neb. 140, 153 N. W. 2d 364. The jury, being the trier of the facts, found the defendant guilty. We cannot say they were in error. The judgment is affirmed.

AFFIRMED.

IN RE INTERESTS OF ROBERT NORWOOD, JR., ET AL., CHILDREN UNDER EIGHTEEN YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ROBERT NORWOOD ET AL., APPELLANTS.

277 N. W. 2d 709

Filed April 24, 1979. No. 42268.

1. **Judicial Notice.** A court must take judicial notice of its own records in the case under consideration.

2. **Statutes: Parent and Child: Mental Health.** Under the provisions of section 43-209(5), R. R. S. 1943, parental rights may be terminated where parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such conditions will exist for a prolonged, indeterminate period.

Appeal from the Separate Juvenile Court for Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Michael A. Fortune of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellants.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky, for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

CLINTON, J.

This is an appeal from an order of the Separate Juvenile Court of Douglas County, Nebraska, made on June 16, 1978, under the provisions of section 43-209, R. R. S. 1943, terminating the parental rights of Robert Norwood and Violet Norwood as to the four youngest of their five male children. The parents have appealed to this court from that order and assign the following errors: (1) The evidence is insufficient to justify an order terminating parental rights. (2) The court erred in taking judicial notice of its own prior proceedings in this case and the evidence adduced in previous hearings. (3) The juvenile court erred insofar as its findings were based upon the mental condition of the parents since no evidence was presented at the termination hearings of the mental condition of the mother.

These proceedings commenced with the filing of a petition in the juvenile court on April 12, 1973. An amended petition was filed on August 1, 1973. The prayer of the petition was that the parental rights be

terminated on the grounds the children were neglected and dependent within the meaning of section 43-201, R. R. S. 1943, and the parents were unable to discharge their parental responsibilities as required by section 43-209, R. R. S. 1943. After hearings, various orders were entered by the court, including orders finding the children were neglected and dependent, and the parents were unable to fill their parental responsibilities. The culmination was an order of March 20, 1974, placing the children in the custody of the Douglas County social services and reserving for future determination the question of termination of parental rights. The parents appealed from that order to this court and we affirm the judgment of the juvenile court. State v. Norwood, 194 Neb. 595, 234 N. W. 2d 601.

Following that affirmance, the juvenile court placed custody of the children in the Nebraska Department of Public Welfare and the four boys here involved were placed in foster homes, two being placed together and the other two separately. Visitation rights under the supervision of the Department of Welfare were granted to the parents.

Thereafter a motion was made by the State to terminate parental rights, appropriate notice was given the parents, and hearings were held. Throughout all the proceedings, including those resulting in the order of March 20, 1974, the children were represented by a guardian ad litem and appointed legal counsel, and the parents were represented by a guardian ad litem and appointed legal counsel.

During the course of the hearings on termination, the juvenile court indicated it would take judicial notice of its prior proceedings and orders and its own prior findings. To this the counsel for the parents objected.

At the time of the termination hearings the ages of the four children were 12, 10, 9, and 7. We see no useful purpose in outlining the evidence in detail.

However, at the time the juvenile court took custody from the parents on March 20, 1974, and reserved ruling on termination, it may be said that the evidence clearly would have justified termination of parental rights. It appears, however, the court desired to give the parents every opportunity to demonstrate their fitness before taking such a radical step. The evidence adduced at the subsequent termination hearings, including interrogations by the court of the three youngest children, clearly permitted the court to find that the parents' inability to fulfill their parental function because of mental illness and mental deficiency had not changed; the mental illness of the parents, although improved because of the use of medication and participation in group therapy at the Nebraska Psychiatric Unit, was a condition which could be exacerbated by stress, including that arising from family responsibility, and also would return if medication were discontinued; there were reasonable grounds to believe the condition would continue for a prolonged period of time; the 12-year-old son was severely mentally retarded, having a vocabulary of only about 12 words, and required special care which the parents were totally incapable of providing now or at any time in the future; the best interests of the other three children required a stable situation which the parents could not provide and which the foster homes did; and there was a probability that the other three boys could and would be adopted if parental rights were terminated.

The court properly took into consideration all of its earlier proceedings. The matter before the juvenile court was a continuation of the same proceeding. A court must take judicial notice of its own records in the case under consideration. Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N. W. 254. It also has a right to examine its own records and take judicial notice of its own proceedings and judgment in an

interwoven and dependent controversy where the same matters have already been considered and determined. Bank of Mead v. St. Paul Fire & Marine Ins. Co., 202 Neb. 403, 275 N. W. 2d 822; Weiner v. Morgan, 175 Neb. 656, 122 N. W. 2d 871.

The claim of error founded upon the contention there was no evidence of the mother's present mental condition is not well founded for several reasons. The record does show she was a participant in group therapy sessions, all of whose participants, the testifying psychiatrists stated, were afflicted with schizophrenia. The records of the prior hearings show there existed mental conditions in both parents which, in all probability, would continue for an indefinite length of time although ameliorated by medication. Under the provisions of section 43-209(5), R. R. S. 1943, parental rights may be terminated where parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such conditions will exist for a prolonged, indeterminate period. The termination was not founded wholly upon the mental condition of the parents. The record indicates the father was unemployable and would probably continue so. The family's only income was from social security and disability welfare payments. The evidence tended to show that, if custody of the children were returned to the parents, family conditions as to care, sanitation, and education would not be different from those which previously existed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. MUNIZ, APPELLANT.

277 N. W. 2d 712

Filed April 24, 1979. No. 42375.

Appeal from the District Court for Adams County: FREDRIC R. IRONS, Judge. Affirmed.

Stephen A. Scherr, Adams County Public Defender, and Thomas J. Mullen, for appellant.

Paul L. Douglas, Attorney General, and C.C. Sheldon, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Richard L. Muniz appeals from his conviction by a jury of breaking and entering with the intent to inflict great bodily harm and from his sentence to a term of 18 months in the Nebraska Penal and Correctional Complex, which sentence included credit for time already served. Appellant assigns as error that the evidence was insufficient to support the verdict and that the sentence was excessive. We affirm.

Taking the view most favorable to the State, the evidence shows the following facts. Prior to his conviction for the offense at issue here, appellant lived for 7 months with a woman who was not his wife. When this woman asked the appellant to move out, he reacted violently, choking her, but did eventually leave. After moving out, the appellant continually harassed the woman, primarily by telephoning her and writing notes, and occasionally by following her around town or attempting to enter her house. At one point, appellant broke the window to the woman's automobile with a wrench, forcibly pulled her out of her automobile, and held her in his own auto-

mobile for a while. On another occasion he threatened to kill her.

The incident at issue occurred on May 4, 1978. That night, the woman was in her living room with a date. Shortly after 11:30 p.m., appellant, having parked about 6 blocks away, cut the exterior telephone wires to the woman's residence, kicked in the locked door and entered, carrying a gun which was cocked and had two bullets in it. In the course of the ensuing conversation, appellant showed the woman the two bullets and said, "One for you and one for me." The woman testified she was frightened by appellant's conduct and thought appellant intended to kill her.

By 3 or 4 a.m., the woman and her date persuaded the appellant to unload and hand over the gun and leave peacefully. No one was physically harmed, and appellant gave the woman $50 to pay for the damage to her door.

Appellant was convicted of having violated section 28-532, R. R. S. 1943, which states in pertinent part: "Whoever willfully, maliciously and forcibly breaks and enters into any dwelling house . . . with intent to . . . commit any felony . . . shall be punished by imprisonment in the Nebraska Penal and Correctional Complex not more than ten years nor less than one year . . . ." The information charged that the specific intention with which the breaking was done was that of killing the woman, or assaulting her with intent to inflict great bodily injury.

The only element of the offense as to which there could be any doubt whatsoever is whether appellant had the requisite intent to commit a felony when he entered the woman's home. Appellant claims he was carrying the gun because someone had fired upon and hit his automobile shortly before May 4, 1978. A deputy sheriff, who examined appellant's automobile a week before trial in July 1978, did find a bullet hole in the right front fender.

This court has frequently enunciated the rules applicable in this situation. The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from words or acts and the facts or circumstances surrounding the act. State v. Ristau, 201 Neb. 784, 272 N. W. 2d 274. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. In a criminal proceeding, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Jackson, 200 Neb. 827, 265 N. W. 2d 850.

The evidence in this case was clearly sufficient to permit the jury to conclude the appellant had the requisite intent, and the first assignment of error is without merit.

This court has also stated often that a sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Kerns, 201 Neb. 617, 271 N. W. 2d 48. Even disregarding other aggravating circumstances in the appellant's record, his sentence is justified by the fact that, during the 2 months before the present offense, appellant had been convicted of assault and malicious destruction of property and fined $125 due to an incident involving the same woman. The fine assessed against the appellant as a result of that conviction was obviously insufficient to deter him from further acts of violence. As the State correctly points out in its brief, appellant's sentence is relatively conservative when compared to the statutory maximum of 10 years.

AFFIRMED.

IN RE ESTATE OF FLOYD TILSON BROWN, WILLIAM H. SHERWOOD, ADMINISTRATOR. J. LELAND BROWN, APPELLANT, V. WILLIAM H. SHERWOOD, APPELLEE.

278 N. W. 2d 565

Filed May 1, 1979. No. 41754.

1. **Executors, Administrators, and Personal Representatives.** The general rule is that an executor in discharging his trust duties must exercise the care, prudence, and judgment that a man of fair, average capacity and ability exercises in the transaction of his own business.
2. _____. Ordinarily, a personal representative of an estate, acting reasonably for the benefit of interested persons, may properly effect a fair and reasonable compromise with any debtor or obligor.
3. **Executors, Administrators, and Personal Representatives: Contempt.** It may be the duty of the personal representative to prosecute a suit for the collection of assets. In a proper case the court may punish an administrator for contempt on his refusal to sue, or it may revoke his letters and appoint an administrator who will prosecute the action. The duty of an executor or administrator to bring an action on a debt due the estate may depend on whether the claim is reasonably good or one of doubtful character. He may decline to sue on a doubtful or controverted claim notwithstanding the fact that the heirs think it is well-founded, unless they are willing to give him indemnity for costs.

Appeal from the District Court for Furnas County: Jack H. Hendrix, Judge. Affirmed.

Edward F. Fogarty of Guilfoyle, Fogarty & Lund, for appellant.

Knapp, State, Yeagley, Mues & Sidwell and Person, Dier & Person, for appellee.

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

BRODKEY, J.

J. Leland Brown, hereinafter referred to as Leland, appeals to this court from an order entered by the District Court for Furnas County, on June 28, 1977, affirming the action of the county court of that county in approving a settlement for $12,500 of cer-

tain claims made by the estate of Floyd Tilson Brown, deceased, against the Stamford Bank, Stamford, Nebraska, its agents, servants, and employees. Floyd Tilson Brown died September 3, 1968, in Furnas County, leaving surviving him his two sons, Leland and F. Stanton Brown, hereinafter referred to as Stanton. Prior to the death of the father, Floyd Brown, Stanton was operating a farming operation in Nebraska and Kansas, hereinafter referred to as the Nebraska partnership, with his father, while Leland ran a farming operation in Mississippi, hereinafter referred to as the Mississippi partnership, also in partnership with his father. Prior to his death, Floyd Brown became incompetent and his son, Stanton, was appointed his guardian on June 7, 1963. In his will, Floyd Brown provided that Stanton should receive the property owned by the Mississippi partnership. The will also contained a "lopover" clause providing for the equalization of distributions to the two sons.

The appellee in this case is William H. Sherwood, who is the Administrator with Will Annexed of Floyd Brown's Estate; and who, himself, is a practicing attorney in the State of Nebraska, with extensive trial experience covering a period of over 21 years. He was appointed administrator of the estate on November 29, 1968. At the time of Floyd's death, Leland Brown had an accounting action pending in the county court against his brother, Stanton, who was guardian for his father, Floyd Brown; and that litigation was continued through various actions in Nebraska, Kansas, and Mississippi. While the accounting action against Stanton, as guardian of Floyd Brown, was pending, Floyd Brown died and William Sherwood was appointed administrator of his estate. He objected to the accounting of Stanton as guardian; and, after a trial, secured a county court verdict surcharging Stanton with the amount of $65,961. The administrator then appealed the

matter to the District Court where it was combined for trial with an action previously commenced by the administrator against both Stanton and Leland for an accounting of their operations under the two partnerships. The District Court increased the amount of the surcharge against Stanton to $83,224.18.

Thereafter, Leland filed a third party petition in the accounting action against the Stamford Bank and others, as third party defendants, alleging wrongdoing on the part of the bank in its dealings with the guardian, Stanton. Most of Leland's claims, as set forth in his third party petition, were later dismissed on motion; and the appellee, William H. Sherwood, as administrator of the estate, then filed a cross-petition and an amended cross-petition against the bank in the "combined cases." The claims against the bank contained in the cross-petitions all arose out of dealings by the bank with the guardian, Stanton, most of which claims were discussed by the trial judge at length in his memorandum opinion. In his cross-petition, the administrator alleges nine separate causes of action, all generally based upon the bank's knowingly participating with Stanton in the conversion of money and property belonging to the decedent, Floyd Brown, and he prays for damages totaling $85,688 plus interest. It appears from the record that the Browns had maintained various accounts with the Stamford Bank for many years. Prior to his guardianship, Floyd Brown had maintained a checking account with the bank, as had also Stanton and Leland. Also, the Nebraska and Mississippi partnerships had maintained their accounts at the bank. The bank had prepared numerous financial statements both for the partnerships and for the individuals over the years. Without going into great detail as to the nature of the individual claims, which would unduly and unnecessarily extend the length of this opinion,

we deem it advisable to set out in a general fashion the nature of the claims against the bank made by the administrator in his cross-petition. We also add, as revealed by the record, that in evaluating the claims, as set out in the various causes of action for settlement purposes with the bank, the administrator adopted a system for ranking the various claims and causes of action on a scale of 1 to 10, with "10" indicating the best chance of recovery and "1" indicating little chance of recovery. By multiplying each cause of action by its ranking, the administrator, because of his experience in the practice of law, particularly as a trial attorney, was able to approximate the value of each claim for settlement purposes.

In his first cause of action against the bank, the administrator claimed $11,946.41 for conversion by Stanton, in which the bank participated, of certain cattle owned by the Nebraska partnership, which occurred on or about June 7, 1963. Sherwood, the administrator, testified that the chance of success, on his theory that the bank aided, abetted, and participated in the conversion, was "8", with an approximate settlement value of $9,500.

The second cause of action was based upon a claim of conversion of certain machinery belonging to the Nebraska partnership. The administrator gave his opinion that the estate's interest was $4,055.51. The administrator valued this claim as a "5", with a settlement value of approximately $2,000.

The third cause of action against the Stamford Bank was for Stanton's alleged conversion of $14,461 received as a loan from the Lamar Life Insurance Company. The loan was secured by the Mississippi land which was entirely owned by Floyd Brown. The administrator valued his claim against the bank as an "8", with an approximate settlement value of $11,500. The administrator testified that the Stam-

ford Bank knew from Stanton's financial statements that he owned no property in Mississippi, but the bank's defense would be that the insurance company had made the check payable to Stanton Brown.

The administrator valued the fourth cause of action against the Stamford Bank in the amount of $8,311.54 based upon crops, rents, and profits allegedly due on the Nebraska partnership land. He rated this claim as a "5" for settlement purposes, with a value of approximately $4,000.

The fifth cause of action, in the amount of $7,089.30, was based upon a claim that in 1962 and 1963, Stanton converted two truckloads of Mississippi partnership cattle and deposited the proceeds to his own personal account. The bank was charged with aiding, abetting, and participating in the transaction. Sherwood rated this case at "7", with a settlement value of approximately $5,000.

In his sixth cause of action, the administrator claimed that between October 7, 1963, and November 12, 1964, Stanton converted to his own use certain funds drawn from the Mississippi partnership account, although he was unauthorized to draw checks upon that account. The estate's interest in these conversions amounted to $1,201.02. The administrator valued this claim at "8" on the theory that the bank aided, abetted, and participated in the conversion, and that the approximate settlement value of the claim was $1,000. He also testified that one of the bank's defenses to this claim was that not only was Stanton taking money out of the account, but he was also putting money into the account, "and that all the Browns knew it."

The seventh cause of action was based upon the claim that on September 5, 1963, Stanton wrote a check on the Floyd Brown guardianship account in the amount of $461.40 to cover part of his unlawful conversion of property in the estate of Walter I. Farrand, for which he was surcharged. The admin-

istrator rated the claim at "2" with a value of approximately $100 for settlement purposes.

The eighth cause of action, in the amount of $24,361.43, was based upon the claim that between the dates of June 7, 1963, and September 3, 1968, which was the date of Floyd Brown's death, Stanton drew numerous checks upon the guardianship account, which sums were paid by him to the Stamford Bank for his personal debts to the bank. This cause of action was rated by the administrator as an "8" with a value for settlement purposes of about $19,000.

The ninth cause of action was based upon the claim that from June 7, 1963, until September 3, 1968, the date of Floyd Brown's death, Stanton drew numerous checks totaling $13,800 on the guardianship account, which funds were transferred to Stanton's personal account to cover Stanton's overdrafts, and the officer of the bank had personal knowledge of this fact. The administrator rated this claim at "5" because of his feeling that the bank probably did not receive any of the money; and the settlement value, in his opinion, would be approximately $7,000. He testified that the bank's defense would be that Stanton was distributing approximately equal funds to Leland at the same time.

It appears from the record that the total face value amount of the claims as set out in the amended cross-petition of the administrator was $85,688.38, whereas, the total settlement value for all nine causes of action as rated by the administrator was $59,100.

We should also mention that although not included as one of the nine causes of action, there was involved in this case a controversy over a parcel of real estate referred to as the Farrand Quarter. It appears that Stanton bought the Farrand Quarter at a judicial sale on July 25, 1961, and gave his personal check for the downpayment. Stanton later borrowed

money from the Stamford Bank to cover the check he gave as the downpayment on the property. On June 13, 1962, Floyd Brown and Stanton executed two new notes by which Floyd took $6,000 worth of Stanton's debts and the Nebraska partnership took $10,000 worth of Stanton's debts with the result that $16,000 worth of Stanton's debts were then paid by the new notes. The Farrand Quarter was sold by Stanton to the Stamford Bank which then, in turn, sold it to Duane and Paul Johnson, who were the tenants on the property.

The District Court, in the accounting action, found in its memorandum opinion that no constructive trust arose on the Farrand Quarter because of the fact that the funds used to purchase the property had not initially been those of Floyd Brown's. It appears there is a serious question as to the value of the claim arising out of the Farrand Quarter proceedings, and also a question of whether the claim is of any value whatsoever. Nevertheless, in view of the fact that the proposed settlement of the claims of the estate against the bank, hereinafter discussed, would include the settlement of all potential claims against the bank, and is not restricted to those sued upon by the administrator, it is necessary that the Farrand Quarter matter be referred to in this opinion.

We now turn to a consideration of potential setoffs which the Stamford Bank could claim against any judgment entered against it. The administrator testified the bank could claim the following setoffs: (a) A partition action distribution in the amount of $25,915.11; (b) recovery from Stanton's bonding company - $22,810; (c) one-half of the tractor-trailer which Leland obtained from the estate but did not pay for - $4,125; and (d) one-half of the Kansas/Mississippi estate distribution to Leland - $16,750.70.

We discuss, first, the partition action distribution setoff. Leland and Stanton owned real estate in

Furnas County and as a result of a partition action of the property Stanton became entitled to $25,915.11. The money was retained by the administrator until Leland brought a garnishment action to seize the funds. Leland's attorney read into the record of the partition action a stipulation between the parties that the $25,915.11 belonging to Stanton and paid to Leland shall "be credited first to any judgment obtained by J. Leland Brown, and any balance left therefrom, if any, shall be credited against any judgment obtained by William Sherwood as Administrator with Will Annexed of the Estate of Floyd Tilson Brown * * *."

The administrator also testified that he obtained a $22,810 judgment against Stanton's bonding company as Floyd Brown's guardian. The $22,810 consisted of a $17,000 bond recovery. The difference represented interest and costs. The administrator testified that he believed the recovery from the bonding company could be claimed as a direct credit by the bank against any judgment the administrator might obtain against the Stamford Bank.

At a public auction of the Nebraska partnership assets, Leland bid $8,250 for a truck and tractor, but never paid for them. The administrator testified that he believed one-half of the $8,250, or $4,125, "would constitute some kind of a credit against Leland's ability to recover from Stanton. Now, whether that would constitute also a defense against me is a good question." In other words, the administrator did not know if the Stamford Bank could claim as a credit the value of the truck and tractor which Leland took in the amount of $4,125.

Also, Leland received $16,750.70, representing Stanton's one-half share of the estate distributed in Mississippi and Kansas.

The four items referred to above total $69,600.81 and represent potential credits to be claimed by the Stamford Bank in the event any judgment was en-

tered against it. No interest was calculated on these potential credits with the exception of the recovery from the bonding company.

Leland contends, however, that the total value of the claims against the bank, as set out in the amended cross-petition in the amount of $85,688.38, does not include any interest on the settlement value of the claims which he contends in his brief amount to the sum of $43,903. It must be remembered, however, that there can be no recovery of interest unless the individual causes of action are sustained in the lawsuit. Furthermore, any setoffs to which the bank may be entitled would also draw interest. Under the present state of the record it is impossible to state with any degree of accuracy what amount of interest would be involved with respect to either the claims or the setoffs if the matter came to trial.

The record reveals that negotiations for a settlement of the estate's claims against the Stamford Bank were entered into by the administrator's attorney. At one time the administrator's attorney reported that the Stamford Bank would pay $26,000 in complete settlement of the estate's and Leland's claims against the bank. Leland rejected this offer. The administrator's attorney then reported that he could settle all of the estate's and Leland's claims against the bank, except for Leland's claim in the Farrand Quarter, for $17,500. Leland's attorney at that time accepted the settlement. However, when the parties met in open court to complete the settlement, Leland rejected the offer, contending that he had not understood that the settlement included a release of his claims against the Stamford Bank. The administrator then separately agreed to release the Stamford Bank from all the estate's claims for a $12,500 payment.

After Leland refused to join in the settlement with the Stamford Bank, he brought suit against the bank. The Stamford Bank introduced as a defense

the running of the statute of limitations. A trial before a jury was held, and the defendant prevailed.

The motion to approve the $12,500 settlement between the Stamford Bank and the administrator was heard by the Furnas county court and was approved, although both Leland and Stanton objected to such approval. Leland then appealed the county court's approval to the District Court for Furnas County, Nebraska. A 2-day trial was held in the District Court after which the court affirmed the county court's approval of the settlement.

The administrator testified as follows about the action Leland brought against the Stamford Bank following Leland's refusal of the $17,500 settlement offer: "* * * I was concerned before that case was tried, and I am concerned about it now in terms of * * * the main thrust of the Stamford Bank's defense, to-wit: Their claim is that Leland and Stanton for a long period of time were operating sort of in cahoots. That they had kind of a collusive understanding that they were going to do what was necessary to keep all of these ships afloat, the Mississippi partnership, the Nebraska partnership, and what not. It was that area of this lawsuit more than any other consideration, Mr. Fogarty, that I was concerned about it and that I believe may have been the heart of the defense of the Stamford Bank in that statute of limitations trial. That's what I was worried about, yes, sir."

The duties of an administrator are set out in the Nebraska statutes. Section 30-304, R. R. S. 1943 (Reissue 1964), provided in pertinent part as follows: "The bond of the executor required by section 30-303 shall be conditioned as follows: (1) To make and return to the county court, within three months, a true and perfect inventory of all the goods, chattels, rights, credits, and estate of the deceased which shall come to his possession or knowledge, or to the possession of any other person for

him; (2) to administer according to law and to the will of the testator all his goods, chattels, rights, credits and estate which shall at any time come to his possession or to the possession of any other person for him, * * *."

In addition, section 30-803, R. R. S. 1943 (Reissue 1964), provided that: "Nothing herein shall be construed to prevent an executor or administrator, when he shall think it necessary, from commencing and prosecuting any action against any other person, or from prosecuting any action commenced by the deceased in his lifetime, for the recovery of any debt or claim to final judgment, or from having execution on any judgment."

Sections 30-304 and 30-308, above quoted, were both repealed by section 316 of L.B. 354, Laws 1974, which became effective January 1, 1977. The new probate code, including section 30-2476, R. R. S. 1943, provides: "Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 30-24,100, a personal representative, acting reasonably for the benefit of the interested persons, may properly: * * * (17) effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. * * *." It seems clear that the administrator, under either statute, had authority to settle claims in favor of the estate against third parties.

"The general rule is that an executor in discharging his trust duties must exercise the care, prudence, and judgment that a man of fair, average capacity and ability exercises in the transaction of his own business." Bates v. Scottsbluff Nat. Bank, 190 Neb. 456, 209 N. W. 2d 165 (1973). See, also, In re Estate of Bush, 89 Neb. 334, 131 N. W. 602 (1911); In re Estate of Hunter, 129 Neb. 529, 262 N. W. 41 (1935).

"It may be the duty of the personal representative

to prosecute a suit for the collection of assets. In a proper case the court may punish an administrator for contempt on his refusal to sue, or it may revoke his letters and appoint an administrator who will prosecute the action. The duty of an executor or administrator to bring an action on a debt due the estate may depend on whether the claim is reasonably good or one of doubtful or desperate character. He may decline to sue on a doubtful or controverted claim notwithstanding the fact that the heirs think it is well founded, unless they are willing to give him indemnity for costs." 31 Am. Jur. 2d, Executors and Administrators, § 182, p. 103. See, also, Minahan v. Waldo, 161 Neb. 78, 71 N. W. 2d 723 (1955).

The administrator testified that in February of 1976, he sent to Leland's then attorney a demand to allow him to negotiate in good faith toward a settlement or else indemnify the estate for the costs and attorney's fees that would thereafter accrue. Leland did not respond to the administrator's demand.

In Gillilan v. Oakes, 1 Neb. [Unof.] 55, 95 N. W. 511 (1901), this court stated: "The evidence tends to show that at the time such election of remedies was made by the administratrix it appeared to be for the best interests of the estate; that the value of the property at that time exceeded the amount due on the contract and no claim is made of any collusion between the administratrix and the appellee in such election for the purpose of defrauding the estate. Under these conditions her act was clearly binding on the estate."

Leland's attorney admitted at the trial that William Sherwood, the administrator, was in the best position and "knows more about this case than anybody." The administrator stated that he felt the $12,500 settlement with the Stamford Bank for all the estate's claims was the best settlement under the existing conditions, and that a more successful result could not be obtained through litigation. He also

testified it was his recommendation that the District Court affirm the county court's approval of the settlement. Leland has not alleged nor presented any evidence that the administrator participated in any collusion or fraud.

Judge Clark, of the county court of Furnas County, approved the settlement; and Judge Hendrix, of the Furnas County District Court, affirmed the county court's approval, after a full hearing on the matter. Judge Hendrix was the judge in the original accounting actions, and he wrote the memorandum opinion, out of which the estate's claims against the bank arose.

We conclude that the administrator was manifestly correct in his decision to settle the claims of the estate against the Stamford Bank for $12,500, and in his recommendation to both the county and District Court that approval be given him to do so. After full hearings and the presentation of evidence in both courts, they approved his request to effectuate the settlement. The decision whether to settle or compromise disputed claims can not be determined with mathematical precision, and it is possible that the personal representative of an estate may occasionally err in that regard. See In re Estate of Bush, *supra*. We are convinced from the evidence that the administrator conscientiously endeavored to protect the interests of the estate in his endeavor to settle the claims against the bank. He was aided in this regard by his many years of experience as a lawyer, and particularly as a trial lawyer. To have acceded to the desire of the appellant that he proceed to litigate the claims may well have resulted in a smaller recovery to the estate than the amount tendered in settlement; and in addition, would undoubtedly have necessitated incurring substantial court costs, attorney's fees, and other litigation expense, which may or may not have been recovered. Continued litigation might also have resulted in

larger amounts due to the bank as setoffs, and increased amounts of interest thereon. Although the administrator requested indemnity from the appellant as a condition to proceeding with the litigation of the claims, the appellant neglected to provide it when requested. We conclude there was ample evidence in the record to justify the action taken by the administrator to settle the claims in question, and also to justify both the county and District Court in approving such proposed settlement. The judgment of the trial court should be affirmed.

AFFIRMED.

JOHN RICHARD FARMER, APPELLEE, V. RICHMAN GORDMAN STORES, INC., APPELLANT.

278 N. W. 2d 332

Filed May 1, 1979. No. 41947.

1. **Administrative Law: Appeal and Error.** Upon appeal to the District Court from an order of the Nebraska Equal Opportunity Commission the review is by trial de novo upon the record.
2. **Evidence: Appeal and Error.** Where the evidence supporting the District Court's findings of fact is substantial, the findings will not be disturbed.

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

George C. Rozmarin of Swarr, May, Smith & Andersen, for appellant.

Thomas F. Dowd, P.C., for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and WHITE, JJ., and J. KELLY, District Judge.

WHITE, J.

This is an appeal from an order of the District Court for Douglas County affirming a decision of the Nebraska Equal Opportunity Commission that the

appellee, John Richard Farmer, was discriminated against by the appellant, Richman Gordman Stores, Inc., on account of race and color in violation of the Nebraska Fair Employment Practice Act, section 48-1101 et seq., R. R. S. 1943, as amended. We affirm.

Section 48-1104, R. R. S. 1943, amended in 1977, provided in 1973, when this action began, as follows: "It shall be an unlawful employment practice for an employer: (1) * * * to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, or national origin; * * *."

The assignments of error all relate to the findings of the District Court alleging that they were arbitrary and not supported by a preponderance of the evidence. An appeal to the District Court from an order of the Nebraska Equal Opportunity Commission is now governed by section 48-1120, R. S. Supp., 1978. This section provides that the determination by the District Court shall extend to all questions of law and fact presented by the entire record and an order of the commission shall not be vacated, modified, or set aside unless the findings of the commission in support of the order are unreasonable or arbitrary or are not supported by a preponderance of the evidence. "The District Court is required to review the entire record, weigh the evidence, and determine what is the preponderance of the evidence. * * * The review in the District Court amounts to a trial de novo upon the record." Snygg v. City of Scottsbluff Police Dept., 201 Neb. 16, 266 N. W. 2d 76; Duffy v. Physicians Mut. Ins. Co., 191 Neb. 233, 214 N. W. 2d 471.

In overruling Richman Gordman's motion for a new trial, the trial court said: "* * * if I were deciding this case de novo, I think I would probably

find for the defendant, but my review is limited." Appellant points to this statement as an indication that the District Court applied an incorrect standard of review. However, the court went on to say: "I have decided it on the basis of whether or not the finding and the judgment of the Commission is supported by the preponderance of the evidence and whether or not it is contrary to law. I don't think it is contrary to law, and I think that it is supported by the evidence, and that is what I am basing it on." By the former statement, the court may have been alluding to the deference owed to the original forum, which had the opportunity to observe the witnesses and their manner of testifying. See Tedco Development Corp. v. Overland Hills, Inc., 200 Neb. 748, 266 N. W. 2d 56. The latter statement of the District Court and the following analysis indicates the proper standard of review was applied.

The evidence most favorable to the appellee's position indicates that the appellee, a black, was employed by Richman Gordman Stores, Inc., from July 17, 1965, to May 2, 1973; that for the 6 months prior to his discharge, the appellee worked at the appellant's store at 120th and Center Streets in Omaha and prior thereto worked at the appellant's store at 16th and Burt Streets.

Eighty percent of the customers at the Burt Street store were black. The appellee had observed and expressed concern about the handling of black customers by the company's security personnel and had conducted store meetings where he expressed his views on the subject. The appellee advised Nelson Gordman, vice president of operations, of his concern about losing customers if the company's policies did not improve relative to race relations. One week thereafter the appellee was summoned to a meeting and the president suggested that Farmer consider a transfer to the 120th Street store. The appellee accepted.

The appellee was a member of the Marine Corps Reserve and was required, under his Reserve obligation, to attend monthly scheduled weekend Reserve functions. It was his absence on Sunday, April 29, 1973, that lead to his discharge. Both parties agree there was no actual Reserve commitment on that day.

According to the evidence of the appellee, he told store manager Lund on the previous Monday that he would be unable to work on Saturday, April 28, due to a Reserve commitment. At this time appellee offered to work on Sunday, his scheduled day off, instead of Saturday, but Lund informed him that they had ample management personnel to work over the weekend as Sunday would be slow considering it was a week after the Easter weekend. The appellee was therefore not scheduled to work on either Saturday or Sunday, April 28 or 29. This evidence was disputed by Lund. According to Lund, complainant did not indicate that he only needed Saturday off. Mr. Lund understood that appellee was required to be absent both days, otherwise he should have merely arranged a trade of Saturday for Sunday, appellee's normal day off. Mr. Lund received information from an unidentified employee that she had seen Farmer at a place in the city of Omaha under circumstances indicating he was not attending a Reserve function on Sunday.

On May 2, after concluding that no Reserve function had taken place on Sunday, April 29, personnel manager Simon summoned the appellee into his office at which time he terminated the appellee's employment and gave him his paycheck stating that negotiations had come to an end relative to the placement of Farmer with the Richman Gordman Stores, Inc.

In order to show that Farmer's dismissal was not race related, appellant presented examples of two Caucasian managerial employees who had been re-

leased for misrepresentation of the need for time off. Appellant admitted, however, that those employees had been given a chance to explain or deny their misrepresentations prior to dismissal. Although it is strongly disputed by the appellant, there is evidence that the same opportunity was not given to the appellee. According to Farmer, he was not advised of the reason for his discharge and thus was denied the opportunity of explaining his absences the weekend of April 28 and 29 or the details of the work schedule per his alleged discussion with store manager Lund on the preceding Monday.

On the basis of this evidence, the District Court found that the order of the commission finding the discharge was based on racial matters was not arbitrary or capricious and we agree. We do not try the facts again. The District Court was under the obligation to try the case de novo to determine whether there was substantial evidence on which to base the order. It found there was. The judgment of the trial court is therefore affirmed. The appellee is allowed a fee of $500 for services in this court.

AFFIRMED.

NEBRASKA STATE BANK, A CORPORATION, APPELLEE, V. CHARLES R. DUDLEY ET AL., APPELLANTS.

278 N. W. 2d 334

Filed May 1, 1979. No. 42077.

1. **Constitutional Law: Appeal and Error.** Appellate review in civil cases is not a fundamental right guaranteed by either the due process or privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States.
2. **Appeal and Error.** Where the right to appellate review is granted by law, it must be afforded in a nondiscriminating manner.
3. **Constitutional Law: Legislature: Appeal and Error.** Article I,

section 24, of the Nebraska Constitution, does not bar either the Legislature or this court from making reasonable rules and regulations governing review on appeal.

Appeal from the District Court for Dakota County: LLOYD W. KELLY, JR., Judge. Affirmed.

Donald E. O'Brien and Daniel C. Galvin of O'Brien, Galvin & O'Brien and Lawrence Hammerling, for appellants.

David R. Crary, Sandra K. Inkster, and Daryl L. Hecht of Crary, Huff, Yates & Clem, P.C., for appellee.

Heard before KRIVOSHA, C. J., CLINTON, and HASTINGS, JJ., and STUART, District Judge, and KUNS, Retired District Judge.

CLINTON, J.

This is the third appearance of this cause in this court. Nebraska State Bank v. Dudley, 194 Neb. 1, 229 N. W. 2d 559; 198 Neb. 132, 252 N. W. 2d 277. At the last trial in the District Court for Dakota County, which involved only the defendants' counterclaim against the plaintiff, the jury rendered a verdict for the plaintiff and judgment was entered thereon. No motion for a new trial was filed within 10 days after the verdict as required by statute. §§ 25-1143, 25-1144, R. R. S. 1943; Parker v. Christensen, 192 Neb. 117, 219 N. W. 2d 235. At the time of the filing of a timely notice of appeal from the judgment, the attorney for the defendants filed a late motion for a new trial, as well as an application to permit its filing. The affidavit in support of the motion to permit late filing alleges the defendants' attorney, a member of the Iowa bar, not admitted to practice in Nebraska, was ignorant of Nebraska law pertaining to the effect of failure to file a motion for new trial; the defendants were thus unavoidably prevented from filing a timely motion for new trial; and therefore

late filing should be allowed as provided by section 25-1143 (1), R. R. S. 1943. The District Court denied the motion.

The defendants now seek to escape the consequences of the failure, i.e., the limited review available in this court under such circumstances, by attacking the constitutionality of section 25-1912, R. R. S. 1943, claiming: (1) It is unconstitutionally vague and therefore it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States; and (2) it violates the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States. The defendants' contentions are not meritorious and the judgment is affirmed.

Section 25-1912, R. R. S. 1943, insofar as is pertinent, reads as follows: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal . . . and, except as otherwise provided in section 29-2306, by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court. . . . Except as otherwise provided in section 29-2306, an appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when such notice of appeal shall have been filed, and such docket fee deposited in the office of the clerk of the district court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional."

The statutes pertaining to new trial applicable here are sections 25-1142 and 25-1143, R. R. S. 1943. The first section defines new trial and states the grounds therefor. Section 25-1143, R. R. S. 1943, insofar as pertinent here, reads: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, except (1) where unavoidably prevented . . . ." Section 25-1144, R. R. S. 1943, prescribes the form of the motion.

Defendants argue they were misled because section 25-1912, R. R. S. 1943, says: ". . . no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional." They further complain that, if one reads the statutes pertaining to a motion for new trial, one cannot tell the effect of a failure to file a motion unless the reader goes further and examines the cases which determine that effect.

The pertinent provisions of section 25-1912, R. R. S. 1943, are not at all vague in the ordinary sense of the term; contrariwise, they are perfectly clear. The defendants took the necessary jurisdictional steps to vest jurisdiction in this court and we do have jurisdiction. By failing to file a motion for a new trial and have it ruled upon, they failed to preserve for review trial errors. Nebraska Children's Home Soc. v. Collins, 195 Neb. 531, 239 N. W. 2d 258. In a law action where no motion for new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings.

The defendants' claim of vagueness thus rests upon the premise that everything one needs to know to perfect an appeal *and* preserve trial errors and to effectively bring all issues before this court *must*, to insure due process under the Fourteenth Amendment to the Constitution of the United States, be set forth in one section of the statutes. They cite no

authority which so holds and we can find none.

Implicit in the defendants' position is the claim they have been denied due process because they are deprived of the right of appeal under the Constitution of the United States. The Supreme Court of the United States, up to this time, has never found that a right of appeal in a civil matter is inherent in the right of due process of law, but has held otherwise. National Union v. Arnold, 348 U. S. 37, 75 S. Ct. 92, 99 L. Ed. 46; Ohio v. Akron Park District, 281 U. S. 74, 50 S. Ct. 228, 74 L. Ed. 710; Luckenback Steamship Co. v. United States, 272 U. S. 533; 47 S. Ct. 186, 71 L. Ed. 394; Nowak, Rotunda & Young, Constitutional Law, p. 499. Where the right of appeal is granted by law, due process requires only that the right be subject to exercise in a nondiscriminatory fashion. National Union v. Arnold, *supra*.

In Life & Casualty Ins. Co. of Tennessee v. Womack, 228 Ala. 70, 151 So. 880, the Supreme Court of Alabama was confronted with a contention similar to that made here. The petitioner there failed to properly preserve in the trial court questions for review in the Supreme Court. He contended on appeal that due process under the Fourteenth Amendment required that nonetheless the Supreme Court of Alabama review all questions raised on the appeal. The court simply said: "Such position is untenable. . . . Due process of law is provided when the party is given full opportunity to present the questions of law and fact in the trial court, with the right to reserve questions for review, and have them reviewed by the appellate courts. All this is provided for by law in an orderly administration of justice."

Although the defendants do not claim any violation of their rights under our own Constitution, we take note of the fact that Article I, section 24, provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." We have held on numerous occa-

sions that section 24 does not prevent the Legislature or this court from making reasonable rules and regulations for a review of a case on appeal. Schmidt v. Boyle, 54 Neb. 387, 74 N. W. 964; Barney v. Platte Valley Public Power and Irrigation District, 144 Neb. 230, 13 N. W. 2d 120; In re Estate of Kothe, 131 Neb. 531, 268 N. W. 464; In re Estate of Mathews, 125 Neb. 737, 252 N. W. 210; Paper v. Galbreth, 123 Neb. 841, 244 N. W. 896; School District v. Traver, 43 Neb. 524, 61 N. W. 720.

The contention that section 25-1912, R. R. S. 1943, constitutes a violation of the privileges and immunities clause of the Fourteenth Amendment is likewise without merit. That clause is: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." What has already been said really answers the contention relative to "privileges or immunities." The design of the privileges and immunities clause was to insure that no state could treat a citizen of the United States, with respect to certain enumerated fundamental rights, which do not include appellate review, any differently than it treated its own citizens. Slaughter-House Cases, 83 U. S. (16 Wallace) 36, 21 L. Ed. 394 (1872). The original particular design of the privileges and immunities clause was to preserve those rights established by the Civil Rights Act and prohibit the states from violating such rights. See Raoul Berger, Government by Judiciary, C. 3, The "Privileges or Immunities of a Citizen of the United States," p. 37.

The pleadings support the judgment.

AFFIRMED.

KRIVOSHA, C. J., concurring.

I am in full agreement with the majority opinion in this case. I add this concurring opinion solely for the purpose of highlighting a matter which I believe deserves particular attention. In this case the record indicates that defendants' Iowa attorney was

joined by Nebraska counsel. The record further indicates that Nebraska counsel's name appeared on the various pleadings and on the briefs filed in this court. Yet Nebraska counsel did not appear in this court at the time of oral argument, nor does the record indicate when, if at all, Nebraska counsel participated in this matter in the trial court. It is obvious that had Nebraska counsel been more actively involved in the trial of this case, Iowa counsel might not have failed to timely file a motion for new trial.

The purpose of resident counsel joining with nonresident counsel is obvious. It is to insure that the nonresident counsel will be associated with a counsel involved in the litigation who is knowledgeable and familiar with the laws and practices of this state. By permitting his name to be affixed to a pleading or brief, a resident lawyer represents to this court that he is a part of the litigation and a counsel of record. Accordingly, he should be held accountable for the transaction of the litigation to the full extent as if there were no nonresident counsel. A resident lawyer should not permit his or her name to be affixed to pleadings or briefs unless he or she intends to be involved in the litigation and familiar with the actions taken by nonresident counsel. The failure to properly perform in a case in which counsel's name appears may give rise to subsequent disciplinary action by reason of counsel failing to act in accordance with the Code of Professional Responsibility as adopted by this court.

STATE OF NEBRASKA, APPELLEE, V. DUANE FULLER, APPELLANT.

278 N. W. 2d 756

Filed May 1, 1979. No. 42125.

1. **Criminal Law: Right to Counsel: Confessions.** The right to counsel attaches when the proceeding ceases to be investigatory and becomes accusatory. Statements obtained during the investigation of a crime are not inadmissible because counsel was not present.
2. **Right to Counsel: Waiver.** A statement which is obtained after the proceeding has become accusatory and there has been no voluntary and intelligent waiver of the right to counsel is not admissible.
3. **Criminal Law.** The criminal code which became effective January 1, 1979, is not applicable to offenses committed prior to its effective date.
4. **Criminal Law: Homicide: Juries.** The jury should only be instructed on those degrees of homicide that are supported by the evidence.
5. **Discovery: Appeal and Error.** The trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

Richard L. Schmeling, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant appeals from a sentence to life imprisonment for first degree murder. The assignments of error relate to the sufficiency of the evidence to support the conviction; the overruling of the defendant's motion to suppress; and the trial court's instructions to the jury.

The defendant was charged with killing Marvin

Gerheardt on September 3, 1977. On the date in question the defendant and Gerheardt were prisoners in the penal complex confined in cell C-4 in the east cell house at the State Penitentiary. Two other prisoners, Charles Jack Clark and Robert Bessent, were confined in the same cell. Later, Bessent was moved and Kem Kershaw moved into the cell.

The evidence shows that Gerheardt was despondent and had been talking about committing suicide for some time. He had made several attempts by injecting drugs and air into his veins. On September 3, 1977, Gerheardt had obtained an empty 5-gallon plastic milk bag which was inflated and then attached to a hypodermic syringe from which the plunger had been removed. While Gerheardt held his arm so as to expose a vein near his elbow, the defendant inserted the needle into the vein. The defendant then collapsed the plastic bag forcing air into Gerheardt's body. Gerheardt immediately suffered distress and was dead by the time he had been removed to a hospital. An autopsy showed that Gerheardt had died from pulmonary edema secondary to acute heart failure resulting from the injection of air into his body.

Gerheardt's death was investigated by the State Patrol and all occupants of the cell were questioned. The defendant gave a brief, nonincriminating statement without requesting counsel. After that day, the defendant was interrogated on seven separate occasions. Except for one occasion, he either requested counsel which was not furnished or did not give a statement. On September 29, the defendant gave a second statement which was not incriminating, although he admitted disposing of the plastic milk bag.

On or before November 2, 1977, Clark decided to cooperate with the authorities in exchange for a transfer. He gave a statement which incriminated Fuller, but the investigators wanted more satisfac-

tory evidence. Clark then agreed to be wired with a transmitter and to attempt to induce defendant to discuss his role in Gerheardt's death so that the investigators could hear and record Fuller's own incriminating statements.

Defendant made a detailed statement to Clark on November 17, 1977. It was recorded, but technical problems prevented its accurate reproduction and it was not offered in evidence. That same evening, the investigators disclosed the recording to Fuller who then gave a confession which was received in evidence at the trial. Clark and Kershaw also testified as to Fuller's statement.

Fuller's statements to Clark were obtained at the request of the investigators. Although the statements were elicited through deception, they were admissible because deception does not tend to make a statement involuntary or unreliable. Heldt v. State, 20 Neb. 492, 30 N. W. 626 (1886). Electronic surveillance with the cooperation of one party has not been afforded constitutional protection. See, Cook, Constitutional Rights of the Accused - Pretrial Rights, § 65, p. 401 (1972); 57 A. L. R. 3d 172, Admissibility, in Criminal Prosecution, of Evidence Obtained by Electronic Surveillance of Prisoner (1974).

The fact that the statements were obtained at the request of the patrol officers presents a more serious problem. In Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), Massiah, after indictment, made voluntary and incriminating statements to another indictee who was cooperating with the prosecution. A radio transmitter had been placed in the informer's car and an investigator listened to the defendant's conversation. The United States Supreme Court held Massiah's statements, deliberately elicited after indictment and in the absence of his retained counsel, were not admissible.

In Brewer v. Williams, 430 U. S. 387, 97 S. Ct. 1232,

at p. 1239, 51 L. Ed. 2d 424 (1977), the court said the right to counsel attached "at or after the time that judicial proceedings have been initiated against him — 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' "

The above cases may be distinguished because in those cases the defendant had been arrested or charged at the time the statements were made. The fact that the defendant in this case was interrogated on seven occasions prior to giving incriminating statements elicited by the authorities is some indication that the investigation had focused on the defendant. However, there is no right to have charges filed even though the authorities have probable cause to believe a crime was committed by a certain person. In Hoffa v. United States, 385 U. S. 293, 87 S. Ct. 408, at p. 417, 17 L. Ed. 2d 374 (1966), the United States Supreme Court said: "Nothing in Massiah, in Escobedo, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." See, also, United States v. Nashawaty, 571 F. 2d 71 (1st Cir., 1978); United States v. DeVaughn, 541 F. 2d 808 (9th Cir., 1976); Cook, Constitutional Rights of the Accused — Trial Rights, § 77, p. 299 (1974).

The circumstances surrounding Gerheardt's death placed Fuller within the narrow scope of the investi-

gation. Prior to the statement to Clark, the evidence against Fuller consisted of his admitted disposal of the death instrument and nonincriminating statements as opposed to Clark's statements. Both Fuller and Clark claimed to be cooperating in exchange for special benefits and, of course, personal exculpation for the murder. As the investigators told Clark, they needed much better evidence to believe him and the investigation continued.

The preliminary evidence necessarily focused the investigation on Fuller's involvement to a greater degree; but Clark's questions were investigatory and the accusatory stage with its adjunct right to counsel had not begun. The testimony of Clark as to Fuller's statements to him was admissible. Hoffa v. United States, *supra*.

Following Fuller's November 17, 1977, recorded conversation with Clark, the defendant was interrogated at the penal complex at 6:33 p.m., by investigators Renner and Osborne. The defendant refused to give a statement and refused to waive his right to have an attorney present. He was then kept isolated in a custodial area of the prison until 9:30 p.m. At the request of the county attorney, Fuller was taken to the county attorney's office and a second interrogation, complete with Miranda warnings, began at 10 p.m. Fuller decided to waive counsel and make a statement. The evidence indicates that the defendant may have believed that the county attorney would find extenuating circumstances and not charge him with first degree murder. The expectation that cooperation might lead to leniency does not necessarily render a confession involuntary, although it frequently is a determining factor. Cook, Trial Rights, *supra*, § 74, p. 292-94.

Fuller was alone with the county attorney from 10 p.m. to 11 p.m. After being read his rights and again asserting his rights, Fuller decided to waive his constitutional rights and make a confession.

Both the county attorney and Fuller agree that Fuller's decision to waive his rights and confess was a result of the county attorney's decision to file first degree murder charges in the morning unless Fuller's statement was somehow mitigating *and that a mitigating statement could not be made to the county attorney if Fuller insisted on having counsel present.*

Although Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), does not require an absolute halt to all conversations by the police with the defendant once the right to silence is asserted, observance of the constitutional right is tested by the circumstances to determine whether the right was "scrupulously honored." Michigan v. Mosley, 423 U. S. 96, at p. 105, 96 S. Ct. 321, at p. 326, 46 L. Ed. 2d 313 (1975). Mosley's right to cut off questioning was honored when the first interrogation ceased, and the second interrogation involved a different interrogator, a different crime, and no persuasion was used to reverse his earlier refusal to discuss those separate crimes.

Recent cases consider the validity of a subsequent waiver of the once-asserted right to counsel under certain circumstances. United States v. Rodriguez-Gastelum, 569 F. 2d 482 (9th Cir., 1978) (en banc), cert. den., 98 S. Ct. 2266; United States v. Massey, 550 F. 2d 300 (5th Cir., 1977); United States v. Grant, 549 F. 2d 942 (4th Cir., 1977), cert. den., 432 U. S. 908; United States v. Pheaster, 544 F. 2d 353 (9th Cir., 1976), cert. den., 429 U. S. 1099; United States v. Womack, 542 F. 2d 1047 (9th Cir., 1976); United States v. Cavallino, 498 F. 2d 1200 (5th Cir., 1974); Commonwealth v. Watkins, 379 N. E. 2d 1040 (Mass., 1978); Zelenka v. State, 83 Wis. 2d 601, 266 N. W. 2d 279 (1978); People v. Sparks, 82 Mich. App. 44, 266 N. W. 2d 661 (1978). These cases hold that the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. "If

the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda v. Arizona, 384 U. S. 436, at p. 475, 86 S. Ct. 1602, at p. 1628, 16 L. Ed. 2d 694 (1966). In Mosley, a concurring opinion stated "* * * a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Id.*, 423 U. S. 96, at p. 110, n. 2, 96 S. Ct. 321, at p. 329, n. 2. (Justice White concurring). "We understand that the interrogating officer may not badger the suspect or bring pressure intended to induce a change of mind. Nor can he coerce the suspect into reconsidering an assertion of his right to counsel." United States v. Rodriguez-Gastelum, *supra*, at p. 488.

At the suppression hearing, both the defendant and the county attorney testified that the defendant hesitated about waiving his right to have a lawyer present. The defendant testified that he changed his mind " 'Cause [the county attorney] assured me that my statement would help him decide on what type of charge he would file against me, and he thought I was not guilty of first degree murder and that it would help him decide what type of charge to file."

The defendant was asked if the county attorney ever said "anything to you * * * about what he would do if you did not talk to him?" Defendant responded, "He assured me that he would file first degree murder charges on me" on the following morning.

The county attorney testified as follows concerning the initial conversation: "I asked him, 'Do you willingly do without the services of a lawyer at this time,' and he hesitated somewhat. He said some-

thing like I'm not sure, I don't know. I said, 'Well, Mr. Fuller, please understand before I can visit with you, you have to tell me that you will do without the services of a lawyer, and I can't visit with you unless you tell me that,' and I said, 'I'd like to talk to you about this matter, but before I can, you must waive the services of counsel or else I — we're just not going to be able to do it,' and I said, 'Now, will you please tell me are you willing to do without the services of a lawyer?' He said, 'Yes, I will,' something to that effect, 'Yes.' "

The recorded statement reveals the following: "Q. Do you willingly do without the services of a lawyer at this time? A. Mr. Lahners, I — Q. Go ahead. Just speak up. A. Okay. I wonder if I shouldn't have a lawyer before this statement goes down. Q. Well, that's up to you. Now, you have talked to me about it before. And if you want a lawyer, you certainly can have a lawyer. And as I have told you before, you know, what I want to do is I want to get the full story from you. I want to review it in light of the other statements that have already been given to us by other people before I make my decision. Now, you know, you have told me about it once. And I just want to run back through it, put it on paper, because it is getting late and I don't want to make any mistakes, Duane. A. Yeah. Q. If it's agreeable with you and if you want to waive your right to have a lawyer at this time, why, we can go on. That's, you know, that's up to you. Are you willing to do that? A. Yes."

Under the circumstances of this case, we believe the State did not meet its burden to show that Fuller voluntarily and intelligently waived his right to remain silent and his right to have counsel present. This was not a matter of a confession initiated by the defendant as in United States v. Grant, *supra*; Commonwealth v. Watkins, *supra*; Zelenka v. State, *supra*. Nor is it distinguishable as the result of sum-

marizing evidence against the defendant. United States v. Massey, *supra*; United States v. Pheaster, *supra*; United States v. Cavallino, *supra*. Nor was defendant interrogated for a separate offense. Michigan v. Mosley, *supra*. Fuller resisted until he was faced with the murder charge and told that exercising his constitutional right to counsel would prevent him from making a statement to the county attorney.

Because the record fails to show a voluntary waiver of the right to have counsel present, the statement obtained by the county attorney should have been suppressed and not received in evidence. Although the evidence of the State without the confession of the defendant was clearly sufficient, if believed, to sustain a verdict of guilt beyond a reasonable doubt, we are unable to say that the admission of the confession into evidence was harmless error. The jury might find serious problems of credibility with the testimony of Clark and Kershaw, and without the confession of the defendant in evidence the jury might reach a different result. The judgment must, therefore, be reversed and the cause remanded for a new trial.

Appellant assigns as error the refusal of a requested instruction that suicide is not a crime. Suicide is not a crime in Nebraska. Lange v. Royal Highlanders, 75 Neb. 196, 110 N. W. 1110 (1907). "Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon [the other's] desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own [volition]." Turner v. State, 119 Tenn. 663, 108 S. W. 1139, at p. 1141 (1908). See, also, Martin v. Commonwealth, 184 Va. 1009, 37 S. E. 2d 43 (1946). The requested instruction had no bearing upon defendant's guilt or innocence.

The Nebraska Criminal Code, which became effective January 1, 1979, makes assisting suicide a

criminal offense punishable as a Class IV felony. § 28-307, R. S. Supp., 1978. The appellant argues that he should be tried under this statute and its substantially diminished maximum penalty of 5 years imprisonment or $10,000 fine, or both. § 28-105 (1), R. S. Supp., 1978. The new code, however, is not applicable. State v. Weinacht, *ante* p. 124, 277 N. W. 2d 567. "The provisions of this code shall not apply to any offense committed prior to January 1, 1979. Such an offense shall be *construed and punished* according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted." (Emphasis supplied.) § 28-103 (1), R. S. Supp., 1978. Assisting suicide was not a separate offense on September 3, 1977, and the homicide statutes were applicable. See §§ 28-401 to 28-403.01, R. R. S. 1943.

The appellant's argument raises a question as to whether the sentence is excessive because punishment for the same conduct is now reduced. By statute, an imposed sentence is to be reduced to the new maximum whenever the Legislature decreases the maximum period of confinement. § 29-2204.01, R. R. S. 1943. However, that provision is limited to the amendment of "the particular law under which such sentence was pronounced." See State v. Rubek, 189 Neb. 141, 201 N. W. 2d 255 (1972). Here, the defendant was convicted and sentenced under the homicide statutes. §§ 28-401 to 28-403.01, R. R. S. 1943. That penalty remains unchanged. Nebraska Criminal Code, §§ 28-105 (1) and 28-303, R. S. Supp., 1978. The defendant is not entitled to a reduction in sentence.

The defendant also argues that he could not have formed the requisite intent to justify a charge of murder as he was unaware that Gerheardt's apparatus could actually cause death. The evidence does not support this contention. Defendant's cellmate, Clark, testified that all three of them regularly injected various drugs; they discussed Ger-

heardt's probability of success in his proposed suicide based on this experience. Defendant later told Kem Kershaw that he knew Gerheardt could not kill himself with the small injections of air that he had been giving himself but that the 5-gallon "milk bag was enough air that would surely explode the heart inside of him [Gerheardt] if it was injected into the vein."

The defendant also contends that an instruction on a lesser-included offense of manslaughter should have been given. In a homicide case, the jury should only be instructed on those degrees of homicide that are supported by the evidence. State v. Simpson, 200 Neb. 823, 265 N. W. 2d 681 (1978); State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849 (1977). Manslaughter is not an appropriate instruction where the evidence clearly establishes either first degree murder or innocence and the court is not required to give the instruction. Davis v. State, 116 Neb. 90, 215 N. W. 785 (1927); Thompson v. State, 106 Neb. 395, 184 N. W. 68 (1921). Here, the evidence does not support a killing without intent; and there was no sudden quarrel or unintentional act. See § 28-403, R. R. S. 1943. The instruction was properly deleted at the request of both counsel.

Equally without merit is the argument that the court should have given an instruction on the theory that Gerheardt dominated Fuller and forced him to assist in his death. At trial, defendant's attorney did not request such an instruction for good reason. Duress or compulsion is no excuse to a charge of homicide. 22 C. J. S., Criminal Law, § 44, p. 135. Moreover, general subservience alone is inadequate to establish duress. Compare State v. Schroeder, 199 Neb. 822, 261 N. W. 2d 759 (1978), where justification was not a defense to an assault.

The final assignment of error relates to the overruling of the motion to produce prior statements of state witnesses before trial. The trial court is

vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Isley, 195 Neb. 539, at p. 544, 239 N. W. 2d 262 (1976). The record shows that defense counsel was able to depose both Kershaw and Clark and that the court compelled production of the investigative reports of these witnesses' initial statements. No other suggestion of prejudice is claimed or suggested by the record. Abuse of discretion is not shown by denial of access to the witnesses' statements.

The judgment of the District Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM B. ORTMAN ET AL., DOING BUSINESS AS ORTMAN'S GAS MART, APPELLEES, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

278 N. W. 2d 338

Filed May 1, 1979. No. 42130.

1. **Administrative Law: Alcoholic Liquors: Licenses and Permits.** The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically nor capriciously.
2. **Alcoholic Liquors: Licenses and Permits.** Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license.

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

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

Koenig & Murray, for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KNAPP, District Judge.

WHITE, J.

This is an appeal by the Nebraska Liquor Control Commission from the order of the District Court for Thayer County which overturned the Commission's order denying appellees Ortmans' application for a retail beer license, off-sale only. The city council of Hebron, Nebraska, had recommended approval of the license. The protest was filed against the application by an agent of the Nebraska Liquor Control Commission. Prior to the hearing, in a letter dated August 11, 1977, the appellees were advised of the issues to be considered at that hearing which were as follows: "1. The need for an additional license within the community. 2. The propriety of issuing a license to be utilized in connection with a gas station." The appellees were advised and the Commission did take judicial notice from its records that there were two on and off-sale beer licenses, two nonprofit corporation licenses, one on-sale beer license and two package liquor licenses existing within the community of Hebron, Nebraska. At the hearing on September 8, 1977, after finding the above judicially noted facts, the Commission found that these licenses currently in existence adequately served the needs of the community, and that the application should be denied. Neither the city of Hebron, the Legislature, nor the Commission has ever established any definitive policy relating to population-license ratios or absolute limits on the number of licenses as was present in Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413. This case is controlled by Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission, *ante* p. 176, 277 N. W. 2d 693, in which we said: "The final reason given by the Commission was that there are 38 package licenses in Columbus, therefore there was no need for this license. This is suggestive of a requirement that there be a showing of public convenience and necessity such as is neces-

sary to obtain permits and licenses in the public utility and service area. Nowhere in the statutes relating to the liquor laws is there any such requirement." Had a ratio or limiting theory been adopted prior to the hearing in this case, the burden would be on the appellees to show such action limiting the number of licenses to be unreasonable or arbitrary. See Allen v. Nebraska Liquor Control Commission, *supra*. But no such regulation was in effect. The only basis for the denial as announced by the Commission being an absence of need, there was no sufficient reason to deny an otherwise proper application for a liquor license. See Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission, *supra*.

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

AFFIRMED.

CHRISTIE C. JONES, APPELLANT, V. RICHARD H. FOUTCH, APPELLEE.

278 N. W. 2d 572

Filed May 1, 1979. No. 42145.

1. **Verdicts: Motions, Rules, and Orders: Evidence.** For the purpose of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed and he must be given the benefit of all inferences therefrom. The question must be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor.
2. **Motor Vehicles: Negligence: Evidence: Guest Statute: Proximate Cause.** A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury.
3. **Negligence.** Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.

4. **Motor Vehicles: Negligence.** Significant in the determination of gross negligence is the presence or imminence of danger that is visible to, known by, or made known to a driver, together with persistence in negligence, heedless of the consequences.
5. **Negligence: Juries: Evidence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury.
6. **Motor Vehicles: Negligence.** Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered.
7. **Negligence: Evidence.** Although any one of several acts of negligence proximately causing an accident might not, standing alone, constitute gross negligence, no one act should be separated from the whole of the acts and held to be the independent cause of the accident. The several acts are to be considered as a whole to determine whether or not gross negligence has been established.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded for a new trial.

Robert C. Guinan of Guinan & Kolenda and Thomas J. Culhane of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellant.

J. Thomas Rowen of Miller & Rowen, P.C., for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and COLWELL and VAN PELT, District Judges.

HASTINGS, J.

This was an action for injuries brought by plaintiff, a passenger on the 1971 Honda motorcycle being operated by the defendant on the 17th day of July 1974 when it was involved in a one-vehicle accident near 55th and Center Streets in Omaha, Nebraska. Defendant's motion for a directed verdict, made at the close of plaintiff's case for the reason that plaintiff being a guest passenger under section 39-6,191, R. R. S. 1943, had failed to establish that defendant

was guilty of gross negligence proximately causing the accident, was overruled. Defendant's motion was renewed at the close of all of the evidence and was taken under advisement by the trial court. The case was submitted to the jury which returned a 10 to 2 verdict in favor of the defendant, which was accepted by the court, and judgment on the verdict was rendered accordingly. Immediately thereafter, the trial court ruled in favor of the defendant and sustained defendant's motion for a directed verdict, made at the close of all of the evidence and held under advisement, and the cause was ordered dismissed. Plaintiff's motion for a new trial was overruled. Plaintiff appeals, assigning as error the giving of certain instructions, misconduct of the trial judge in making unprovoked and unrequested comments to the jury regarding the law of the case during plaintiff's closing argument, and the directing of a verdict in favor of the defendant.

At the time of the accident, plaintiff was 15 years of age and a junior in high school, and defendant was 16 years of age. Defendant had a license to operate a motor vehicle, but not a license to operate a motorcycle. He had driven this particular motorcycle two or three times before the accident. The parties had known each other for somewhere between 6 months and 1 year before the accident, but would not consider themselves boy friend and girl friend. Plaintiff had never ridden with defendant on a motorcycle before, but had done so in an automobile and considered him to be a good driver.

On the day of the accident, defendant stopped at plaintiff's house at about 5 o'clock in the afternoon, and plaintiff asked defendant to take her out to Cryer pool in Omaha for a swimming meet with the Hanscom pool swimming team with which plaintiff had some connection. All during the time they were driving out to the pool, plaintiff had no complaints about defendant's driving. They arrived at the pool,

apparently located in the vicinity of 114th and Center Streets, around 6 o'clock. They left the pool sometime later and proceeded east on Center Street to the point of the accident, which occurred around 8 o'clock in the evening.

According to plaintiff, Center Street is a four-lane street except for about 2 blocks near 72nd Street. They proceeded in the curb lane without incident until they reached approximately 65th Avenue, traveling at a speed which kept them up with the flow of traffic. They had passed through the intersection with 65th Avenue when they were run off the street onto the dirt by an automobile pulling in front of them from a side street. Defendant slowed down; they proceeded on the shoulder of the street for about 150 feet and then pulled back onto Center Street, going pretty much with the flow of traffic. "He had to gain a little speed to get back onto the road. Then it was fine after we did." They went through the intersection of 64th Avenue with a green light. An automobile, in which a friend by the name of Kelly Cotton was riding, passed them just after they were forced off the road. They passed the intersection with 63rd Street and the traffic was "pretty heavy" going both east and west on Center Street. About this time, defendant accelerated "a little trying to get past some of the cars, because it was pretty well congested." Defendant was going faster than the flow of traffic, accelerating, and the traffic was "rather heavy." They had been traveling in the outside lane until about halfway between 63rd and 60th Streets when defendant began switching lanes, trying to pass some of the traffic. As they approached 60th Street, they were driving between the lanes, between cars, going faster all of the time, "especially through the intersection here, because if I remember right the light was just turning when Rick and I were coming through. So we beat all the cars through, because he didn't have to slow down,

and they were at a stop." Plaintiff said they were accelerating as they reached the intersection with 60th Street, but she didn't know how fast they were going. She looked over defendant's shoulder and saw something that read 90, but didn't know what it was. At that time she told defendant to slow down. That was because she at first thought he wanted to get through the cars and would then slow down, but he just kept going faster and faster.

Just as they got past the railroad tracks, about 1 block east of 60th Street, they saw the automobile in which Kelly Cotton was riding, which was in the inside lane. Defendant passed this car in the outside lane, still accelerating. They traveled about 1½ to 2 blocks after this, defendant continuing to accelerate. Plaintiff said she told him to slow down and still thought he would because she knew a curve was coming. Defendant pulled back over into the inside lane but, although they had been on this same street earlier in the evening, defendant didn't slow down for the curve. There was no other eastbound traffic ahead of them and, as they took the curve, they didn't make it and crashed into the guard rail. As a result of the accident, plaintiff suffered severe, painful, and permanently disabling injuries.

On cross-examination, plaintiff stated she had ridden in an automobile with defendant before this time, but never on a motorcycle, although she had ridden as a passenger on motorcycles perhaps 10 times before this accident. She stated that in her opinion the sole cause of the accident was the speed at which defendant was operating the motorcycle.

Kelly Cotton testified that they were proceeding in the inside lane and the defendant's motorcycle passed them in the outside lane "right around the railroad tracks." The vehicle in which the witness was riding was going about 35 to 40 miles per hour. He thought the motorcycle was going 45 to 50 miles an hour, and that the accident occurred about 2 or 3

blocks farther down the street. Defendant never changed lanes, did not weave between lanes, and went straight on until they hit the curb on the curve.

Gary Gernandt, a police officer, interviewed the defendant shortly after the accident and was told by him that just east of the railroad tracks he must have hit some gravel or something, but that he wasn't going too fast and the next thing he knew, he hit the guard rail. The officer stated his investigation revealed no gravel, sand, or other type of obstruction, but he had observed one skid mark leading from the guard rail and curb area which was hit, running in a southwesterly direction in the outside lane for 61 feet. He testified that the speed limit in this area was 35 miles per hour.

A witness by the name of Cornelius Coleman, who was not acquainted with either party, had been proceeding west on Center Street at the time of the accident. He observed defendant pass a couple of cars about 600 to 1,000 feet before the accident. He said it seemed like the defendant "cut back" and lost control. He estimated the speed of the motorcycle at between 50 and 55 miles per hour.

Defendant testified he was driving between 35 to 40 miles per hour. He started around the curve and was leaning into the curve; he didn't know whether plaintiff was leaning with him, but they didn't make the curve. He said plaintiff had been riding real "good" as a passenger before the accident.

Steven Jensen, an expert in the operation of motorcycles, testified that on a curve, if the passenger does not lean into the curve with the driver, it tends to make the vehicle want to run in a straight line, making it hard to turn. He also testified he would not recommend traveling at a speed of 55 miles per hour within the city limits on a four-lane street making a curve.

The threshold question in this case is whether or not there was sufficient evidence of gross negli-

gence, on the part of defendant proximately causing the accident, to justify submitting the case to a jury. A motion for a directed verdict was made by the defendant at the close of plaintiff's case and again at the close of all the evidence, so the issue was squarely presented to the trial court. For the purpose of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed and he must be given the benefit of all inferences therefrom. The question must be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor.

As stated in Davis v. Landis Outboard Marine Co., 179 Neb. 391, 138 N. W. 2d 474 (1965): " 'A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury. Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.' "

Looking at the evidence in the light most favorable to the plaintiff, the jury could have found that defendant was 16 years of age, without a great deal of experience operating a motorcycle; that although he possessed a motor vehicle driver's license, he did not possess a motorcycle operator's license and had only driven this particular motorcycle 2 or 3 times before this accident; that although defendant had been driving in a very satisfactory manner until about 6 or 7 blocks before the point of the accident, as they reached 63rd Street defendant began accelerating, going faster than the flow of traffic

which had become quite congested, and switching lanes to pass automobiles; that as they approached 60th Street defendant did not attempt to switch lanes but was driving between lanes of automobiles, going faster all of the time, and he went through the intersection during the change of the traffic light. The jury could further find that plaintiff told defendant to slow down but he just kept going faster and faster; that as they passed a car of a friend at the railroad tracks near 61st Street and continued to accelerate, plaintiff again told defendant to slow down because they both knew the curve was coming. The jury could have found the speed of defendant's motorcycle to have been 50 to 55 miles per hour in a 35 mile-an-hour zone, which an expert felt was not recommended under the circumstances; that a skid mark extended 61 feet straight to the curb where the collision with the guard rail occurred; and that the defendant didn't know what happened except they just didn't make the curve.

Under those set of facts, it is obvious that defendant, a relatively inexperienced motorcycle driver without an operator's license and the demonstration of proficiency required by such license was operating his vehicle as much as 15 to 20 miles in excess of the speed limit in an area where the traffic was heavy and congested; that he not only was going from lane to lane, but was driving between the lanes; and that he was aware of the impending curve and had been twice warned by plaintiff to slow down, but continued in his negligent operation.

This court said in Luther v. Pawling, 195 Neb. 679, 240 N. W. 2d 42 (1976): "In our past decisions we have commented upon the difficulty of color-matching cases in this area. However, beyond what we have said above about the principles governing the determination of gross negligence, we have held to be significant the presence or imminence of danger that is visible to, known by, or made known to a

driver, together with the *persistence* in negligence apparently heedless of the consequences. These factors should be given material, if not controlling, significance." Also, in Werner v. Grabenstein, 165 Neb. 231, 85 N. W. 2d 297 (1957): "The evidence referred to above discloses that the driver of the truck had knowledge of the imminence of danger. He was thrice cautioned by the other occupants but he persisted in his negligent driving. He had an abundant opportunity to desist from his recklessness. The facts indicate quite clearly that he was heedless of the consequences that might and did quickly ensue from his acts and omissions that should be characterized as grossly negligent. These involve not only rate of speed but other matters such as repeated warnings and requests that he reduce the speed of the truck because he was going too fast, adverse conditions of the road, and the nature of the vehicle he was operating. These were all known to the driver and they enhanced the perils to which he subjected his guest." Finally, in Demont v. Mattson, 188 Neb. 277, 196 N. W. 2d 190 (1972), the rule has been stated as follows: "This court has frequently reiterated in slightly varying language that whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. Boismier v. Maragues, *supra*. In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury."

The evidence permitted a finding of danger known to the defendant, persistence of negligent driving on his part, failure to heed the warnings of plaintiff, and disregard of the consequences that might be suffered by the plaintiff. The evidence supports a finding of gross negligence, and the trial court was correct in submitting the case to the jury and incorrect in later sustaining defendant's motion

for a directed verdict after receiving the jury's verdict.

It is a somewhat unusual situation to have a trial court sustain a motion for a directed verdict for the defendant after having received a jury verdict in favor of the defendant and entering judgment on the same. However, that is precisely what happened in this case. If there is no prejudicial error in the trial and submission of the case, the verdict stands and the granting of the motion is superfluous. On the other hand, if plaintiff is correct and there were prejudicial errors, then the case must be reversed and remanded for a new trial.

Plaintiff complains that the court's instructions are erroneous in that they told the jury that excessive speed itself could not constitute gross negligence and this was confusing to the jury in that it implied to the jury that it could segregate speed from the other allegations and consider it separately in weighing the presence or absence of gross negligence.

By instruction No. 19 the court told the jury as follows: "You are instructed that under the Nebraska Motor Vehicle Guest Statute, gross negligence means great or excessive negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. It also means an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. There is no fixed rule for the ascertainment of what is gross negligence under the Nebraska Guest Statute, but whether or not gross negligence exists must be determined from the facts and circumstances in each case." Although that instruction may very well have been approved, standing alone, it was not the approved instruction, NJI No. 7.51, requested by the plaintiff. In that regard, this court adopted rule (a) at page IX of NJI as follows: "Whenever Ne-

braska Jury Instructions (NJI) contains an instruction applicable in a Civil or Criminal Case, and the Court, giving due consideration to the facts and the prevailing law, determines that the jury should be instructed on the subject, the *Nebraska Jury Instruction* shall be used." (Emphasis supplied.) By not following that admonition, the trial judge fell into the all-too-easy trap of cutting and pasting exceptions and qualifications. For example, by instruction No. 18, he defined a guest and set forth the requirement of Nebraska law that before a guest may recover, the guest must prove gross negligence on the part of the host. However, before having attempted the general definition of gross negligence which appeared in the later instruction No. 19, he offered one definition of what it wasn't: "Gross negligence does not necessarily extend to wanton or wilful or intentional disregard for the guest's safety." He then added another statement which should have been incorporated within the general definition of gross negligence: "It may arise from a series of acts or omissions, or both, none of which standing alone would constitute more than ordinary negligence, but which taken together may establish gross negligence. In such cases it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence." Then followed instruction No. 19, previously quoted. However, there is a further attempt to define gross negligence, or rather what is not gross negligence, in the following language taken from instruction No. 20: "The line of demarcation between gross and ordinary negligence is not always clear. However, you are instructed that momentary inattention in the operation of a motor vehicle does not ordinarily in itself amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence. You are further instructed that the operation of a motor vehicle at a rate of speed

prohibited by law is not in itself gross negligence." The plaintiff specifically objected to this instruction at the instruction conference and requested instead the giving of NJI No. 7.51.

What has happened, it seems, is that the trial court took abstract and isolated statements of law made by this court in prior cases, intended for direction of the *trial court*, explaining why the court should or should not have directed a verdict. For example, in the instruction conference the trial court stated: "That is an exact statement from the case of Calvert, as I remember." This is true, but in Calvert v. Miller, 163 Neb. 501, 80 N. W. 2d 123 (1957), the trial court submitted the case to the jury which resulted in a verdict for the plaintiff. In that case, the defendant driver was attempting to pass another automobile on the highway when the latter, without warning, signal, or justification, turned partially into the passing lane. In reversing the case and ordering it dismissed, this court said: "There is no proof that he [defendant] did not have complete control of the automobile he was operating until the Olsen car was suddenly turned to the left and, to some extent, into the passing lane in which the Chrysler car had moved or was entering for the purpose of passing the Olsen car. There is no evidence that Olsen gave any signal or warning that he was intending to change the position of his car and direct it toward or into the lane to his left or that Gary Miller had or could have had any notice or reason to believe that Olsen would do so. The record permits an inference that Gary Miller was justified in assuming that the Olsen car would continue in the right traffic lane of the highway and that it could be safely passed as the operator of the Chrysler car intended and was attempting to do. Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689. It is a permissible inference from the facts that the cause of the accident was the failure of Olsen to give proper attention

to the traffic to his rear and his improper conduct under the circumstances. There is no reason to conclude that the Chrysler car would not have safely passed the Olsen car without incident but for the unfortunate failure and conduct of Olsen as recited above.

"There is emphasis on the high rate of speed of the Chrysler car. Excessive or improper speed may be evidence of negligence but excessive speed is not alone gross negligence. * * * The situation portrayed by the record may not reasonably be held to disclose that Gary Miller was guilty of gross negligence within the meaning of the guest statute."

In O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322 (1959), the trial court directed a verdict against the plaintiff and dismissed the case. In reversing and ordering a new trial, this court did state: "The rule is: 'Excessive speed of a vehicle *does not necessarily establish gross negligence, although it is a factor to be considered.*' " (Emphasis supplied.) The court went on to discuss the additional claims of negligence, involving control, lookout, unreasonable speed under the circumstances (in addition to speed over the lawful limit referred to in the quotation above), and concluded that " 'a jury question was in our opinion presented as to whether or not, under the circumstances here, the things which defendant did and failed to do amounted to negligence in a very high degree, i.e., gross negligence.' "

In Carley v. Meinke, 181 Neb. 648, 150 N. W. 2d 256 (1967), the trial court directed a verdict for the defendant and on appeal this court reversed and remanded for a new trial. After stating that the evidence, if believed, would support a finding of excessive speed under the circumstances, lack of control, warnings to the driver, etc., this court went on to say: "It is also true that any one of the foregoing acts of negligence might not, standing alone, constitute gross negligence. * * * 'It is apparent that no

one act of the defendant can be separated from the whole of these acts and held to be the independent cause of this accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence.' "

The point of all this is to attempt to demonstrate that although the statements taken from prior cases and included in the instructions were correct abstract statements of the law as far as they went, they were not intended to instruct a jury, but rather the judge, as to why the case should or should not have been submitted to a jury. Had the instructions included all the explanatory information set forth in the quotations, the jury might well have been better able to understand what yardstick to use. The court is not unmindful of the frequently-stated rule that any one instruction should be considered in the light of all the others and will not support a claim of prejudice if the meaning of the instruction is reasonably clear and does not tend to confuse the jury. However, it seems to us, in this case, there was no valid reason for pointing out that speed alone is not in itself gross negligence any more than it would have been valid to individually discuss the other items of negligence submitted by the court, i.e., lack of lookout or control, and absence of a valid motorcycle license as provided by law.

"Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered. 60 C. J. S., Motor Vehicles, § 404, p. 1030. '* * * it is not necessary in all cases that the operator of a car be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered.' "

Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180 (1953). Speed cannot be considered in a vacuum; it is a relative factor which must be considered in light of other surrounding circumstances. Had the trial court, even after having attempted to isolate speed, gone immediately ahead in the same instruction No. 20 with the correct words from NJI No. 7.51: "In this respect, no one act is to be segregated and weighed separately to determine whether or not it constituted gross negligence. Instead the several acts are to be considered as a whole.", rather than require the jury to refer back to instruction No. 18 which contained the somewhat less mandatory words: "It may arise from a series of acts or omissions, or both, none of which standing alone would constitute more than ordinary negligence, but which taken together may establish gross negligence.", it might very well have been acceptable. Nevertheless, in this case we feel that the instruction complained of unduly emphasized and isolated one element of negligence which, standing alone, did not constitute gross negligence, without a clear admonition that it should be considered together with all other factors. As a result, it had a tendency to confuse and mislead the jury. Although certainly not determinative of this court's finding, the fact that the jury wrote the following note to the trial judge after submission of the case affords some evidence of corroboration of the same: "We are having trouble clarifying Gross Negligence. It seems that the two parts to the definition contradict each [other]. Is Gross Negligence (1) A series of negligent acts (ex 3/out of 4) [sic] or (2) Willful distruction [sic] (3) or both." The trial court responded with supplemental instruction No. 1 as follows: "In answer to your question, the definition of gross negligence is adequately stated in Instructions 18, 19 and 20. The Instructions do not contradict each other, and are the law in the State of Nebraska. You will kindly re-

read Instructions 18, 19, and 20, because they are not inconsistent." Had the trial court utilized NJI No. 7.51 rather than attempting a piecemeal definition by reciting what gross negligence was not, such confusion probably would not have resulted.

Whenever applicable and practicable, Nebraska Jury Instructions (NJI) are to be used when charging the jury, but if it becomes necessary to draft a special definitional instruction it should, whenever possible, be placed in an affirmative rather than a negative posture.

The other error claimed by plaintiff's attorney occurred during the last 6 minutes of plaintiff's rebuttal argument. Unfortunately, according to plaintiff's affidavit, no court reporter was immediately available to make a record of what had transpired, although at the request of plaintiff's attorney the proceedings were halted to make an attempt to locate one. It was agreed the argument would proceed and the jury was instructed and retired to deliberate at 12:10 p.m. A record was then made at 12:15 p.m., in which, as might be expected, there was some disagreement as to what the facts truly were. In this regard, it might be well to point out that even though neither the statutes nor the rules of the court specifically require the presence in court of the reporter throughout every phase of the trial, it is certainly advisable that one be available.

When the record was made, plaintiff's counsel stated that in rebuttal to the argument of defendant's counsel, he, plaintiff's counsel, said: " 'Taking the logical extension of Mr. Rowen's argument, I would ask you if he is trying to tell you that a vehicle in which you would be a guest passenger' — and I suggested that perhaps it might even be the jurors themselves on their way home — 'and that it was traveling 100 miles an hour on Dodge Street,' and I was about to get into the point of giving the traffic situation on Dodge Street and the fact it's a two-lane

street, and just as I was about to discuss these other pertinent factors, Judge Tesar interjected and said, 'That's right, that's right.' " The trial judge disagreed and said: "The only difference is that the statement was a little different from what was put into the record. The statement was, 'Do you mean to tell me if a person goes 100 miles an hour on Dodge Street that that is not gross negligence?' and the Court said, 'Yes, I mean to tell you that.' He said, 'You mean to tell me going 100 is not gross negligence,' and used the words gross negligence, without any question, and that's why I stopped you." Plaintiff's counsel replied: "At that point I was just about to extend the original part of the argument concerning Dodge Street and I wasn't allowed to continue that; that's when he said, 'That's right, that's right,' to the jury. The judge replied, "I said that; that's exactly right as to what I said because you asked the question and I answered it for you." Plaintiff's attorney replied: "Further, the defendant's argument was based, as far as liability is concerned, strictly on the issue as to whether or not the plaintiff had shown speed alone, so this became the focal point of the whole final argument and the interjection by the Judge was directed to that area." It appears from that portion of the record that plaintiff's attorney was asking a rhetorical question of the jury, expecting an answer only in their verdict, but the trial judge volunteered his answer.

The affidavit of plaintiff's attorney made some 3 days later and being a part of the transcript, although being somewhat more in detail and containing conclusions of counsel, is not substantially different from the record made. From that portion of the bill of exceptions constituting argument on the motion for a new trial, it is obvious that defendant's attorney interpreted the judge's remarks as instructing plaintiff's attorney that such attorney's statements earlier referred to were improper.

It is practically impossible to draw any firm and accurate conclusions as to what occurred without an actual recording, not only of the words spoken but the manner as well as the tone of voice employed. Any time a lawyer in his argument to the jury attempts to figuratively expand the record with hyperbolic examples, he runs the risk of an admonition by the court, whether requested by opposing counsel or not. On the other hand, the trial judge should confine himself to such admonitions, not attempt to amplify his written instructions, and refrain from remarks that are calculated in any way or may have the tendency to influence the minds of the jury. It is our opinion that although the comments made by the trial judge, whatever they in fact were, may not have been sufficient to constitute reversible error, at least they had to have the effect of exacerbating the prejudical effect of the isolation of speed as set forth in the court's instructions.

From a consideration of all of the facts and circumstances, it is our opinion that error was present, as set forth above, which was prejudical to the plaintiff. Accordingly, the judgment of the trial court is reversed, both as to the verdict of the jury and the dismissal by the court, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

COLWELL, District Judge, concurs in result.

THE OMAHA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE, V. CONTINENTAL WESTERN CORPORATION, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH DAVE BENNETT, INC., A CORPORATION, GUNDERSON'S INC., A CORPORATION, BANK OF MILLARD, A CORPORATION, AND M & S GRADING, INC., A CORPORATION, APPELLANTS.

278 N. W. 2d 339

Filed May 1, 1979. No. 42150.

1. **Foreclosure: Mortgages: Property.** A court has jurisdiction and power to include, within a decree of foreclosure of a real estate mortgage, provisions for the disposition of the proceeds of the sale of the property.
2. **Foreclosure: Liens: Equity.** When marshaling of assets is sought by a junior lien holder, equities are determined as of the time when such request is made.
3. **Foreclosure: Liens: Mortgages.** When the holder of a first real estate mortgage upon property subsequently encumbered in separate parcels to junior lien holders seeks foreclosure, such first lien will be enforced against the entire security; junior lien holders will bear the burden of such first lien in proportion to the value of the parcels upon which they have claims; any surplus remaining after the satisfaction of the first lien should be apportioned among junior lien holders in proportion to the value of the parcels in which they have an interest.
4. **Decrees: Res Judicata.** After the time for appeal has expired, the provisions of a decree are res judicata and binding upon all the parties to the action.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Reversed and remanded with instructions.

Robert T. Cannella of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant Gunderson's.

James E. Lang of Marer, Venteicher, Strasheim, Seidler, Laughlin & Murray, P.C., for appellant M & S Grading.

Kennedy, Holland, DeLacy & Svoboda, for appellant Dave Bennett.

James C. Cripe of Kelly, Cripe & Wellman, for appellees Automation and Alfab.

Heard before KRIVOSHA, C. J., CLINTON, and HASTINGS, JJ., and STUART, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an action for the foreclosure of a real estate mortgage brought by The Omaha National Bank, the plaintiff, against Continental Western Corporation and others, including junior lienors, defendants.

The District Court for Sarpy County, Nebraska, entered a decree of foreclosure, adjudicating various amounts due from the Continental Western Corporation and the extent and priority of liens for such amounts. On appeal by Dave Bennett, Inc., and M & S Grading, Inc., from the portion of such decree disallowing mechanic's liens claimed by each of said parties separately, this court affirmed the decree as to Dave Bennett, Inc., and reversed as to M & S Grading, Inc., establishing its mechanic's lien as to lots 1 to 402, Coronado subdivision, Sarpy County, Nebraska, for the amount claimed by it. See Omaha Nat. Bank v. Continental Western Corp., 202 Neb. 238, 274 N. W. 2d 867. None of the remaining parties appealed from the decree. During the pendency of such appeal, the security was sold at foreclosure sale and the same was duly confirmed by the District Court. Thereafter, applications for the distribution of the surplus were made by several junior lien holders. The order for distribution granted the applications of Alfab, Inc., and Automation, Inc., the appellees. This appeal, from the order of distribution of the surplus, is by Gunderson's, Inc., M & S Grading, Inc., Bank of Millard, and Dave Bennett, Inc., appellants, who assign error. We sustain the assignments of error and reverse and remand the cause with instructions.

It is not necessary to summarize either the evi-

dence or the portion of the record as to those matters which preceded the entry of the decree of foreclosure. That decree, as corrected in accordance with the previous opinion of this court, is res judicata as to all parties.

On September 9, 1977, the trial court found the amount due each creditor of the defendant, Continental Western Corporation, fixed the priority thereof, and ordered the foreclosure. The real estate, which was the security for the first lien of The Omaha National Bank, consisted of two noncontiguous tracts designated as the Antilles and Coronado properties. In paragraph 18 of the decree, the trial court found priorities generally as follows: Tract A, "The Coronado Property," containing lots 1 to 402, inclusive, and lots "A," "B," and "C," in Coronado subdivision in Sarpy County, Nebraska, all subject to first lien in favor of The Omaha National Bank, except lots 396 to 399, inclusive, and part of lot "C" in the southwest quarter of Section 28, Township 14 North, Range 11 East of the 6th P.M., Sarpy County, Nebraska, and eight different parcels thereof subject to junior liens as stated by the court; Tract B, "The Antilles Property," described by metes and bounds, all subject to first lien in favor of The Omaha National Bank, and two parcels thereof subject to junior liens as stated by the court. Lots 396 to 399, inclusive, of the Coronado property were not subject to lien of The Omaha National Bank, but to a first lien held by the First National Bank and two junior liens; the portion of lot "C" in the southwest quarter of Section 28, Township 14 North, Range 11 East of the 6th P.M., Sarpy County, Nebraska, was not subject to the lien of The Omaha National Bank, but to a first lien held by Gunderson's, Inc., and three subordinate liens. In paragraph 19 of the decree, the court directed that upon foreclosure sale, all of the real estate should first be offered for sale by parcels in the following order: (1) All of the

Antilles property; (2) lots 396 to 399, inclusive, of the Coronado property; (3) the part of lot "C" in the southwest quarter of Section 28, Township 14 North, Range 11 East of the 6th P.M., Sarpy County, Nebraska; and (4) lots 1 to 395, inclusive, lots 400 to 402, inclusive, and lots "A," "B," and "C," except that parcel in (3). Offering the property as an entirety was authorized but the bids for the entirety were not sufficient and the bids for the parcels were finally accepted. Lienors were authorized to bid separate portions of their secured debts upon different parcels. In paragraph 20, the court directed that the proceeds of the sale be applied to the payment of costs and the satisfaction in whole or in part of the first liens; that the surplus, if any, should remain in the hands of the clerk for disbursement pursuant to the further order of the court; and that such surplus should be subject to the lien of the junior lien holders in the same order in which they bound the real estate, to be distributed by the court according to their respective equities and priorities.

Next appears this proviso: "[P]rovided, however, such surplus sale proceeds shall first be divided between 'The Antilles Property' and 'The Coronado Property' in the same proportion as such separate tracts contributed to the creation of such surplus funds, such proportion to be the same proportion as the respective aggregate highest bids for each such tract bore to one another when the real estate was offered for sale by parcels as above provided whether such bids were finally accepted or not, and after such division, the liens of the junior lienholders on each such tract shall attach to the portion of the surplus sale proceeds so attributed thereto and their respective rights in such portions of the surplus funds shall thereafter be separately determined as above stated." The return of the sheriff to the order of sale showed that the parcels were sold as follows: (1) The Antilles property to

S.W.N., Inc., for $100,000; (2) lots 396 to 399, inclusive, in Coronado property to the First National Bank, Council Bluffs, for $71,000; (3) part of lot "C" of Coronado property, in the southwest quarter of Section 28, Township 14 North, Range 11 East of the 6th P.M., Sarpy County, Nebraska, to Gunderson's, Inc., for $15,000; and (4) lots 1 to 395, inclusive, lots 400 to 402, inclusive, and lots "A," "B," and "C," except that parcel in (3) to The Omaha National Bank for $385,423.27.

By an addendum the sheriff reported the unsuccessful offer of the entirety and also that The Omaha National Bank had bid the sum of $75,000 for the parcel referred to in (1), but said bid was not accepted. The trial court confirmed the sale and directed the making of deeds to the high bidders. Upon the payment of bids and the application of lien payments, this left a surplus of $25,000 to be applied to the payment of costs and the balance for distribution among the lien holders junior to The Omaha National Bank. The appellees contended that the bid of S.W.N. for the parcel referred to in (1) produced the entire surplus and that it should be apportioned between them in proportion to their lien interests in the Antilles property. Appellants contended that the amount of the surplus should be divided into two parts between the Antilles and Coronado properties according to the proviso quoted above and that such parts should then be apportioned among junior lien holders. The trial court upheld the contention of the appellees and ordered distribution accordingly.

The proceeds of the sale of the parcels referred to in (2) and (3), not subject to the lien of The Omaha National Bank, are not material to nor involved in this appeal.

It is first necessary to consider whether paragraph 20 of the decree of foreclosure is binding upon the court and the parties and whether it requires a proportionate division of surplus proceeds between the

Antilles and Coronado properties. The trial court did have jurisdiction and the power to order the disposition of the proceeds of the sale. 59 C. J. S., Mortgages, §§ 689 and 692, pp. 1251 and 1257. The parties, by their failure to appeal the provisions for the disposition of proceeds, have become bound by the terms of said decree. The parties to this appeal concede this point by arguing only the meaning of paragraph 20. The merits of paragraph 20 are not presented by this appeal and we do not hold that surplus proceeds should be subject to a preliminary division as here provided, if such issue were presented in this appeal.

In the more usual and frequent cases where marshaling of assets is ordered, the primary lienor has security, a part of which is subject to a second lien. Equity will then, if requested by the subordinate lienor, require the prior lienor to satisfy his claim so far as possible by resort to the part of his security not subject to the subordinate lien. The equities are determined at the time when marshaling is sought; a first lienor who has previously released a part of his security does not lose any of his priority over the subordinate. First State Bank v. Niklasson, 116 Neb. 713, 218 N. W. 744.

When the first lienor forecloses a lien upon one or more tracts which have been encumbered to several junior lienors in several separate parcels, the primary lien should be enforced against the entire security so that each junior lienor will bear the burden of the first lien in proportion to the value of the parcel upon which he has a claim; any surplus arising after the satisfaction of the first lien should then be apportioned among the junior lien holders according to the respective values of their security. Bryson v. Newtown Real Estate & Development Corporation, 153 Conn. 267, 216 A. 2d 176; Vandever Invest. Co., Inc. v. H. E. Leonhardt Lbr. Co., 503 P. 2d 185 (Okla.); Annotation, 76 A.L.R. 3d 326. When, how-

ever, several junior lienors have taken security upon the same tract, their relative priority will depend upon the time when their liens attached.

An examination of paragraph 20 shows that the court was making a move toward apportionment by providing that any surplus should be divided between the Antilles property and the Coronado property in proportion to the amounts realized from each. This provision was clear and definite. It was not provided that there should be a comparison of the amounts bid upon each tract by unsuccessful bidders. It is very possible that bidders might vary their bids between tracts for tactical reasons to promote their own interests, even though acting in good faith. In this case, the trial court found that the high bid on each tract represented the fair value thereof, and that a resale would not produce a greater amount. There is no such finding as to the bid of The Omaha National Bank upon the Antilles property. There would be a different situation if, during the course of the proceedings leading to the entry of the decree, the amount of the debt and lien had been divided between the two properties and each was ordered sold for the satisfaction of the separate lien against it. It would have been simple to determine separate surpluses. The Omaha National Bank, however, would have surely appealed from such a restriction upon the operation of its lien.

The trial court failed to apply the clear provisions of paragraph 20 and to allocate the amount of the surplus between the Antilles and Coronado properties in proportion to the amount for which each was sold. The order of distribution is reversed and the cause is remanded with the following instructions: (1) The trial court will allocate the amount of the surplus remaining after the discharge of the first lien of The Omaha National Bank and the payment of costs, excluding the costs of this appeal, 79.4 percent to the Coronado property and 20.6 percent to

the Antilles property; (2) the court will then determine a proportion of each separate parcel within Coronado by area or value to the entire tract and follow the same process to parcels within Antilles; and (3) the allocated part of the surplus as to each tract separately will then be ordered paid to junior lienors according to such proportions and in the order of their priority in time as to the parcel in which they have an interest.

REVERSED AND REMANDED WITH INSTRUCTIONS.

EUGENE D. SCHAFFERT ET AL., APPELLANTS, V. G. W. HARTMAN ET AL., APPELLEES.

278 N. W. 2d 343

Filed May 1, 1979. No. 42163.

1. **Deeds: Conveyances: Grantor-Grantee.** As used in the law of conveyancing, an exception is a withdrawal from the operation of the grant of some part of the thing granted; thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance and the thing excepted remains in the grantor the same as if no grant had been made. An exception in a deed is nothing more than a qualification by which some part of the estate is not conveyed, but which would have passed to the grantee but for the exception.
2. **Deeds: Conveyances: Grantor-Grantee: Easements.** As used in the law of conveyancing, a reservation gives rise to some new thing issuing out of that which is granted. A reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as, for example, an easement.
3. **Deeds: Conveyances: Contracts.** The terms reservation and exception may be used as synonyms in conveyances and contracts, the description of what is being excepted or reserved normally making clear what is being accomplished and thus no ambiguity results.
4. **Deeds: Conveyances.** Where a deed is plain and unambiguous, its meaning is to be determined without reference to extrinsic facts.
5. **Deeds: Conveyances: Intent.** In determining the intent of the

parties to a deed, the language of the instrument, together with the surrounding circumstances, are to be considered.

Appeal from the District Court for Hitchcock County: HUGH STUART, Judge. Affirmed.

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

Hanson & Hanson, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and CANIGLIA, District Judge.

CLINTON, J.

This appeal arises from an action to quiet title to an undivided one-half interest in the oil, gas, and other minerals (hereafter for convenience referred to as minerals) in a tract of land, hereinafter identified as tract (A), in Hitchcock County, Nebraska, in the plaintiffs Schaffert. Schafferts and the defendants Hartman both filed motions for summary judgment on the ground there was no disputed issue of material fact and each was entitled to judgment as a matter of law. The court denied the motion of the Schafferts, granted the motion of the Hartmans, and quieted title in them to the disputed one-half interest. Schafferts then appealed to this court. We affirm.

The issue in the trial court and here is the construction and effect of a provision in a warranty deed by which Hartmans, on February 1, 1960, conveyed to Schafferts one contiguous tract of land in Hitchcock County, designated by legal description, which consisted of tract (A) above referred to and additional land which we shall refer to as tract (B). In the deed, following the legal description of the property, was the following: ". . . excepting and reserving a half interest in the oil, gas and minerals, the intention being that the interest excepted and reserved by the grantors shall be subject to and reduced by outstanding mineral interests, and that this

instrument shall accordingly convey to the grantees a full and unencumbered half interest in the oil, gas and minerals, along with all other rights in said property." The issue was submitted to the trial court upon the pleadings which incorporated a real estate contract and certain deeds of conveyance, admissions, answers to interrogatories, and affidavits. Neither party contends there is any question except one of law.

The record establishes the following undisputed facts. On June 17, 1950, Hartmans' predecessor in title conveyed to a third party an "undivided one-half interest in and to all of the oil, gas and other minerals in and under, and that may be produced" from tract (A). The instrument of conveyance recited that tract (A) was then "under an oil and gas lease." The habendum clause in the above conveyance was as follows: "TO HAVE AND TO HOLD the above described property, together with all and singular the rights, appurtenances thereto in anywise belonging unto the said Grantee, herein, his heirs and assigns for a period of the next 20 years from June 17, 1950 and as long thereafter as oil and/or gas is produced from these premises or the property is being developed or operated . . . ."

On December 28, 1959, the Hartmans, then the owners of tracts (A) and (B), contracted to sell the land to the Schafferts. The contract contained the following provision immediately following the legal description of the property: ". . . together with an undivided half interest in the oil, gas, mineral and royalty rights therein, the grantors hereby reserving to themselves an undivided half of the same, subject to previous reservations in the chain of title, the intention being that the grantees shall have a full half interest in the said oil, gas, minerals and royalty rights."

On February 1, 1960, in consummation of the contract, the Hartmans conveyed to Schafferts the land

(tracts (A) and (B)) by the deed which contained the provision quoted in the second paragraph of this opinion.

When the 20-year term mentioned in the mineral conveyance of June 17, 1950, expired, there had been no production of oil or gas from tract (A). At a later time, in 1975, oil and gas leases covering both tracts (A) and (B) were executed and delivered.

Schafferts contend that by virtue of the deed from the Hartmans they became the owners not only of an undivided one-half interest in the minerals in tracts (A) and (B), but also owners of the reversionary interest in the minerals in tract (A) which followed the expiration on June 17, 1970, of the term interest granted by the mineral conveyance of June 17, 1950.

Schafferts' argument is founded in part upon the fact that the terms "exception" and "reservation" are, in the law of conveyancing, terms of art which have different meanings. They correctly point out by quotations from opinions of this court that an exception is "a withdrawal from the operation of the grant, of some part of the thing granted; thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance. * * * If the exception be valid, the title to the thing excepted remains in the grantor, the same as if no grant had been made. * * * An exception in a deed is nothing more than a qualification, by which some part of the estate is not conveyed, which would have passed to the grantee but for the exception. * * *," Kozak v. State, 189 Neb. 525, 203 N. W. 2d 516, and that a reservation is "some new thing issuing out of what is granted . . . a reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as an easement, the right to pass over, or the like." Eiseley v. Spooner, 23 Neb. 470, 36 N. W. 659.

They argue, therefore, that the term exception and the term reservation as used in the conveyance

apply to two different things. The reservation purportedly refers to the minerals conveyance for the 20-year term in tract (A) and the purpose of the reservation is to limit the warranty as to and give notice of the outstanding interest. The intention is that, when the term expired, the reversionary interest passed to the Schafferts. The exception, it is asserted, applied only to a half interest in the minerals in tract (B). Thus, by the deed, the Schafferts received a present one-half interest in the minerals in tract (A), together with the reversionary interest in the other half of the minerals in tract (A), and so became the owners of all the oil, gas, and other minerals in that tract.

It is to be noted that Schafferts' argument is inconsistent in that when they say the reservation applies to the 20-year term, they pervert the definition of the word reservation, for under the definition upon which they rely, the proper term to apply to the exclusion of the undivided mineral interest owned by the third party would be exception and not reservation, for no new thing was being created. Furthermore, the language, "excepting and reserving," clearly pertains to the entire tract and does not, as they contend, embrace an exception as to tract (B) and a reservation as to tract (A) for the tracts are not separately referred to.

Schafferts further argue the Hartmans could not make an exception of minerals because "at the time of the conveyance of the property, the Hartmans did not have a one-half interest in the minerals in Tract A. Therefore, they could not except that which they did not have." This is contrary to fact. As to tract (A), the Hartmans owned the fee in one-half of the minerals and the reversionary interest in the other half. The argument is indeed a strange one for, if the Hartmans had no interest, how did the Schafferts acquire any interest from the Hartmans? A grantor makes an exception for one or both of two reasons,

either he excepts because he does not own or because he wants to retain. In the present instance the exception did both — it excluded the present one-half mineral interest owned by other parties and retained the future or reversionary interest in that same one-half.

The Schaffert argument twists beyond recognition the rather plain and clear language of the deed. It is based entirely upon the unnecessary insertion into and the imprecise use of the term "reserving" in the language describing the intended effect of the deed upon the mineral ownership.

The first phrase of the exception is this: "excepting and reserving a half interest in the oil, gas and minerals." This phrase, despite the unnecessary use of the term reserving, is perfectly clear. It means that the grantors retain one-half of the mineral interest in the land described in the deed. That land consisted of tracts (A) and (B). Since, however, there existed the outstanding term interest in the minerals, it was necessary to state whose half interest in the minerals was subject to the outstanding term interest. The next phrase of the deed answers that question. The excepted one-half was "subject to and reduced by outstanding mineral interests." Thus, the grantors' (Hartmans) interest was "subject to" the term interest. This is the same as saying they retained the reversionary interest, which existed only in tract (A). The draftsman could have stopped there, for by the plain language Schafferts became the owners of a present interest in the minerals in all of the land, and Hartmans retained their present interest in one-half of the minerals in tract (B) and retained the future or reversionary interest to one-half of the minerals in tract (A). However, the draftsman wanted to make clear beyond all doubt what was being accomplished so he redundantly described the interest in the minerals the Schafferts were to receive by saying: ". . . and that

this instrument shall *accordingly* [recognizing the redundance] convey to the grantees a *full and unencumbered* [i.e., the grantors' interest, not the grantees', has the burden of the term interest] half interest in the oil, gas and minerals, . . ." (Emphasis supplied.)

The language of the exception may not use the words of art precisely, but it is plain and unambiguous and written in language obviously designed to make clear to a layman who was aware of the existence of the term interest exactly what the effect would be. It is a notorious fact that a great many lawyers and courts use the terms exception and reservation interchangeably as well as redundantly in the manner of laymen who do not know that they are terms of art. See cases cited at 15A Words & Phrases, p. 100, under the heading, Exception — In Deed, Reservation synonymous. No harm is done (at least no example of harm readily comes to mind) by misuse of the terms because the description of what is reserved or excepted, or reserved and excepted, makes clear what is being accomplished.

Where a deed is plain and unambiguous, its meaning is to be determined without reference to extrinsic facts. Badura v. Lyons, 147 Neb. 442, 23 N. W. 2d 678. In determining the intent of the parties to a deed, the language of the instrument, together with the surrounding circumstances, are to be considered. Hart v. Saunders, 74 Neb. 818, 105 N. W. 709. In this case the language of the deeds and the surrounding circumstances, i.e., the state of title to the minerals, leave nothing ambiguous. There is no claim that there was a mistake of fact or fraud which impaired the validity of the deed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SANDY PATRICK KERNS, APPELLANT.

278 N. W. 2d 348

Filed May 1, 1979. No. 42255.

1. **Criminal Law: Attorneys at Law: Right to Counsel.** The test for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is 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.
2. **Criminal Law: Plea Bargains: Right to Counsel: Post Conviction.** Where the likelihood of conviction was great, where a favorable plea bargain was arranged, and where the rights of the defendant were patiently explained prior to acceptance of a guilty plea, defendant's request for post conviction relief due to alleged ineffectiveness of counsel was properly denied.
3. **Attorney and Client: Right to Counsel: Constitutional Law.** Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Renne Edmunds of Knowles & Edmunds, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Brueggemann, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is a post conviction action by the appellant. He seeks to have vacated a sentence of 5 to 10 years for robbery and a 10-year sentence for rape. The basis of appellant's claimed right to post conviction relief is an alleged ineffectiveness of counsel in two respects. First, that the trial counsel allegedly failed to advise the defendant of the possibility of the suppression of the results of a lineup held at the Omaha police station. Second, that the counsel had

a conflict of interest with a codefendant. After a hearing, the trial court denied post conviction relief. Appellant appeals. We affirm.

On the day he was to stand trial for two counts of armed robbery and two counts of forcible rape, the defendant, through his attorney, William Campbell, a staff member of the public defender's office of Douglas County, agreed to plead guilty to one count of robbery and one count of rape. The county attorney agreed to drop an additional count of rape and one of robbery. The trial court made an extended inquiry and gave an explanation of the defendant's constitutional rights, the pleas that could be entered, the possible sentences, and the factual basis for the plea. Appellant does not contend in this court that the proceedings did not comply fully with the standard set forth in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971). Essentially the appellant complains his counsel did not inform him prior to his plea of the possibility of suppression of identification evidence when he had a reasonable basis to believe that a motion to suppress would have succeeded under United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

The test for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is 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." State v. Leadinghorse, 192 Neb. 485, 222 N. W. 2d 573 (1974).

In his testimony relating to the matter, Mr. Campbell testified candidly that he did not remember but he felt he would have discussed with the appellant the fact that there may have been a basis for challenging the identification proceedings. At the arraignment, the following colloquy took place: "THE

COURT: Is there any questions involved of Miranda, any statements made in custody, or competency of witnesses to indentify the Defendant under Wade, and other decisions? MR. Campbell: There is no Miranda issue. There is an identification issue as a part of the State's case. There presumably could have been a Wade hearing."

At the same hearing, however, a further exchange took place: "THE COURT: In your opinion, would the victim in the rape charge be competent to testify, and identify the Defendant? MR. Ryberg (County Attorney): The preliminary hearing is replete with excellent identification. THE COURT: Was there any lineup involved? MR. Ryberg: Yes. THE COURT: Did it meet the test required by Wade, and other decisions? MR. Ryberg: If I remember right, it was a four or five man lineup at the time. THE COURT: If the case, on either count, were tried to the Court, or to the jury, would a conviction result? MR. Ryberg: I believe so, Your Honor. THE COURT: Is that your understanding of the evidence the State has in this case? MR. Campbell (Appellant's counsel): Yes, exactly, Your Honor. THE COURT: In your opinion would the victim in the rape charge be able to take the stand competently, identify the Defendant, and further that if the case were tried to a jury, or to the Court, considering the plea arrangement, would there be such a likelihood of conviction occurring on each count; that it favors him to waive his Constitutional Right to trial, and the entry of these pleas? MR. Campbell: Yes, Your Honor. I was at the preliminary hearing. I cross examined (the rape victim) * * * as to Count Three, and Ollah Johnson (the robbery victim) as to Count Two. I am convinced conviction would be the result of the trial." The correctness of these statements by appellant's counsel was not disputed at the post conviction hearing.

It is evident counsel for the appellant recognized the possibility of a motion to suppress but considered the likelihood of its success to be minimal. The court below in this action concurred in counsel's opinion.

In an exhaustive and complete memorandum detailing its findings of fact and conclusions of law, the court analyzed the evidence with respect to the line-up procedure at the Omaha police station and determined, in fact, that such Wade hearing would not have resulted in the suppression of the evidence in any circumstance.

Furthermore, the trial court at the arraignment addressed the appellant on this very issue: "THE COURT: I do want you to understand, as far as the competency of any witnesses to be able to identify you, you would ordinarily, under a plea of not guilty, be entitled to have the Court hear, in advance of such witnesses taking the stand, to have the Court hear the evidence as to the manner in which they picked you out, so to speak, or the manner in which they would purport to identify you as the party involved in the crimes with which you are charged to here in advance of their taking the stand to determine whether or not all of your Constitutional Rights, and the requirements made by Supreme Court cases were fulfilled, and upheld in the way in which they would be able to identify you. If you enter a plea of guilty as to those two counts at this time, you are adjudged convicted of those two crimes, you would also waive, or give up your right to have that hearing, have the Court determine that. Do you understand what I am saying? THE DEFENDANT: Yes."

In view of the eyewitness identification by the two victims of the crimes, the likelihood of conviction, the favorable plea bargain arranged by counsel, and the patient explanation by the court specifically addressed to the rights of the appellant now raised, the

suggestion that the appellant's plea of guilty was somehow either induced by the failure of counsel to move to suppress the eyewitness identification or that such failure to file a Wade motion indicated a lack of competence of counsel is patently frivolous.

The trial court found, as we find, that the appellant not only knowingly waived his rights to a suppression hearing, but that the hearing would not have resulted in the suppression of the identification, and that absent such suppression, the likelihood of conviction was strong. The challenge to the competency of appellant's counsel was unwarranted and totally devoid of merit.

The second aspect in which appellant argues ineffectiveness of counsel is that counsel had a conflict of interest. The alleged conflict was the representation by Mr. Campbell (appellant's counsel from the Douglas County public defender's office) of Mark Allen Smith, a codefendant.

Smith stood charged with the same crimes as the appellant, i.e., two counts of robbery and two counts of rape. Pursuant to a plea bargain, Smith plead guilty to one count of robbery. Both counts of rape and the other robbery count were dismissed. As related above, only one of the counts of rape was dismissed under the plea bargain negotiated for the appellant. Appellant cites the more favorable plea bargain obtained by Smith as evidence of the alleged conflict of interest. This difference in treatment is sufficiently explained, if it need be explained, by the fact, found by the trial court, that the victim of the rape could not positively identify Smith, while she clearly could identify the appellant. This is a sufficient difference to have justified the differences in the plea bargains. Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. See Holloway v. Arkansas, 435 U. S. 475, 98

S. Ct. 1173, 55 L. Ed. 2d 426 (1978). It is necessary that the appellant show the conflict of interest actually existed. The appellant points to a statement made by appellant's counsel at the time of sentencing of Smith: "The problem here is that my client (Smith) is *tainted* by the other charges, *by the other defendants*, by the multiple counts, by the complexity of the whole matter. This Court knows all about that. We stand convicted on the robbery of Olaful Jonsson [sic]. He was present at that time. There was a toy pistol used, and my client was in the car at the time of Sandy Kern's holding a toy pistol and/or a knife on Mr. Olaful Jonsson." (Emphasis supplied.)

Mr. Campbell was asked to, and did explain the remark to the trial court in this post conviction action: "I think I meant that he was tainted because of the complexity of the matter, meaning number of defendants, number of counts, the fact that it is so often difficult for a defense counsel to get the sentencing judge to zero in on one felony count in the disposition of it * * *."

The trial court, in the order denying the appellant's motion for post conviction, reviewed the evidence and determined: "This court does not see any such bias in counsel's remarks to the court at sentencing of either defendant, concludes that the plea bargain arranged by counsel on both defendants was definitely in their respective best interests. Counsel's statement to the court at Smith's sentencing that defendant Kerns was holding a pistol or knife in the Jonsson robbery is clear from the records of the presentence report and he was only asking the court to attempt to obviate the natural tendency to add to the seriousness of the single conviction, the multiple counts, and the defendants involved. At defendant's sentencing counsel placed his client in the best light he could, namely, that he is a young man in need of medical and psychologi-

cal help. There is no indication that he did not show the same conscientious protection of the interests of the defendant as he did in representing Smith." No conflict of interest is apparent from the face of the record and none has been shown to us. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD H. DAVIS, APPELLANT.

278 N. W. 2d 351

Filed May 1, 1979. No. 42298.

1. **Post Conviction: Appeal and Error.** An issue which has been fully litigated by direct appeal cannot be relitigated in an action for post conviction relief or by mere presentation of different arguments related to the same issue if the alleged facts are known to the defendant at the time of direct appeal.
2. **Criminal Law: Statutes: Prosecuting Attorneys: Evidence.** An order to the prosecuting attorney under the provisions of section 29-1912, R. R. S. 1943, is not an appropriate way for a defendant in a criminal case to procure handwriting exemplars of third parties unless it be alleged that such exemplars are in the possession of the prosecutor and are relevant evidence in the prosecution.
3. **Post Conviction: Statutes: Courts.** In post conviction proceedings under section 29-3001 et seq., R. R. S. 1943, the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility.

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

Clifford Davis, pro se.

Paul L. Douglas, Attorney General, and Sharon M. Brueggemann, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is a post conviction action under the provi-

sions of section 29-3001 et seq., R. R. S. 1943. It follows the conviction of Davis in two criminal prosecutions consolidated for trial in which he was found guilty of (1) possession of heroin with intent to deliver, (2) illegal possession of a firearm by a felon, (3) being an habitual criminal, and (4) possession of a controlled substance. On earlier direct appeal to this court the conviction on charges (1), (2), and (4) above were affirmed, the conviction on charge (3) was vacated, and the cause was remanded for resentencing. State v. Davis, 199 Neb. 165, 256 N. W. 2d 678.

In this action, Davis pleads four grounds which he claims make the convictions unconstitutionally infirm and therefore void. These are: (1) He was denied discovery of handwriting exemplars which he claims would have demonstrated that search warrants used in the search of his residence were forged. (2) He was deprived of effective assistance of counsel because the court refused a continuance which he had requested in order that he might take the deposition of one Washington, an alleged informant on whose information the warrant was based and who, at the time of request for continuance, was incarcerated in a San Francisco jail. (3) He was denied compulsory process for witnesses on his own behalf. This claim relates to compelling the appearance of the informant Washington. (4) He was denied a full and fair hearing on the validity of the search warrants.

The District Court granted an evidentiary hearing at which Davis represented himself, having expressly declined the offer of the court to appoint counsel for him. After the hearing the court refused to vacate the convictions and sentences. We affirm.

Underlying all of the stated grounds for relief is Davis' claim that he was the victim of a conspiracy managed by Omaha Police Officer Farmer and other persons who caused or assisted in the planting

of the controlled substance in Davis' residence and then seized the contraband in a search of his apartment using a warrant which was invalid because, among other things, the judge's signature thereon had been forged.

To establish the factual basis for his claim of conspiracy, Davis, at the evidentiary hearing, called three members of the public defender's office of Douglas County, two of whom had represented him either in preparation for or at the trial at which he was convicted, and two deputy county attorneys of Douglas County.

One of the evident purposes of the testimony was to impeach the veracity of Officer Farmer. One of the public defenders testified, without objection being made by the State, that Davis told him the identity of an unnamed informant referred to in an affidavit used to procure a search warrant against Davis in another case. Davis had drawn the conclusion that that particular party was the informant because that person was the only one in his home at the time in question and so was the only person who could have had the personal knowledge of the presence of the controlled substance as described in the affidavit. This assistant public defender testified he then called the alleged informant, who at the time of the call was incarcerated in Kearney, and the latter denied he was the informant. The witness then relayed this information to the prosecutor. Some time later the action against Davis was dismissed. The witness concluded that because the action was dismissed, the police officer must have lied in the affidavit and on that account the prosecution was dismissed.

A second member of the public defender's staff testified he was informed by a member of the county attorney's staff that Washington was the informer referred to in the affidavits in the prosecution here involved. After being so informed, he made a tele-

phone call to San Francisco and talked to Washington who was then incarcerated in a San Francisco jail. In the first telephone conversation with Washington, Washington declined to give any information except to say he did not know Davis and to add that he wanted to think over whether he wanted to say anything further. Later, Washington made a collect call back to the witness. In that telephone conversation, Washington reiterated he did not know Davis and would not recognize him if he saw him, but he (Washington) knew the controlled substance had been planted in Davis' apartment; that certain other people also knew this, including Officer Farmer; and the arrangement was that Washington would notify "interested parties" when the plant had been made. Washington said one Herbert Offord (Alford) could verify all this. He also stated he could prove the story because he had taped a conversation of the "set up" and Officer Farmer's voice was on the tape. He indicated his willingness to testify if permitted to do so. A third member of the public defender's staff testified that at the request of his colleague he listened to the second conversation with Washington. He verified the substance of what Washington said.

At the time of the conversations, Washington was wanted in Omaha in connection with a homicide charge and also as a witness in the case against Davis. Attempts were being made to extradite Washington to Nebraska, but these were unsuccessful as Governor Brown of California denied extradition.

Testimony at the evidentiary hearing indicated that at the time of trial, Offord, who purportedly had the same knowledge as Washington, was incarcerated in the Nebraska Penal and Correctional Complex. Although Davis knew this, he did not attempt to call Offord as a witness on his behalf, either at trial or as a witness in the evidentiary hearing.

From the two members of the county attorney's staff was elicited the following information. One of them made a trip to San Francisco and talked to Washington in an effort to get him to waive extradition. He was unsuccessful. Washington did not tell him that he had any information about drugs being planted in Davis' apartment. The second member of the county attorney's staff made a trip to San Francisco for another purpose, but while there, talked to Washington's attorney about extradition. He did not talk to Washington and did not have any information from Washington about a conspiracy or the planting of drugs.

The record indicates the District Court judge denied Davis' motion for discovery. The matter being complained about here is the denial of the production of handwriting exemplars of Judge Elizabeth Pittman and Officer Farmer. Davis argues these are required to be produced under the provisions of section 29-1912, R. R. S. 1943. It is plain that section 29-1912, R. R. S. 1943, does not refer to such matters, but, insofar as pertinent here, relates to things in the hands or control of the prosecutor which might be used by the State as evidence. See § 29-1912 (f), R. R. S. 1943. There is no way an order to the prosecuting attorney could require third parties to give handwriting samples. It is not claimed the prosecutor had the exemplars in his possession. Exemplars are not things which the State could have used in the prosecution of Davis. The record does indicate the municipal judge voluntarily gave to Davis' attorney a signature sample. Davis made no use of it. Neither did he call the municipal judge to testify as a witness as to whether or not her purported signature on the warrant was genuine. He apparently did not attempt to get a signature sample directly from Officer Farmer whom he claims committed the forgery. It is clear from the record of the previous suppression hearing that Davis was contending at

that time that forgeries had been committed.

One member of the county attorney's staff testified that in his telephone conversation with Washington, Washington indicated he was in fear for his life if he were to be returned to Nebraska.

The District Court did not err in denying post conviction relief. The denial of the motion for a continuance and the validity of the search warrants were both issues which were raised on the direct appeal in this case. The record indicates that all of the circumstances which would have supported a continuance and the alleged facts surrounding the validity of the warrant were known to Davis at the time of that appeal. He now seeks to relitigate those issues making new arguments. An issue which has been fully litigated by direct appeal cannot be relitigated in an action for post conviction relief or by mere presentation of different arguments if the alleged facts are known to the defendant at the time of direct appeal. State v. Moss, 191 Neb. 36, 214 N. W. 2d 15; State v. Moore, 192 Neb. 74, 218 N. W. 2d 540.

The record does not establish that Davis ever made any request to the District Court, either prior to trial or since, to take steps under the provisions of section 29-1906 et seq., R. R. S. 1943, or section 29-3206, R. R. S. 1943, to procure the attendance of Washington as a witness.

The factual basis for all four of Davis' claims depended upon the assertion that he was the victim of a conspiracy and of planted evidence. The burden was on Davis to establish the factual basis for such a claim. The determination of whether or not such a conspiracy existed and whether the evidence was strong enough to require the conviction to be vacated, so the matter might be more fully explored, rested upon the judgment of the trier of fact as to the credibility of that evidence. We have many times said that questions of credibility are for the trier of fact and not for this court. In connection therewith

we point out the following: Davis made no effort to support his claim in the post conviction action by deposition testimony of Washington. Davis did not, at trial nor at the evidentiary hearing, attempt to procure the testimony of Offord who was an available witness in Nebraska and who purportedly had the same information as Washington. Neither at the suppression hearing nor in the post conviction action did Davis call the municipal judge to support his claim of forgery. This would have seemed the obvious thing to do. If there was a forgery, it could have been proved by the testimony of the municipal judge. The record shows Davis' counsel talked to the judge but did not call her as a witness. Davis made no attempt to make any use of the signature sample which the municipal judge voluntarily furnished to him. The District Court judge who presided at the evidentiary hearing could well have concluded that Davis wanted to use, in his quest for post conviction relief, only testimony which was absolutely safe and which could not be subjected to scrutiny, i.e., the hearsay recitals of what Washington and the informant in the unrelated case told the witnesses in telephone conversations.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK LEE ERNEST, APPELLANT.

278 N. W. 2d 355

Filed May 1, 1979. No. 42337.

1. **Bonds: Bail.** It is within the discretion of the trial court to remit a part or all of the penalty of a bail bond.
2. _____: _____. An order forfeiting a part of a bail bond and remitting the balance will not be disturbed in the absence of an abuse of discretion.

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

Judy L. Raetz, for appellant.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant, Jack Lee Ernest, was convicted of burglary and second degree arson and of being an habitual criminal in 1977. His sentence to imprisonment for 30 years on each count was vacated by this court because he had not been present at the evidentiary hearing on the habitual criminal charge and the sentencing hearing and he had been sentenced over objection. See State v. Ernest, 200 Neb. 615, 264 N. W. 2d 677.

On July 27, 1978, the defendant was again found guilty of being an habitual criminal and was sentenced to imprisonment for 29 years on each count, the sentences to run concurrently with each other and concurrently with a sentence the defendant was then serving in the Iowa penitentiary. On August 9, 1978, $1,500 of the defendant's bond was forfeited and the balance was remitted.

The defendant has appealed and contends that the sentences were excessive, that his bond should not have been forfeited, and that he should have been granted a new sentencing hearing because of misconduct of the county attorney.

The allegation of misconduct relates to a claim by the public defender that the county attorney had agreed to make no statement at the time of sentencing. The county attorney's understanding of the agreement was that he would say nothing concerning the nature of the sentence to be imposed. At the sentencing hearing the county attorney made no statement concerning the nature of the sentence to be imposed but did say that the State had no objec-

tion to the presentence report being brought up to date and that any statement the defendant was willing to make concerning another person who was involved in the burglary and arson would be of no value to the State. The record does not sustain the claim of misconduct and there is nothing in the record that would entitle the defendant to a new sentencing hearing.

The defendant has a lengthy criminal record which includes convictions for assault and battery, forgery, breaking and entering, burglary, attempted burglary, possession of burglary tools, and receiving stolen goods. He is an habitual criminal and the sentences imposed were not excessive.

It is within the discretion of the trial court to remit a part or all of the penalty of a bail bond. § 29-1109, R. R. S. 1943; State v. Konvalin, 165 Neb. 499, 86 N. W. 2d 361; State v. Kennedy, 193 Neb. 472, 227 N. W. 2d 607. An order forfeiting a part of a bail bond and remitting the balance will not be disturbed in the absence of an abuse of discretion.

The State produced evidence that the county had incurred expenses in the amount of $1,441.62 in connection with the second sentencing hearing which was necessitated by the defendant's failure to appear at the first hearing. There was no abuse of discretion in forfeiting $1,500 of the defendant's bond.

The judgment of the District Court is affirmed.

AFFIRMED.

ROBERT W. TILDEN, EXECUTOR OF THE ESTATE OF CHARLES F. WALLIN, DECEASED, APPELLEE, V. GUENTHER BECKMANN AND ILSE G. BECKMANN, HUSBAND AND WIFE, APPELLANTS, IMPLEADED WITH HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF LEXINGTON, NEBRASKA, A CORPORATION, APPELLEE.

278 N. W. 2d 581

Filed May 8, 1979. No. 41769.

1. **Equity: Foreclosure: Evidence: Witnesses.** A real estate foreclosure action is an action in equity, and upon appeal to this court is triable de novo, subject, however, to the condition that when the 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. The above rule is applicable even though all the witnesses testifying were called by only one of the parties.
2. **Trial: Pleadings.** Even after the issues have been made up, it is within the sound judicial discretion of the trial judge to permit amendments to the pleadings in the furtherance of justice.
3. **Equity: Assignments: Property: Intent.** Though there may be no assignment *in haec verba* of a mortgage and note, the facts may establish an equitable assignment of such interest. Equity disregards mere form, and no particular words or particular form of instrument is necessary to effect an equitable assignment. Any language, however informal, may amount to an equitable assignment if it shows the intention of the owner of a chose in action to transfer it, so that it will become the property of the transferee.
4. **Conveyances: Assignments: Intent.** The intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not.
5. **Undue Influence.** A person asserting the exercise of undue influence on a decedent must prove that the decedent was subject to such influence; that there existed an opportunity to exercise such influence; that there was a disposition to exercise such influence; and, that the result appears to be the effect of such influence.

Appeal from the District Court for Gosper County: JACK H. HENDRIX, Judge. Affirmed.

Harold W. Kauffman and William A. Day, Jr. of

Gross, Welch, Vinardi, Kauffman & Day, for appellants.

Carlton E. Clark of Clark and Clark, for appellee.

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

BRODKEY, J.

Defendants below, Guenther Beckmann and Ilse G. Beckmann, husband and wife, appeal to this court from a judgment and decree entered by the District Court for Gosper County in an equity action brought by Robert W. Tilden, executor of the estate of Charles F. Wallin, deceased, also known as Fred Wallin, for the purpose of foreclosing a second mortgage, executed by the defendants Beckmann, covering certain real estate owned by them; and securing a certain promissory note in the amount of $20,264 executed by the Beckmanns on July 1, 1971, payable on July 1, 1972, but later extended by agreement of the parties. Home Federal Savings and Loan Association of Lexington, Nebraska, was also made a party defendant to the action, and admittedly held the first mortgage lien upon the premises.

The promissory note executed by the Beckmanns was made payable to Fred Wallin and/or Dale E. Wallin as joint tenants with rights of survivorship, and the mortgage securing the note also listed as the mortgagees therein Fred Wallin and/or Dale E. Wallin as joint tenants with rights of survivorship. Dale E. Wallin is the son of Fred Wallin, deceased.

The petition filed in this action on November 2, 1976, alleges that the plaintiff is the duly appointed and qualified executor of the estate of Charles F. Wallin, deceased; alleges the residence of the defendants and the execution of the note and mortgage previously referred to; declares the balance due on the note and mortgage to be payable at that time be-

cause of default in payments on the mortgage; and prays for a foreclosure of the mortgage and the sale of the real estate covered by said mortgage. Subsequently, on April 29, 1977, the trial court permitted the plaintiff to amend his petition in foreclosure, over the objections of the defendants, to further allege: "That plaintiff holds an assignment of the entire interest of Dale Wallin, joint mortgagee with right of survivorship and has the entire ownership of the note and mortgage contained herein." In their answer, the Beckmanns admit certain allegations of plaintiff's petition; deny all other allegations not admitted; further allege as a defense to the action that on February 27, 1976, the decedent, Charles F. Wallin, signed a written satisfaction of the note sued upon and delivered it to the defendants Beckmann; and prayed that the court dismiss plaintiff's petition.

In a subsequent reply filed to the answer of the defendants, the plaintiff denies the allegations of defendants' answer, and specifically denies the allegation of satisfaction as set out in defendants' answer, alleging that at the time of the execution of the instrument offered as the satisfaction, the deceased, Charles F. Wallin, did not have the mental capacity to execute the alleged satisfaction, and that the purported satisfaction was the result of undue influence exerted upon the mind of the decedent and was not his free and voluntary act.

A pretrial conference was held on April 8, 1977, at which time certain exhibits were marked for trial and foundation waived; and the court, in its order, specifically provided, among other things: "No further pleadings will be permitted except by order of the court after good cause shown" and also: "The issues will be made up by the pleadings and will not be limited by this order. However, the principal issue is expected to be the effect of a release marked as Exhibit No. 3 and the influence or competency involved thereon."

Trial was commenced on April 29, 1977, at which time plaintiff called seven witnesses on his behalf, including the defendants, Guenther and Ilse Beckmann. The plaintiff, Robert W. Tilden, who was executor of the estate of Charles F. Wallin, deceased, testified that decedent's son, Dale Wallin, had filed a contest to the will of the deceased because his father had cut him out of the will; that a settlement was subsequently made of Dale's claim, between the estate and Dale Wallin; and that as part of the settlement Dale Wallin assigned all of his interests in and to the note and mortgage. The court sustained an objection to the testimony as not being the best evidence, and ordered it stricken. Counsel for defendants then pointed out to the court that there was nothing in the petition at that time pleading that Dale Wallin had assigned his interest in the note and mortgage to the estate, and also, that Dale Wallin was not a party to the foreclosure action. Whereupon plaintiff orally moved the court for permission to amend his pleadings to include that allegation. Counsel for defendants objected to the court's granting such permission on the ground that the pleadings and issues were made up and finalized at the time of the pretrial. The court overruled defendants' objection and permitted the amendment of the pleadings to show the assignment referred to. The court then received in evidence, over defendants' objection, exhibits 7, 8, and 9; exhibit 7 being the claim which Dale E. Wallin filed in the estate of his father, Charles F. Wallin; exhibit 8 being a stipulation for settlement of the claim of Dale E. Wallin; and exhibit 9 being a release of the real estate mortgage in question signed by Dale E. Wallin and his wife, Mary Wallin, and also by Robert W. Tilden, executor of the estate of Charles F. Wallin, which release was for the apparent purpose of delivery to the Beckmanns upon the satisfaction of their mortgage indebtedness. Following the production of the evi-

dence from plaintiff's witnesses, plaintiff rested; whereupon the defendants moved the court to dismiss plaintiff's petition on the ground that plaintiff failed to prove a cause of action against the defendants. The court overruled the motion and the defendants then rested. Following arguments of counsel, the court took the matter under consideration. In its judgment and decree entered on August 5, 1977, the court found that the plaintiff had established by clear and convincing evidence: "1. Charles F. Wallin was subject to influence. 2. The opportunity to exercise it existed. 3. There was a disposition to exercise it. 4. The result appears to be the effect of such influence." The court further found that the judgment of foreclosure should be issued; that the defendants Beckmann owed the sum of $16,464.40 with interest, as prayed, from January 1, 1973, subject to the first lien of the Home Federal Savings and Loan Association of Lexington; and that plaintiff's lien is a valid second lien upon the real estate. The court further ordered that in case the judgment is not paid within 20 days from the entry of the judgment, an order should issue to the sheriff of Gosper County commanding him to sell the premises as on execution and apply the proceeds thereof in payment of the amounts so found. Defendants then perfected their appeal to this court. We affirm.

Before proceeding to a discussion of the specific issues involved in this appeal, we first consider the scope of review by this court. We start with the undisputed fact that this is an action in equity to foreclose a real estate mortgage. The rule is well established that actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. R. S. 1943, subject, however, to the condition that when the 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. Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478 (1951); Biggerstaff v. Ostrand, 199 Neb. 808, 261 N. W. 2d 750 (1978). Defendants contend, however, that the latter part of the above-stated rule is not applicable to this case for the reason that they did not present any witnesses on their behalf, but rested at the conclusion of plaintiff's case. We do not agree with this premise. The plaintiff presented the testimony of seven witnesses, including the testimony of the two defendants themselves. The testimony of these witnesses was conflicting on certain material issues, particularly with reference to the question of whether the deceased was subject to undue influence in his attempted satisfaction of the mortgage in question. The matter was tried to the court, which had before it all of the evidence, conflicting or otherwise, and which observed the witnesses during their testimony and clearly accepted one version of the facts over another. We reject the argument that the above-stated rule is applicable only where witnesses testify on behalf of the opposing parties.

We first consider defendants' contention that the trial court erred in permitting the plaintiff to amend his petition to include an allegation that Dale Wallin, the son of the deceased, who was a joint payee and mortgagee under the note and mortgage executed by the Beckmanns, had assigned his entire interest in and ownership of the note and mortgage in question. It is clear that if, as alleged, the purported satisfaction of the note given to the Beckmanns during deceased's lifetime was null and void because of undue influence practiced upon him by the Beckmanns, Dale would have become the outright owner of both the note and the mortgage upon the death of his father by virtue of the fact that he was the surviving joint tenant of the property. Sheldon v. Wat-

kins, 188 Neb. 599, 198 N. W. 2d 455 (1972). If, in fact, he settled his proceedings to contest the will of his father by assigning his interest in the note and mortgage to the estate, then it would seem clear that the executor would have the right to bring the foreclosure action in this case; and that Dale Wallin, having divested himself of all interest in the note and mortgage, would not be a necessary party to the proceedings.

Defendants contend, however, that the court erred in permitting the plaintiff to amend his petition to allege the assignment in question, as the provisions of the order of the court in the pretrial hearing precluded such an amendment at the trial itself. We do not agree. As previously stated, the pretrial order provided: "No further pleadings will be permitted except by order of the court after good cause shown" and also: "The issues will be made up by the pleadings and *will not be limited by this order.*" (Emphasis supplied.) Even assuming that an amendment of the petition would come within the purview of "no further pleadings," it is clear that the court, after hearing lengthy arguments pro and con at the trial, with regard to the propriety of the amendment in question, did permit the amendment. We think it is clear that even after the issues have been made up, it is within the sound judicial discretion of the trial judge to permit amendments to the pleadings in furtherance of justice. See, § 25-852, R. R. S. 1943; Commercial Natl. Bank of Omaha v. Gibson, 37 Neb. 750, 56 N. W. 616 (1893). We conclude that the trial court acted properly in permitting the amendment of the petition in the manner indicated during the trial itself; that its action was in furtherance of justice; and further, that the reception of exhibits 7, 8, and 9, in support of plaintiff's claim of an assignment by Dale Wallin of his interest in the note and mortgage in question, was proper. While defendants are correct in their argu-

ment that the record does not contain an assignment *in haec verba* by Dale Wallin of his interest in the note and mortgage, this fact is not dispositive; and we believe the facts in this case indicate there was at least an equitable assignment of such interest. The rule is well established that since equity disregards mere form, no particular words or particular form of instrument is necessary to effect an equitable assignment, but any language, however informal, if it shows the intention of the owner of a chose in action to transfer it, so that it will become the property of the transferee, will amount to an equitable assignment. See 6 Am. Jur. 2d, Assignments, § 83, p. 264 et seq. It is also the rule that the intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not. 6A C. J. S., Assignments, § 53, p. 673.

As previously stated, the court received into evidence exhibit 7 which is a claim filed by Dale E. Wallin in the estate of his father on June 18, 1974. His claim against the estate is based on three separate transactions. The first transaction involves a mortgage and note executed by one Harold Swanson in the principal sum of $24,000 on March 17, 1972. In connection with this item, Dale Wallin alleges that he is the owner of an undivided one-half interest in said note and mortgage; that the note has been paid in full; that the estate and decedent have received and have under their control the principal sum of the note and mortgage in an amount of $30,000; and that the claimant is entitled to $15,000 of that amount. The second item in the claim involves the Beckmann note and mortgage. In his claim Dale alleges that there is due on the mortgage the approximate sum of $19,000; that the note was payable to decedent and the claimant; that decedent and the estate have taken possession of the indebtedness and the se-

curity thereto; that the claimant is entitled to one-half interest therein; and he makes claim against the estate in the amount of $9,500 plus interest. The third item of the claim involves certain shares of stock in corporations which the claimant alleges he owned; and further, that the decedent, Charles F. Wallin, caused the certificates to be cancelled, converted the stock, and caused him loss in the amount of $30,000. The total amount of the claim filed by Dale Wallin against the estate was the sum of $54,000 plus interest.

Exhibit 8, received in evidence by the trial court, is entitled "STIPULATION FOR SETTLEMENT OF CLAIM OF DALE E. WALLIN", dated July 9, 1976. It is signed by Robert W. Tilden, executor, and Dale E. Wallin; and the stipulation was approved and accepted by the associate county judge. The stipulation provides that Dale Wallin shall receive, in settlement of his claim, the sum of $37,500, payable at the time of the execution of the agreement and the approval of the Gosper county court; that Dale Wallin agrees that he will execute any and all necessary documents, releases, and waivers necessary in the administration of the decedent's estate; and that he will claim no further or other interest in and to any other property of the estate of Charles F. Wallin, deceased.

Finally, as previously stated, the court admitted into evidence exhibit 9, which is the release by Dale E. Wallin and his wife of the real estate mortgage involved herein, which was also signed by Robert W. Tilden, executor, allegedly for delivery to the defendants upon their payment of the note.

We believe it is clear from the above exhibits, as well as other testimony in the record, that Dale Wallin intended to and did assign all his interest in the note and mortgage in question to the estate, which paid him $37,500 in settlement of his claim filed in the estate; and that he agreed he would

claim no further interest in the property of the estate and would execute any and all necessary documents and releases. Though no formal assignment was apparently executed by Dale Wallin, it is clear that under the rule set forth above there was at least an equitable assignment of his interest, and we so hold. This being so, it seems clear that, contrary to the contentions of the defendants, Dale Wallin was not the real party in interest at the time the foreclosure suit was instituted, and the executor of the estate, Robert W. Tilden, was the proper party to bring this action.

We now consider the defense set out by the defendants in their answer that on February 27, 1976, the decedent signed a written satisfaction of the note in question and delivered it to the defendants. The "satisfaction" referred to appears in evidence as an exhibit and reads as follows: "February 27, 1976 First National Bank Elwood, Nebraska Gentlemen: You presently have in your possession a note given to the undersigned by Guenther Beckman, [sic] payable to the undersigned and Dale Wallin, in the sum of $20,264.00, dated July 1, 1971. I hereby authorize you to cancel said note and return it to Guenther Beckman [sic] as it has been satisfied. [Signed] *Fred Wallin* Fred Wallin"

According to the testimony of the Beckmanns, the decedent, who was 91 years old at the time of his death on March 31, 1976, and, because of ill health before his death, had been in a nursing home and the hospital, had requested the Beckmanns, whom he had known for about 20 years, to take him into their home to live. According to the testimony of the Beckmanns, they had come to this country from Germany, and had become very friendly with the deceased. The deceased had loaned them money on occasions and had helped them out in other ways; and they, too, had done favors for the deceased. According to the Beckmanns, the decedent had a fall-

ing out or disagreement with his son, Dale. Decedent had indicated to them that he did not want Dale to inherit any of his property because of a refusal, on the part of Dale, to deed back to the decedent certain real estate he had obtained title to as surviving joint tenant under a conveyance to him and his mother, she having subsequently died. He indicated he wanted his property to go to another son and a granddaughter. Although requested by the decedent, defendants at first were hesitant about taking the decedent into their home to live because, according to Mrs. Beckmann, she would have to give up her employment at a nursing home in order to take care of him. However, after discussing the matter for some time, they decided they would do so, and informed the decedent of that fact. According to the Beckmanns, when they informed the decedent of their decision, he became overjoyed and at that time directed them to go to the bank and pick up the note which the Beckmanns had given him. On the basis of the letter signed by Fred Wallin, under date of February 27, 1976, which was prepared by an attorney at the request of Guenther Beckmann, the bank delivered the note to the Beckmanns; but it was later returned to the bank upon request.

In his reply to the answer of the defendants, the plaintiff denied the satisfaction of the note in question by the decedent; alleged that the decedent lacked the mental capacity to execute the alleged satisfaction; and alleged the purported satisfaction was obtained by undue influence exerted upon the decedent. In its judgment and decree, the court made no specific finding with reference to the mental capacity of the decedent at the time of his execution of the alleged satisfaction, but did specifically find that the evidence in the record clearly established that: (1) The decedent was subject to influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it;

and (4) that the result appears to be the effect of such influence. The court, in effect, found that the satisfaction referred to was the product of undue influence and was therefore void, and the court then proceeded to order foreclosure of the mortgage. We believe the questions of mental capacity and undue influence are related and must be discussed together, since the question of susceptibility to undue influence may well depend upon the mental capacity of the person subjected to the influence.

Although, technically, all the witnesses testifying were witnesses for the plaintiff because the defendants had rested at the end of plaintiff's testimony, the offered testimony with regard to the above issues varied considerably. Russel Morgan, the president of the First National Bank of Elwood where the decedent did part of his banking, testified that Fred Wallin was fairly sharp in financial affairs and was an aggressive businessman; that he maintained his place as well or better than anyone 91 years old and a widower living alone at home; and that the last time he saw Wallin before his death he was all right mentally. Marcia Morgan, who was the administrator of the West Side Care Home in Lexington, testified Wallin was admitted to that nursing home on February 17, 1976. He appeared antagonistic but was mentally alert and independent. She stated she had no independent opinion of Mr. Wallin's physical condition or mental capacity while he was in the home. Byron Owens, the president of the Home Bank in Elwood, stated that Wallin was a regular customer, and that in the late fall of 1975 Wallin was still alert, but toward the end of 1975 Wallin would come into the bank more frequently and sometimes forgot what he came for. Robert W. Tilden, the executor of the decedent's estate, was formerly in the banking business in Elwood and knew Wallin very well. He testified that Wallin's general physical condition slipped somewhat after his wife's death,

and that thereafter he thought Wallin slipped somewhat mentally and showed signs of forgetfulness. Tilden was appointed special guardian of Wallin on March 8, 1976, shortly before Wallin's death, and he testified that, in his opinion, Wallin was not competent to transact business when he took over as guardian. Dr. John Ford, who was Wallin's physician, testified that in February 1976 Wallin was lucid and able to understand when you spoke to him; although, if his business had a degree of complexity to it, he was better off if someone else was handling it. He stated that while Wallin had a certain degree of senility, he had given him no mental examination for judging his competency. In response to a question put to him during the trial as to whether one of the side effects of Wallin's vascular and heart problems would include any effect on his ability to think and his mental capacities, Dr. Ford replied: "Well, I think it would be safe to assume that these same processes that were affecting his legs and his heart were probably affecting his brain. We did note some increase in senility at the time of his admission insofar as there would be periods of confusion occasionally at night, although at times he was very clear and lucid. There would be occasions when he would not be as clear."

Ilse Beckmann also testified with reference to decedent's general physical condition, but expressed no opinion with reference to his mental competency. Guenther Beckmann testified that when he first visited Wallin in the nursing home, shortly before his death, Wallin was mentally alert and carried on an intelligent conversation.

Certain medical records of the decedent were also received in evidence. In one of the records of Mr. Wallin's hospitalization, under date of January 29, 1976, Dr. Ford notes: "The patient's inability to recall details in his life and particularly failure to remember some recent events, although the patient

would at times repeat himself, probably indicate some signs of some early organic brain syndrome." This record was made approximately 2 months prior to Wallin's death.

It is clear, from the above, that the testimony with reference to the mental competency of the decedent was conflicting. Defendants' next argument is that there is no evidence of undue influence. The record discloses, however, that Fred Wallin and defendant, Guenther Beckmann, had frequent contacts, mostly of a business nature, but to some extent social. Beckmann frequently took Wallin with him on trips to other cities for the sake of company and companionship. When the Beckmanns discovered that Wallin was in the West Side Care Home, Guenther Beckmann went to visit him. Beckmann purchased pajamas for Wallin. Wallin confided with the Beckmanns about his family problems with his son, Dale, and begged them to see that Dale did not receive any more of his property. He went so far as to give Beckmann a general power of attorney to handle his affairs. The evidence is undisputed that he desperately wanted to leave the West Side Care Home, and begged the Beckmanns to take him to their home.

There can be little question that the decedent was susceptible to undue influence because of his mental and physical infirmities. The medical records show that he was suffering from moderately severe congestive heart failure, slight emphysema, and other medical problems. While in the nursing home he apparently fell and fractured his hip, and was taken to the hospital where he was operated upon and died shortly thereafter. When Wallin was admitted to the hospital in May of 1974, his records for that admission show mental and physical infirmities. On January 29, 1976, he advised the doctor he was 84 years of age when his actual age was 91. On that date, he was diagnosed as having: (1) Congestive heart failure, (2) peripheral vascular disease,

(3) stasis ulcers on great toes bilateral, (4) bilateral inguinal hernias, (5) benign prostatic hypertrophy, and (7) early organic brain syndrome." On February 1, 1976, the medical records show, as an addition to the diagnosis, arteriosclerotic heart disease and chronic brain syndrome with mild senility.

Defendants argue that the executor failed to establish any of the four elements necessary to prove undue influence; specifically they contend there is no evidence in the record that Wallin was subject to influence, or that there was an opportunity to exercise such influence; that there is no evidence of a disposition by the Beckmanns to exercise such influence; and, further, that it does not appear the satisfaction and cancellation resulted from undue influence. The trial court found to the contrary after a hearing and after observing the witnesses testifying in the case; and we believe there is evidence in the record to support all of the elements. Because of the conflict in the testimony of the witnesses, we give strong weight to the rule that in determining the weight of the evidence, this court will consider 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. See, Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478 (1951); and Biggerstaff v. Ostrand, 199 Neb. 808, 261 N. W. 2d 750 (1978). We conclude that the judgment and decree of the trial court should be affirmed.

AFFIRMED.

KUNS, Retired District Judge, dissents.

LESLIE PECK, APPELLEE, V. MASONIC MANOR APARTMENT HOTEL, APPELLANT.

278 N. W. 2d 589

Filed May 8, 1979. No. 41895.

1. **Bailment: Contracts.** The term "bailment" is comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.
2. _____: _____. It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed.
3. **Evidence: Witnesses.** The owner of personal property is qualified to express an opinion of the value thereof solely because of his status as owner of it.

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

John A. Rickerson, for appellant.

S. J. Albracht of Lathrop, Albracht & Swenson, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, and BRODKEY, JJ., and RICHLING and CLARK, District Judges.

RICHLING, District Judge.

This action was commenced in the municipal court of Omaha by Leslie Peck, as plaintiff, against Masonic Manor Apartment Hotel, a corporation, as defendant, to recover for the loss of the plaintiff's boat which had been stored in the defendant's garage. A jury trial was had in the municipal court and a verdict rendered for the plaintiff in the sum of $5,000. Judgment was rendered thereon. Appeal was taken to the District Court for Douglas County. Upon hearing de novo on the record, the case was remanded to the municipal court for retrial, without comment or opinion. Upon retrial, jury was waived, and pursuant to stipulation the case was

tried upon the transcript, bill of exceptions, including exhibits introduced at the prior trial, and additional evidence. Verdict and judgment were rendered for the plaintiff in the sum of $5,000 and costs. Appeal was again taken to District Court. Upon trial de novo upon the record the District Court affirmed the judgment of the lower court. Timely appeal was filed in this court. We affirm.

The Masonic Manor Apartment Hotel, a corporation, owns and operates an apartment building in Omaha, Nebraska, at 52nd and Leavenworth Streets. In conjunction therewith it also operates a garage which is attached to the apartment building. The garage consists of eight levels, or ramps. The garage contains more stalls than are necessary for the useage of tenants in the apartment building. The excess stalls are rented to other persons or companies.

In December 1975 Leslie Peck, plaintiff-appellee, hereafter referred to as Peck, entered into a written agreement with the Masonic Manor Apartment Hotel, defendant-appellant, hereinafter referred to as Manor. The agreement provided that the Manor agreed to rent space for the storage of Peck's boat upon payment of a stipulated monthly fee, which was paid by Peck in advance from month to month. The Manor reserved the right to move the boat from the stall first designated in said agreement "to another spot in the garage for the convenience of the Masonic Manor." The agreement further provided that the Manor "shall not be held liable for any damage to these boats and equipment while on the premises * * *." The Manor rented space for the storage of 100 boats. In addition, residents of the Manor had space reserved to them for the storage of 117 motor vehicles and the Manor rented space for the parking of an additional 37 vehicles which were owned and operated by others, including two commercial enterprises.

Vehicular entrance and exit was through two large overhead doors just off of Leavenworth Street. Entrance through these doors from the outside could be obtained only by the use of a key or a transistor opening device. Doors could be opened from the inside by depressing a button mounted on a pillar. When functioning properly the doors, once opened, automatically closed in approximately 20 seconds.

No key or opening device was furnished to any boat owner. On the contrary, Peck was advised, when he signed the agreement, of the procedure which was mandatory in order to bring or remove his boat from the garage or go to the boat for the purpose of working thereon.

The manager of the Manor testified "[W]e keep the garage locked at all times" and that the only way the boat could be removed is with the consent and approval of the main office, who in turn would notify the engineers. The manager's office was in the apartment building. In addition there was an engineer on duty at all times. The engineer's duties required his services throughout the apartment building, and at many times a considerable distance from the garage. Before a boat owner could go to his boat, or remove the same, it was necessary that he contact the office by a telephone the Manor provided in a booth outside of the garage doors. An engineer would then be sent to the garage. The engineer would require the boat owner to either show his copy of the written agreement or make satisfactory identification of himself. The engineer then accompanied the boat owner to his boat. The Manor's chief engineer testified that no boat owner could go to his boat without being accompanied by the engineer on duty; that if he came for his boat too early in the morning or too late in the evening he was "out of luck" because the doors were always locked; and that entrance could be gained or the boat removed only by contacting the office which

was open only during the day. Peck testified he went to the garage on a number of occasions, either to work on his boat or to take the boat out for use and to later return it; that on each occasion he had to use the phone provided in the booth at the door to signal; that the engineer on duty came and unlocked the door to let him down to his boat only after he had shown the copy of his agreement and provided satisfactory identification; and that the engineer then accompanied him to his boat. An assistant engineer testified that because of the coming spring and the expectancy that Peck would be removing his boat for use more frequently, the assistant engineer had, on his own volition, moved Peck's boat from ramp eight to ramp six because the exit door was on ramp five and it would be more convenient to both Peck and the Manor to have the boat relocated. Peck testified he was assured the boat would be just as secure on ramp six as on ramp eight and that the same procedure for removing his boat, or getting to it, must be adhered to. On March 26, 1976, Peck went to the garage intending to take his boat out to the lake for use and then to return it. He obtained entrance by first signaling and then exhibiting to the engineer his copy of the agreement and identifying himself. He was permitted to go down to his boat without the engineer accompanying him. When he went to the stall he found his boat missing. He reported this to the engineer, who took him to the manager where the fact that the boat was missing was again reported. A search of the garage by Peck and all the Manor personnel available failed to locate the boat. It was never found or recovered.

The Manor offered no evidence to account for the disappearance of the boat. Its only evidence concerned the procedure whereby boat owners could secure access to their boats and confirmed that owners of motor vehicles either had keys or transistor opening devices for the door. The evidence

confirmed there had been no break-in into the garage. On the day following the discovery of the absence of the boat, Peck returned to the garage to make further search. He found that one of the overhead doors contained a sign indicating that the other door should be used. Upon going to the other overhead door he found it in an open position, thus permitting free access into or exit from the garage. No employee of the Manor was on duty in the area of the opened door. Peck was able to enter and have free access to the garage. He took a picture of the open door as well as of the other door containing the sign. These were received in evidence. The sign was obviously not a hurriedly made one. Upon inquiry Peck was advised by a Manor employee that the sign was kept in the garage for use on those occasions when one of the doors malfunctioned. Apparently that door was malfunctioning and there was some cause for the other one to remain open. Peck's inquiry, for the first time, disclosed that the 117 residents of the Manor as well as the owners or operators of the other 37 motor vehicles, including two commercial enterprises, had full access to the garage by way of key or transistor opening devices furnished by the Manor.

Peck testified as to the amount he paid for the boat when new, shortly before storing it at the Manor garage. He further testified as to further expenses for bringing the boat to Omaha, since the purchase price was f.o.b. elsewhere, as well as to the amounts he had spent in "rigging" the boat. Further foundation was laid by showing his knowledge of boat prices on the market. Peck was permitted, as owner, to offer his opinion of the market value of the boat at the time it disappeared. He testified it then had a market value of $5,000. The Manor offered no evidence to rebut this evidence as to value.

The original petition in the municipal court al-

leged that the loss of the plaintiff's boat was through the negligence of the Manor by permitting unauthorized personnel to gain admission to the premises. Upon remand, and before the second trial in the municipal court, plaintiff was granted leave to amend the petition to conform with the proof by adding an additional allegation of negligence, "in failing to keep a proper lookout for property belonging to the plaintiff."

The Manor assigns as error the finding of the lower court that the plaintiff sustained his burden of proof as to (1) liability and (2) damages.

The Manor's first contention is that the written agreement between the parties relieves the Manor of liability wherein it provided that "The Manor shall not be held liable for any damage to these boats and equipment while on the premises." The Manor contends it was intended that loss of the boat be included in the language "damage to these boats."

In Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581, we held: "A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used."

The contract was drawn and provided by the Manor. The contention that "loss" was intended to be included in "damage" is without merit.

In addition this court held in Nagaki v. Stockfleth, 141 Neb. 676, 4 N. W. 2d 766: "[T]he right of a bailee to limit his liability as such by contract does not extend to exemption from the consequences of his own negligence, if resulting in damages to bailor.

"[U]nder the rules applicable generally to bailees for mutual benefit or bailees for hire [the bailee is] required to exercise ordinary care for its safekeeping, and is liable to the owner for any loss resulting from his negligent acts or omissions * * *."

Further this court held in Simpkins v. Ritter, 189

Neb. 644, 204 N. W. 2d 383: "It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed. * * *

" 'The term "bailment" is comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.' "

The Manor next claims as error the finding that Peck had sustained his burden of proof as to liability. Its argument in support thereof is two-pronged. First, it argues that Peck failed to prove either of the two alleged specific acts of negligence. The uncontradicted evidence of both parties was that Peck delivered the boat to the Manor garage for storage and placed it in the stall assigned by the Manor; that it was moved to a different stall at the discretion of the Manor; that the boat was then under the control of and in the possession of the Manor; and that Peck had no access to the boat except upon the fulfillment of procedures dictated by the Manor. The evidence further established that the boat was to be stored and redelivered to Peck upon Peck's following the prescribed procedures; that Peck had no key or means of entry to the garage without consent of Manor employees; that unknown to Peck until after the boat was missing, 137 tenants and the renters of 37 other stalls, including two commercial companies, had keys or opening devices, or both, available to them and to whomever else they might permit to use them. Peck, upon finding the boat missing, learned of previous garage door malfunctions occurring with sufficient frequency to cause the Manor to have a sign prepared and available when the overhead doors malfunctioned; and that shortly following the discovery of

the loss of the boat Peck found one such door open and no Manor employee present, or other security measure taken, to prevent entry by anyone, including any unauthorized person who might enter the garage from the busy thoroughfare running past the garage or from the business district within which the garage was located. The Manor employees testified they had no idea how the boat turned up missing, thereby confirming that they failed to keep a proper lookout for Peck's boat. The triers of fact, first a jury, next the municipal judge, and finally the District Court upon trial de novo upon the record, have found the evidence sufficient. We concur.

The second prong of the Manor's argument appears to be an attempt to raise the question of whether there was a bailor-bailee relationship or a lessor-lessee one. The case, on the first trial to a jury, was submitted as a bailment. It was retried on the same theory and tried de novo on appeal as a bailment. There appears to be no doubt that the conditions of a bailment rather than that of lessor-lessee existed.

The Manor last assigns as error that the damages were excessive under the evidence adduced at trial.

Peck, as owner, over objection, was permitted to give his opinion as to the value of the boat at the time of loss. Foundation for his testimony as to value was laid by eliciting from him the cost of the boat, cost of transporting the boat to Omaha, cost of motors and other parts and accessories required to "rig" the boat, as well as the purchase price of similar boats on the market in Omaha at the time of loss.

This court in Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141, has ruled: "The owner of personal property is qualified to express an opinion of the value thereof solely because of his status as owner of it. * * * The qualification of a witness to give testimony of the value of personal property is

committed to the sound discretion of the trial court and its ruling thereon will only be disturbed when clearly erroneous." This case has been cited and the principles of law set forth therein approved in other decisions of this court.

The Manor offered no evidence to rebut or contradict Peck's evidence of value at the time of loss. For all the reasons set forth above, the findings and judgment of the District Court are affirmed.

AFFIRMED.

KRIVOSHA, C. J., concurs in result.

AGNES MAHAN, APPELLEE, V. WILLIAM F. MAHAN, APPELLANT.

278 N. W. 2d 594

Filed May 8, 1979. No. 42142.

1. **Divorce: Alimony: Property.** 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.
2. _____: _____: _____. The fixing of alimony or distribution 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 Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Richard A. Douglas, for appellant.

R. M. Van Steenberg of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

Heard before KRIVOSHA, C. J., CLINTON, and HASTINGS, JJ., and STUART, District Judge, and KUNS, Retired District Judge.

STUART, District Judge.

This is an appeal from an order of the District

Court refusing to modify the alimony provision of an original decree of dissolution of marriage. The marriage of the parties was dissolved on October 12, 1972. As part of this decree each party was awarded certain property and William F. Mahan was ordered to pay Agnes Mahan as alimony the sum of $700 per month for a period of 121 months commencing November 1, 1972. The decree continued: "Such alimony shall terminate on the remarriage or the death of the plaintiff. * * * All payments of alimony are subject to further order of the court."

On January 11, 1977, Dr. Mahan filed a motion for modification of the alimony provision of the original decree, alleging changes in Mrs. Mahan's circumstances. Mrs. Mahan filed an answer and cross-petition. After trial the District Court found that Dr. Mahan had failed to prove any material change in circumstances which would justify a modification of the original decree as it pertained to alimony. The court also found that Mrs. Mahan had failed to prove any material change in circumstances which would entitle her to an increase in alimony. Costs were taxed to Dr. Mahan including a $1,250 fee for Mrs. Mahan's attorney.

Appellant contends that the increase in Mrs. Mahan's earned income constitutes a material change in circumstances. At the first trial on September 21, 1972, Mrs. Mahan testified she went back to work as a beauty operator in 1972 and at the time of the trial was making $40 per week. At the second trial it was shown that her income as a beautician was as follows: For 1974, $4,668; for 1975, $4,914; for 1976, $5,003; and for 1977, $5,593. In addition she had income from interest on savings and the alimony paid by Dr. Mahan. An attempt on her part to show Dr. Mahan's income during the same time periods was not allowed by the trial judge.

It stands to reason that at the time of the trial, when Mrs. Mahan had just resumed her occupation

as a beauty operator, her income would be small. Her annual increase of earned income from 1974 to 1977 approximates 5 percent per annum. These facts are insufficient to show a material change in circumstances. "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. * * * The fixing of alimony or distribution 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." Hansen v. Hansen, 199 Neb. 462, 259 N. W. 2d 912; Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618.

We have examined Dr. Mahan's other claims that there has been a material change in circumstances and find that they are without merit.

Appellant also claims the trial court's award of $1,250 for appellee's attorney was excessive. The record shows Mrs. Mahan's counsel spent a total of 36 1/6 hours time plus $17 for out-of-pocket expenses. We find that this claim is without merit.

The appellee is allowed an additional attorney's fee of $750 for the services of her attorney in this court.

AFFIRMED.

T. S. MCSHANE CO., INC., A CORPORATION, APPELLANT, V. DOMINION CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.

278 N. W. 2d 596

Filed May 8, 1979. No. 42149.

1. **Bill of Exceptions: Records: Affidavits: Appeal and Error.** Although an affidavit may be used to prove service of process, such affidavit cannot be considered on an appeal of a cause to this court,

unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.

2. **Judgments: Verdicts: Appeal and Error.** The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
3. **Statute of Limitations: Time.** A cause of action accrues and the statute of limitations begins to run when an aggrieved party has a right to start and maintain a suit.
4. **Contracts: Statute of Limitations: Time: Sales.** The statute of limitations begins to run against a cause of action to recover the purchase price or value of goods sold and delivered at the time of their delivery unless there is some agreement as to the time and manner of payment different from that which the law implies, which is, payment shall be made in cash on delivery. If a term of credit is given to the buyer, the statute begins to run when, and only when, the period of credit has expired.
5. **Statute of Limitations: Ratification.** The mere entry of a credit by creditor without the consent of his debtor is without effect upon the statute of limitations and the fact that the debtor knows of an unauthorized entry of credit and makes no objection thereto is not alone sufficient to constitute a ratification of the credit so as to toll the statute of limitations.
6. **Contracts: Statute of Limitations: Time.** The latest item of a continuous account removes prior items from the operation of the statute of limitations. Transactions may be independent because of special contracts, long intervals, or other circumstances.
7. **Sales.** Openness of an account may be indicated when further dealings between the parties are contemplated and when some term or terms of the sale or sales is left open and undetermined.

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

Raymond, Olsen & Coll, for appellant.

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

Heard before BOSLAUGH, CLINTON, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

HICKMAN, District Judge.

This is an action for monies owed to appellant, the plaintiff below, by the appellee, the defendant below, for parts, equipment, and services. The parties will be hereinafter designated as they were in the trial court.

There are only two issues before the court. The first deals with the trial court's sustaining a special appearance filed by the defendant objecting to jurisdiction of the court over the defendant and the second with whether the statute of limitations barred the action.

Plaintiff filed its action to collect the balance due on the account on August 7, 1973, and summons was issued and served on defendant by serving the secretary of defendant corporation on August 7, 1973. Defendant filed a special appearance on September 6, 1973, objecting to the jurisdiction of the court over the person of the defendant and supported same by affidavit. On November 23, 1973, a hearing was held on the special appearance at which time the affidavits of the defendant and counteraffidavits of the plaintiff were received into evidence. The trial court sustained the special appearance and granted plaintiff 20 days to take further steps to obtain good service upon defendant. The affidavits received into evidence at the hearing on November 23, 1973, have not been made a part of the bill of exceptions. The plaintiff did not stand on the service obtained and on December 13, 1973, plaintiff filed an amended petition. Summons was issued and valid service obtained on defendant on December 13, 1973.

Plaintiff assigns the sustaining of defendant's special appearance as error; however, this assignment of error cannot now be considered by this court in the absence of a bill of exceptions for the hearing on November 23, 1973.

We said in Anderson v. Autocrat Corp., 194 Neb. 278, 231 N. W. 2d 560: "It is true, of course, that an affidavit may be used to prove the service of a summons, notice or other process in an action. See § 25-1244, R. R. S. 1943; Erdman v. National Indemnity Co., 180 Neb. 133, 141 N. W. 2d 753 (1966). While the law permits the use of affidavits for that purpose, and thus avoids problems relating to same

with reference to the 'hearsay' rule, it is still a requirement of law that before such affidavit may be considered in this court, it must first be introduced and received in evidence. The mere filing in the office of the clerk of District Court and its inclusion in the transcript is not sufficient. In State ex rel. Pierson v. Fawcett, 2 Neb. Unoff. 243, 96 N. W. 219 (1901), it was held that an affidavit may be used to prove the service of process; but it is not part of the bill of exceptions, unless presented to the trial court. In Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N. W. 2d 789 (1957), this court stated: 'There is no affidavit preserved or contained in the bill of exceptions in this case. The effect of this omission is that any affidavit considered by the district court is not before and may not be considered by this court. An affidavit used as evidence in the district court cannot be considered on appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44, 102 A. L. R. 1124; Harder v. Harder, 162 Neb. 433, 76 N. W. 2d 260. The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court. Harder v. Harder, *supra*; Frye v. Frye, 158 Neb. 694, 64 N. W. 2d 468.' Numerous other cases to the same effect are collected in 2 Nebraska Digest, Appeal & Error, Key No. 523(2)."

The ruling of the District Court sustaining the special appearance, in the absence of a bill of exceptions for that hearing, must be presumed correct and the burden lies with the plaintiff to show the contrary. Plaintiff has not carried its burden in this

respect by providing this court with a bill of exceptions containing the affidavits.

Prior to a trial on the merits, defendant filed a motion under section 25-221, R. R. S. 1943, to try the issue of the applicability of the statute of limitations separately from any other issue. This motion was sustained and a trial was had to the court on the sole issue of the applicability of the statute of limitations on April 6, 1978. The court rendered its decision on April 24, 1978, finding that plaintiff's cause of action on the disputed items accrued on September 6, 1969, which was 10 days after the invoice for the last disputed item and that plaintiff's claim was therefore barred by the statute of limitations except for the item of $15.58 which the court retained for further decision. A judgment of dismissal against the plaintiff was granted except for the $15.58 item.

The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132; Wallace v. Insurance Co. of North America, 162 Neb. 172, 75 N. W. 2d 549.

A resume of the facts is necessary to a decision on plaintiff's second assignment of error.

Plaintiff corporation is a contractor's equipment, parts, supply, and service company located in Omaha, Nebraska. Defendant corporation's office is located in Scottsbluff and its business is basically the construction of electric transmission lines or parts of them as a subcontractor with its work being performed in various locations in and out of the State of Nebraska. Generally when defendant needed a part for its equipment or needed equipment the order would be called in to the plaintiff's office. Plaintiff would then ship the item directly to defendant at Scottsbluff or to the defendant's job site and then invoice the item to defendant, thereafter posting the charge to its ledger. Plaintiff mailed de-

fendant a monthly statement of the account showing the invoice date, invoice number, the charge, the credits, and the balance owing.

Defendant generally paid by invoice either singularly or in a group and defendant's check in each case specified the invoice or invoices being paid. Defendant's president testified the defendant tried to pay by invoice so that the cost of the item could be charged to the job defendant was then performing and that defendant never paid by plaintiff's monthly statement of account unless the statement was in the exact amount of the invoice or invoices to be paid. There are minor date posting errors between plaintiff's ledger sheets and the dates of some of the invoices, but they are considered to be of no significance to a decision in this case. The account according to plaintiff's ledger had one charge and one payment in 1967. Eleven charges and three payments, together with one credit memorandum, appear in 1968. In 1969, prior to July 14, 1969, there were two charges, two payments, and two credit memorandums. On July 14, 1969, the account had a zero balance.

The evidence shows defendant made payment within 30 days and up to 4 months after being invoiced between July 14, 1969, and December 30, 1970. In June and July 1969, plaintiff performed services on and supplied parts for defendant's Poclain back hoe which resulted in defendant being sent three invoices, dated August 14, 1969, for $1,942.82 for a boom for the back hoe; August 18, 1969, for $269.65 for labor on and small parts for the back hoe; and August 27, 1969, for $6,098.51 for hydraulic parts and services on the back hoe. The terms of payment stated on each invoice were "Net 10th Prox." Defendant was invoiced on July 31, 1969, for $1,948.20 for a Morgan conveyor and its assembly shipped by plaintiff on July 7, 1969, which was not related to the back hoe. On August 20, 1969, defendant was invoiced for $428.40 for an item related to the Morgan

conveyor and shipped by plaintiff on August 5, 1969. On August 30, 1969, defendant was invoiced for $40.41 for a chute, chain, and pin not related to the back hoe which was shipped by plaintiff on August 27, 1969, for which defendant issued its check on October 31, 1969, but which was not shown on plaintiff's ledger as a credit until December 31, 1969. On September 18, 1969, defendant was credited with payment of the invoices of July 31 and August 20, 1969, and by September 18, 1969, defendant had communicated its refusal to pay the plaintiff for the invoices of August 14, 1969, August 18, 1969, and August 27, 1969. Between August 21, 1969, and September 30, 1969, plaintiff sent invoices to defendant for parts and materials shipped in April, May, June, July, and up to August 25, 1969, and for equipment rental, none of which related to the back hoe. These invoices were paid as a group by defendant's check issued October 31, 1969, but are not shown on plaintiff's ledger. On December 19, 1969, plaintiff issued a credit memorandum crediting defendant's account for $1,076.75 which applied to one of the disputed invoices and was for reusable parts plaintiff had taken off of defendant's Poclain back hoe. After August 27, 1969, defendant made no purchases from plaintiff until it ordered a decal for a Grove crane on February 9, 1970, which was shipped on February 16, 1970, and invoiced to defendant on February 23, 1970, at a cost of $15.58. This invoice has never been paid.

After the purchase of the decal, above mentioned, defendant was invoiced on May 7, 1970, for two tampers, which were not related to the back hoe, shipped on April 16, 1970, and defendant's account was credited with payment on May 26, 1970. Defendant was invoiced for a tamper part and carburetor on June 24, 1970, which items were not related to the back hoe and which were shipped by plaintiff on June 20, 1970. Defendant was credited with payment of that invoice on October 5, 1970. The last item,

a parts manual for a crane, was invoiced to defendant on November 23, 1970, and defendant's account was credited with payment on December 23, 1970.

The parties are in agreement that an action can only be brought on a verbal contract within 4 years and that section 25-206, R. R. S. 1943, is applicable.

A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Weiss v. Weiss, 179 Neb. 714, 140 N. W. 2d 15.

Plaintiff's invoices indicate the terms of payment to be "Net 10th Prox." This phrase is not defined in the evidence. The District Court found it to mean 10 days after the invoice.

In Webster's Third New International Dictionary, 1969, the abbreviation "Prox." is used following the word proximo which is defined as "of or occurring in the next month after the present."

Whether the statute commenced to run on September 6, 1969, or September 11, 1969, is of little difference under the facts. We conclude that the cause of action accrued on the disputed items on September 11, 1969, the day following the date plaintiff extended credit. "The statute of limitations begins to run against a cause of action to recover the purchase price or value of goods sold and delivered at the time of their delivery unless there is some agreement as to the time or manner of payment different from that which the law implies, which is that payment shall be made in cash on delivery. If a term of credit is given to the buyer the statute begins to run when, and only when, the period of credit has expired." 54 C. J. S., Limitation of Actions, § 137(b), pp. 60-61.

Thus, the statute of limitations ran on the disputed invoices on September 11, 1973, unless it was tolled.

The plaintiff does not claim that the statute was tolled by any of the statutory grounds set forth in section 25-216, R. R. S. 1943, but relies instead upon

the entry of the credit to defendant's account on December 19, 1969, in the sum of $1,076.75 and upon defendant's purchase of the $15.58 decal shipped by plaintiff on February 16, 1970, and invoiced to defendant on February 23, 1970, either of which plaintiff claims tolled the statute of limitations.

Plaintiff contends that its issuance of a credit memorandum on December 19, 1969, which was posted on plaintiff's ledger on December 31, 1969, crediting defendant's account for the value of the reusable parts from the back hoe, was sufficient to toll the statute to that date, and thus, since valid service was obtained on December 13, 1973, within 4 years of the entry of the credit memorandum, the statute of limitations was tolled.

The facts reflect plaintiff took the reusable parts in June or July 1969, when it worked on the back hoe, and did not credit defendant with the value of those parts until some 5 to 6 months later. Defendant did not request the credit and its issuance was purely the unilateral act of the plaintiff. Defendant did not object to the entry of the credit, but had by September 18, 1969, refused to pay the invoice to which the credit was applied.

Plaintiff cites Heineman v. Thimgan, 136 Neb. 357, 285 N. W. 920, for the proposition that a credit in favor of a debtor may, if duly applied as a part payment on the creditor's claim against the debtor, be sufficient for the purpose of interrupting the running of the statute of limitations. That case was a suit on an open account where the terms of payment were not specified for carpenter work and labor performed by plaintiff for defendant during the years 1923, 1924, 1925, 1927, and 1928. Plaintiff was then due $297.10 which remained unpaid. Thereafter, defendant in the years 1931, 1932, 1933, and 1934, did some work for the plaintiff for which he was entitled to be paid. Suit was commenced in 1937. The court

held that the plaintiff's indebtedness to the defendant was properly applied to reduce the amount of defendant's indebtedness to plaintiff and that this application of the debt amounted to part payment which tolled the statute of limitations. It is clear in the Heineman case that there was an open account and an affirmative act by the debtor. He simply made a part payment in services instead of money.

While the rule announced in Heineman v. Thimgan, *supra*, has application where an affirmative act is performed by the debtor entitling the creditor to reduce the debt by crediting the debtor, it does not apply where no affirmative voluntary act is performed by the debtor.

Section 25-216, R. R. S. 1943, provides, "In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid * * * an action may be brought in such case within the period prescribed for the same, after such payment * * *."

Broadly speaking, the rule that part payment tolls the statute of limitations is based on the theory that part payment "amounts to voluntary acknowledgment of the existence of the debt, from which the law implies a new promise to pay the balance." It follows, therefore, that for a part payment to have the effect of tolling the statute of limitations, it must be made under such circumstances as to fairly warrant the inference that the debtor recognizes the whole of the debt as an existing liability. 51 Am. Jur. 2d, Limitation of Actions, § 366, p. 855.

In Beacom v. Daley, 164 Neb. 120, 81 N. W. 2d 907, it was said: " 'A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to

and acknowledged the greater debt to be due as an existing liability.' "

In the present case defendant took no affirmative action to seek the credit. Thus, no inference can arise that defendant assented to and acknowledged the greater debt to be due and in fact defendant had refused to pay the debt.

In 51 Am. Jur. 2d, Limitation of Actions, § 380, p. 864, it is said: "The mere entry of a credit on a debt by a creditor without the consent of his debtor is generally conceded to be without effect upon the statute of limitations; also, it seems that the mere fact that the debtor knows of an unauthorized entry of credit and makes no objection thereto is not alone sufficient to constitute a ratification of the credit so as to toll the statute of limitations." We therefore hold that the credit memorandum issued by the plaintiff on December 19, 1969, after defendant's refusal to pay the invoice, did not have the effect of tolling the statute of limitations.

Coming now to plaintiff's last contention that the purchase of the decal which was shipped by plaintiff on February 16, 1970, took the earlier items out of the bar of the statute of limitations, we find that this court has recognized the rule that the latest item of a continuous account removes prior items from the operation of the statute of limitations. Thus, in Wellnitz v. Muck, 182 Neb. 22, 152 N. W. 2d 1, plaintiff had sold defendant implements and parts, and had rendered services over a 12-year period. Suit was commenced on August 4, 1965. The evidence indicated no payments were made by defendant after 1959, but defendant made 5 purchases in 1961 prior to August 5, 1961, and one purchase on August 5, 1961. The court held the rule applicable to the items purchased in 1961 only, stating: "Transactions may be independent because of special contracts, long intervals, or other circumstances." Recovery for the purchases prior to 1961 was denied because the pur-

chases were unrelated to the 1961 purchases and because of the inactivity of the account. In Wellnitz v. Muck, *supra*, there was no agreement as to the time of payment and this we believe is an important consideration which we will discuss later in this opinion.

The case of Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132, is also pertinent to a determination of this case. There, plaintiff sued on an account for petroleum products sold to defendant wherein no time for payment of the purchases was specified. Defendant was served with summons on December 14, 1955. The date of the last purchase was December 15, 1951. The account had run from December 21, 1950, to the date of the last purchase and the purchases were related to each other in nature, that is, petroleum products. Plaintiff's ledger showed all charges, dates thereof, and all items of credit for payments made, none of which were in payment of any specific purchase. This court held that the purchase made on December 15, 1951, took the earlier purchases out of the operation of the statute saying, "In 54 C. J. S., Limitation of Actions, § 165, p. 118, citing In re Estate of Holloway, *supra*, [89 Neb. 403, 131 N. W. 606] and other authorities, it is said: 'In order for later items to take earlier items out of the operation of the statute of limitations the account must be continuous; and where the transactions between the parties are independent and remote, the rule does not apply.' "

Unfortunately, this court has never distinguished the various types of accounts and the rules, set forth in 54 C. J. S., § 165, p. 118, apply only to mutual accounts current whereas we have applied it in the past indiscriminately to simple open running accounts, continuous accounts, and the like. Nevertheless, the rule is understood and is the law of Nebraska.

The only evidence presented by the plaintiff in this case was a copy of plaintiff's ledger and the three

disputed invoices. The balance of the evidence was offered by the defendant including the testimony of defendant's president.

The Kansas Supreme Court in Sheldon Grain & Feed Co. v. Schuetz, 207 Kan. 108, 483 P. 2d 1033, speaking of mutual open running accounts, states: "Openness may be indicated when further dealings between the parties are contemplated and when some term or terms of the sale or sales is left open and undetermined." We feel that such statement is applicable to a determination of "openness" in any type of account.

Here there can be little doubt the parties contemplated further dealings with each other since the parties had done business between 1967 through most of 1970; however, it must be pointed out that plaintiff's own invoices set the terms of the sale on each invoice, "Terms: Net 10th prox.," which we find to mean that payment of each invoice was due on the 10th day of the month following the date of invoice. Thus, since plaintiff set the date for payment of each invoice, it follows that upon nonpayment by the 10th day of the month following the date of invoice, the purchase or purchases on each invoice became a separate cause of action and the transactions between the parties became independent of one another. The record reflects that in answer to defendant's "Second Request for Admissions and Written Interrogatories," which were received into evidence, the plaintiff admitted it accepted the checks from the defendant in payment of the invoices listed on the checks. The inference to be drawn from this admission is that plaintiff did not accept the defendant's checks as payment on an open continuous account, but rather upon the invoice or invoices listed. Plaintiff therefore should not have applied each payment upon the balance of the account. A period of over 6 months elapsed between the purchase of the disputed items and the date of the purchase of the

decal. This would seem to indicate remoteness in the dealings between the parties during the important period here involved.

We also believe the purchase of the decal for a Grove crane was unrelated to the purchase of a boom for the Poclain back hoe, hydraulic parts for the back hoe, and the labor performed on the back hoe. Unlike the items for which recovery was allowed in Wellnitz v. Muck, *supra*, which were found to be interrelated closely in time and subject matter, the disputed items here do not relate in their nature or, under the evidence, to the decal.

Because the terms of sale were specified by the plaintiff on each invoice, both Wellnitz v. Muck, *supra*, and Lewis v. Hiskey, *supra*, are distinguished, and we find the purchase of the services, boom, and hydraulic parts in July 1969 were not saved by the purchase of the decal shipped in February 1970.

Admittedly, the case is close, but we cannot say as a matter of law that the District Court was clearly wrong and therefore the judgment is affirmed.

AFFIRMED.

FLOYD LOCKHART, APPELLEE, V. CONTINENTAL CHEESE, INC., A NEBRASKA CORPORATION, AND LAWRENCE SYSTEMS, INC., AND DONALD P. PAULY, APPELLANTS.

278 N. W. 2d 604

Filed May 8, 1979. No. 42176.

1. **Motions, Rules, and Orders: Verdicts: Judgments.** A motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict.
2. **Motions, Rules, and Orders: New Trial: Verdicts: Statutes.** A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law" as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motions for a new trial have been filed,

notwithstanding the fact that no preliminary motion for a directed verdict has been made.

3. **Evidence: Verdicts.** In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong.
4. **Evidence: Judgments.** A review of the relevant books of an employer by a wage claimant, together with his own arithmetic and testimony of his conclusion of the amount due, is sufficient evidence to support a judgment for a salary bonus figured as an agreed percentage of gross profit.

Appeal from the District Court for Webster County: FREDRIC R. IRONS, Judge. Affirmed.

Phillips & Garwood, for appellants.

William H. Stowell and Jerry McDole, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and REIMER and HIPPE, District Judges.

HIPPE, District Judge.

This is an appeal from a judgment of $10,488.84 for plaintiff-appellee upon a jury verdict, and subsequent overruling of an alternative motion filed by defendants-appellants, for judgment notwithstanding the verdict or for a new trial.

The appellee was employed by appellant, Continental Cheese, Inc., a Nebraska corporation, as general manager of a cheese manufacturing plant in Red Cloud, Nebraska, in about 1966. In July 1967 he also became an assistant to the accounts receivable manager of appellant Lawrence in order to facilitate Lawrence in guaranteeing to lenders of Continental that reported inventories in the plant operations were accurate. For a time, portions of the appellee's salary were paid by both Continental and Lawrence. Appellant, Donald P. Pauly, was president and major stockholder of Continental plus

other corporations that deal generally in the manufacture and sale of cheese. Much of the office functions and bookkeeping of Continental was directed from Manitowoc, Wisconsin, by Don Pauly and his office manager, Lyle Bauer.

On December 16, 1971, Don Pauly's letter to the appellee stated, in discussing other matters relating to the Red Cloud plant, that: "I also feel the time has come that you should participate in the profits we hope to produce. We will set-up a basis of 10% of the gross profit, before taxes, as a bonus." Thereafter appellee was paid a weekly salary plus an annual bonus check until July 2, 1976, at which time Don Pauly terminated his employment by closing the Red Cloud plant.

In this case, the appellee alleged he worked but was unpaid for the week of July 3-10, 1976, and had 3 weeks of vacation pay coming, all at $250 per week; and that the bonus paid since 1971 was $9,738.34 short of 10 percent of the gross profit for the same period. The appellants' contention, on the other hand, was that the appellee did not perform substantial services during the week of July 3-10, 1976; that the vacation period was 2 weeks instead of 3 and had been used up by short periods from time to time on other business interests; and that the bonus should be 10 percent of the taxable income reported on the corporate income tax return after adjustments which resulted in a bonus overpayment of $1,659.59 rather than an underpayment. Both parties agreed that appellee's weekly pay was $250 in June 1976, and that a total of $6,996.68 was paid to appellee as a bonus.

The record shows no motion for a directed verdict made on behalf of the appellants at the conclusion of the appellee's case or at both parties' rest. Instructions of the court submitting to the jury separate issues of the July 3-10 pay, vacation pay, and the bonus were not objected to at the instruction confer-

ence. The verdict of the jury equals 3 of the 4 weeks of pay claimed by appellee plus the claim for an underpayment of the bonus.

On this appeal, the appellants assign two errors by the trial judge. These errors illustrate an application of the rules pertaining to the making of trial motions. It should be remembered that a motion for a directed verdict precludes a jury from deciding a case; a motion for judgment notwithstanding the verdict assumes the jury has decided the case but judgment is rendered otherwise in spite of that; and a motion for a new trial assumes that the jury has decided the case but it must be tried all over because a statutory ground shows that a party did get a trial, but it was not a fair trial. Each of the procedures has a different history and purpose but all have a common characteristic of precluding the trier of fact from exercising final judgment in deciding the case because of rulings of law.

First assigned is an error in overruling the appellants' motion for a directed verdict at the conclusion of the appellee's evidence. The record, however, shows that no such motion was made after the court inquired if there were any motions to make. The same inquiry as to the making of motions was made at the conclusion of both parties' evidence and no motion for directed verdict was made by the appellants either time. Since no motion was made, the assignment of error in overruling such a motion is clearly without merit.

The second assignment of error is the trial court's order overruling appellants' alternative motion for judgment notwithstanding the verdict or for a new trial, from which this appeal was timely taken.

As to the motion for judgment notwithstanding the verdict, the absence of a motion for a directed verdict precludes the granting of such judgment. The statute authorizing such a procedure is section 25-1315.02, R. R. S. 1943, and provides: "* * * Within

ten days after the reception of a verdict, a party *who has moved for a directed verdict* may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *." (Emphasis supplied.)

Construing this provision In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526, this court held that a motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict. This is so because the statute provides a way whereby the trial court can overrule a motion for a directed verdict made during trial, conclude all the evidence, receive the verdict, and still set aside the verdict later and conclude the litigation by final judgment if the evidence was legally insufficient to support the verdict. Prior to the adoption of this procedure — largely a copy of the then Federal Rule 50 — the court could only provide for a new trial, with its attendant delay and expense, in order to correct results insufficiently supported by evidence. See, Simmons, "Directed Verdicts Under Federal Civil Procedure Rule 50 and Under Sections 25-1315.01 to 25-1315.03 of the Nebraska Revised Statutes", 30 Neb. L. Rev. 630; and Department of Banking v. Colburn, 188 Neb. 500, 198 N. W. 2d 69. Thus we conclude that the trial court did not err but ruled correctly in overruling the appellants' request for judgment notwithstanding the verdict of the jury, finding for the appellee, because no motion for a directed verdict was made.

Ruling upon this assignment, however, does not dispose of the issues on appeal, because a party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law" as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor ap-

pears in the record and timely appropriate motions for a new trial have been filed, notwithstanding the fact that no preliminary motion for a directed verdict has been made. In re Estate of Kinsey, *supra*. Thus, the failure to make a motion for a directed verdict does not preclude our review of the overruling of a motion for a new trial on the grounds of insufficiency of evidence.

In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong. National Bank of Commerce Trust and Sav. Assn. v. Katleman, 201 Neb. 165, 266 N. W. 2d 736; First Mid America, Inc. v. Palmer, 197 Neb. 224, 248 N. W. 2d 30; Department of Banking v. Colburn, *supra*.

An application of these principles to a careful study of the evidence in the case shows there were only three fact issues submitted to the jury. On the first, appellee testified he worked full days the week of July 3-10, 1976, and explained at length the duties he performed and jobs he accomplished. These consisted of cleanup duties at the plant, arranging for delivery of final checks to milk producers, and generally setting up the plant for a change of management or for closing of the plant altogether. These acts culminated in delivering the keys of the plant on the premises to Don Pauly, his employer, on July 10, 1976. The only contradiction was the testimony of Don Pauly that he believed the tasks could have been performed more quickly.

On the vacation issue the appellee did show that company policy was to grant 2 weeks of vacation pay to terminated employees, that other employees received such pay after their termination by the

closing of the plant in July 1976, with the notable exception of the appellee, and that he did not take any of his vacation time in pursuing other business interests. This evidence was contradicted by the appellants with evidence that, when called at the plant, the appellee was frequently gone or unavailable, and that he was also manager of a local race track.

As to the bonus, the appellee offered evidence in the form of profit and loss worksheets prepared by Lyle Bauer, Continental's office manager, after they were requested and produced following a discovery deposition of that witness prior to trial. They showed the gross profit of Continental operations at Red Cloud to be $167,355.19 for the period from 9-31-71 to 6-30-76. Appellee then took 10 percent of that figure ($16,735.52), less the uncontroverted total bonus payment of $6,996.68 actually paid, to support his claim of the $9,738.84 underpayment. His accuracy at arithmetic was stipulated. The appellants introduced corporate tax returns for a similar period of time and took 10 percent of the net income to form a basis for their assertion that the bonus had been incorrectly *over*paid to the tune of $1,659.59. This court has already held that a review of the relevant books of the employer by the claimant, together with his own arithmetic and testimony of his conclusion of the amount due, is "sufficient" evidence to support a default judgment for the unpaid "10% Bonus of Net Profit" salary, and to award a default judgment for such amount in Morgan v. Weiner, 173 Neb. 715, 114 N. W. 2d 720. The technique used here was no different. No complaint was or is made of the manner in which the trial court submitted these issues to the jury or to its instructions on the law, and we have therefore not reviewed any of its actions in relation thereto.

It is our opinion that the fact issues were each controverted by the respective sides, that they were fairly tried at the trial of the case, that evidence ex-

ists supporting the verdict of the jury, and that the verdict is not clearly wrong. The judgment rendered by the trial court is accordingly affirmed.

AFFIRMED.

CREDIT BUREAU OF HASTINGS, INC., A CORPORATION, APPELLEE, V. DUANE GEORGE AND MARGIE GEORGE, APPELLANTS.

278 N. W. 2d 608

Filed May 8, 1979. No. 42181.

Judgments: Statutes: Time. Under the provisions of section 24-537, R. S. Supp., 1976, a motion to vacate a default judgment in the county court must be made within 30 days after such judgment is entered and in the manner therein provided.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Les Seiler, for appellants.

Michael E. Sullivan of Helmann & Sullivan, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and WINDRUM, District Judge.

WINDRUM, District Judge.

Smitty's Enterprises, Inc., performed services for the defendants, Duane and Margie George. There was a disagreement concerning the service. The account was assigned by Smitty's Enterprises, Inc., to Credit Bureau of Hastings, Inc., a corporation, hereinafter called plaintiff.

Suit was commenced by plaintiff on January 5, 1977, in the county court of Adams County. On that date, the Georges left for their winter vacation and did not return until the 25th of February 1977. Defendants were served by the sheriff having left a copy of the summons for each at their usual place of

residence. A default judgment was entered against the defendants and in favor of plaintiff on January 28, 1977. On March 2, 1977, defendants filed a motion to set aside the judgment and requested 10 days to further plead. The county court overruled the motion. The defendants appealed to the District Court for Adams County, Nebraska. The District Court sustained the judgment of the county court.

Defendants, in their motion to set aside the judgment of January 28, 1977, gave the following reason: "* * * for reason that the service of summons was not properly served upon the defendants; that defendants were absent from the State of Nebraska from January 5, 1977 to February 25, 1977; that both the assignee and assignor had knowledge that said defendants were absent from the State of Nebraska during the period of time this action was filed and judgment taken."

No answer or other proof was produced indicating that the defendants had a meritorious defense. An affidavit of Duane George was filed stating that they were out of the State of Nebraska from January 5, 1977, to February 25, 1977; that at no time during this time were they present in the State of Nebraska; and that he, the affiant, believed the plaintiff knew the defendants were gone from the jurisdiction at the time of the alleged service in the matter. The copies of the summons were duly served by leaving at the usual place of residence. The house of the defendants was being observed by a neighbor. The neighbor lady brought the summons from the front door of the residence of the defendants into the house, but did not communicate with the defendants concerning the same.

If defendants maintained the service of summons was not properly served, they have abandoned such argument.

Section 24-537, R. S. Supp., 1976, reads as follows: "When judgment shall have been rendered against a

defendant in his absence, the same may be set aside upon the following conditions: (1) That he pay the costs awarded against him; (2) that his motion be made within thirty days after such judgment was entered; (3) that he notify in writing the opposite party, or his attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time thereof, if the party reside in the county, and if neither the plaintiff nor his attorney be a resident of the county, by leaving a written notice thereof at the office of the clerk of the court ten days before the trial; *Provided*, that the time of trial shall not be more than forty days after the rendition of the judgment."

Defendants in no way complied with any of the conditions above stated. If defendants rely on any theory of fraud, there is no proof of the same.

Section 24-537, R. S. Supp., 1976, is not new. Immediately prior to 1976, a very similar statute, then being section 26-1,100, R. R. S. 1943, set forth the procedure to open or set aside default judgments in courts in metropolitan and primary cities. Our court, in State Furniture Co. v. Abrams, 146 Neb. 342, 19 N. W. 2d 627 (1945), held that section 26-1,100, R. R. S. 1943, was exclusive and that the municipal court had no jurisdiction to set aside any default judgment unless the provisions as therein set forth were followed.

The rationale in State Furniture Co. v. Abrams, *supra*, is applicable here. Section 24-537, R. S. Supp., 1976, sets forth the exclusive method and a party must follow same to have a default judgment reopened or set aside in the county court.

Since the above is controlling, there is no reason to discuss the holding of Steinberg v. Stahlnecker, 200 Neb. 466, 263 N. W. 2d 861 (1978), or Beren Corp. v. Spader, 198 Neb. 677, 255 N. W. 2d 247 (1977).

Defendants also maintained that even though the court had jurisdiction over them, and even though

they were each given notice of the action by copies of the service of summons being left at their principal place of residence, the judgment against them was void as they were denied all opportunity to be heard. They cite Board of Trustees of York College v. Cheney, 160 Neb. 631, 71 N. W. 2d 195 (1955). A perusal of that case indicates that it has no application here. To hold otherwise would in effect negate service of process by leaving the same at the usual place of residence.

The judgment of the District Court is affirmed. Plaintiff is awarded $65.90 attorney's fees for services in this court, to be paid by defendants as provided by section 25-1801, R. R. S. 1943, taxed as costs.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES K. LEHMAN, APPELLANT.

278 N. W. 2d 610

Filed May 8, 1979. No. 42209.

1. **Supreme Court: Appeal and Error.** Except where jurisdiction is involved, this court will consider on appeal only questions which have been presented to and passed upon by the trial court.
2. **Criminal Law: Constitutional Law: Indictments and Informations.** A preliminary investigation conducted by the prosecuting attorney and upon which he files a sworn complaint or information against the party accused, is a sufficient compliance with the requirement of the Fourth Amendment of the United States Constitution that no warrant shall issue but upon probable cause, supported by oath or affirmation.
3. **Criminal Law: Hearings: Pleas: Evidence: Juries.** The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceedings in the District Court, and after trial and conviction any error 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.
4. **Indictments and Informations: Witnesses: Time.** A trial court may, in the exercise of its discretion, permit the names of wit-

nesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice.

5. **Criminal Law: Constitutional Law: Indictments and Informations.** The provision of the Constitution of the State of Nebraska permitting prosecutions for felonies by information, rather than by grand jury indictment, does not conflict with the Fifth and Fourteenth Amendments of the United States Constitution.
6. **Criminal Law: Statutes: Jurisdiction.** In order to suspend jurisdiction of a state court in a criminal proceeding it is necessary to file a petition for removal in the appropriate United States District Court, to give notice to the adverse parties, and to file a copy of such petition with the clerk of the state court, all as provided by 28 U. S. C. A., § 1446. Once this is accomplished the state court shall proceed no further unless and until the case is remanded.
7. **Courts: Jurisdiction: Appeal and Error.** Once the state court is notified of an order of remand by the federal court, it resumes jurisdiction and may proceed even in the face of an appeal of the remand order, unless the defendant obtains a stay of proceedings.

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

James K. Lehman, pro se.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Defendant was charged in an information alleging that he did "willfully attempt to evade an income tax imposed by the provisions of Secs. 77-27,101 to 77-27,135 R. R. S. [1943] or the payment thereof." He was tried by a jury, convicted, and "sentenced to serve a term of 30 days in the Nebraska State Penitentiary located near Lincoln, Nebraska, and pay a fine of $500.00 and costs of this action."

It should be noted at the outset that defendant proceeded pro se both in the trial court and on appeal. This in spite of the fact that at every point in the proceedings, the trial court diligently, earnestly, and painstakingly pointed out his right to counsel and

willingness to appoint counsel at public expense if defendant could not afford his own attorney. Defendant refused these offers but insisted that he have the assistance of what he called "counsel of trust," laymen who were self-styled experts. This request was denied by the trial judge, but, in a remarkable display of patience and fairness, he permitted defendant to have a nonlawyer sit next to him during the trial to counsel with defendant but who could not participate in the conduct of the trial. At this point, it would be appropriate to mention that at all stages of the trial, with few minor exceptions, the defendant refused to participate in the trial proceedings although he was present and, apparently without disturbance, objected to the jurisdiction and authority of the court over the subject matter and of his person.

Defendant's assignments of error, allowing him some measure of literary license and applying liberal standards of interpretation, are that the arrest warrant was issued without oath, affirmation, or probable cause; that the preliminary hearing held preceding the filing of the information failed to establish probable cause; that the information was served without the names of witnesses being endorsed thereon; that the trial judge violated Article V, section 14, Constitution of Nebraska, which prohibits a judge from practicing law, when he instructed the county attorney to endorse the names of the witnesses on the amended information; that defendant was entitled to a grand jury indictment; and that the trial court was without jurisdiction to commence the trial on May 1, 1978, because the case had been removed to federal court.

At the outset, the State reminds us that this court ordinarily will not consider any error not presented to the trial court by a motion for a new trial. This is a correct statement of the law as set forth in State v. Price, 198 Neb. 229, 252 N. W. 2d 165 (1977). "How-

ever, while this court may have jurisdiction, it will ordinarily not consider any error not presented to the trial court by a motion for a new trial if the trial court would have authority to correct the error assigned." However, all of defendant's complaints go to jurisdiction, which we will always consider even though it may not have been presented to and passed upon by the trial court. "This court has often held that: '*Except where jurisdiction is involved*, this court will consider on appeal only questions which have been presented to and passed upon by the trial court.' " (Emphasis supplied.) Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435 (1960).

Most of the assignments of error border on the frivolous, but will be dealt with as precisely as possible. Defendant claims that the arrest warrant was issued without oath, affirmation, or probable cause. The Fourth Amendment of the Constitution does provide that: "The right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause, supported by Oath or affirmation*, and particularly describing * * * the person * * * to be seized." (Emphasis supplied.) A similar contention was made in Ocampo v. United States, 234 U. S. 91, 34 S. Ct. 712, 58 L. Ed. 1231 (1914), and was answered by the court as follows: "Consequently, a preliminary investigation conducted by the prosecuting attorney of the City of Manila, under Act No. 612, and upon which he files a sworn information against the party accused, is a sufficient compliance with the requirement 'that no warrant shall issue but upon probable cause, supported by oath or affirmation.' " The complaint filed with the county attorney contained an allegation by the deputy county attorney that defendant had violated a particular specified statute and the complaint was accompanied by an affidavit under oath, made by the same official, that he had been in-

formed by a particular official of the Nebraska Department of Revenue that defendant had committed certain acts which, it is obvious, constituted the crime charged. Such an affidavit furnishes probable cause and under the provisions of section 29-404, R. R. S. 1943, the magistrate was required to issue the warrant.

There is no transcript in the record of the evidence given at the preliminary hearing. Therefore, the order of the county judge finding probable cause and binding over the defendant to District Court will be presumed valid. In any event, the fact that defendant was found guilty by a jury on sufficient evidence settled the issue of probable cause. "We reiterate our previously established rule that the sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. We further hold that after trial and conviction in the District Court any error 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." State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610 (1975).

Whatever failure there was to endorse the names of witnesses on the information was rectified by the later endorsement with leave of the court at least 3 weeks before the beginning of the trial. In addition, through pretrial discovery and conference, defendant knew well in advance of the trial not only the names of the witnesses, but had in his possession a summary of their testimony as required by the trial judge. "A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice * * *." State v. Waite, 169 Neb. 113, 98 N. W. 2d 688 (1959). Certainly there was no prejudice to the de-

fendant and the trial judge acted well within his discretion.

There is nothing in the record to indicate the trial judge instructed the county attorney to endorse the names of witnesses on the information. That portion of the record, cited by defendant in his brief in support of such a claim, is as follows: "THE COURT: Now, these two cases are C1533 and C1534 and I understand amended Informations are to be filed. MR. SMITH: I have them ready, Your Honor, and I did endorse the names of the witness [sic] thereon." This was testimony in the companion cases of State v. Forbes, *post* p. 349, 278 N. W. 2d 615, and not the instant case. However, even if the trial judge would have directed the county attorney to endorse the names of witnesses on an information, that would comprise part of his duties in the conduct of judicial proceedings and certainly does not constitute the practice of law.

Indictment by grand jury is not required in the State of Nebraska. Section 29-1601, R. R. S. 1943, provides in part as follows: "The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, * * *." In Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124 (1946), this court said: "The Supreme Court of the United States has held that '* * * the provision of the constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States.' Bolln v. Nebraska, 176 U. S. 83, 44 L. Ed. 382, 20 S. Ct. 287." Also, see Lem Woon v. Oregon, 229 U. S. 586, 33 S. Ct. 783, 57 L. Ed. 1340 (1913).

Defendant's final assignment of error asserts that the state court was without jurisdiction because the case had been removed to Federal District Court under the provisions of 28 U. S. C. A., § 1443. It is true

that a petition for removal was filed in the United States District Court for the District of Nebraska, presumably under the provisions of that section of the United States Code, a copy of which was filed with the clerk of the District Court for Sheridan County on May 1, 1978. 28 U. S. C. A., § 1446, provides in substance that a defendant desiring to remove a criminal prosecution from a state court shall file in the District Court of the United States a verified statement containing a short and plain statement of the facts supporting such removal. It further provides, in part: "(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." It is beyond question from the case law that a bond cannot be required in a criminal case. Lefton v. City of Hattiesburg, Mississippi, 333 F. 2d 280 (5th Cir., 1964). However, the requirement of notice remains. "The language of the statute [28 U. S. C. A., § 1446 (e)] is too plain to require interpretation. Removal is accomplished by filing a petition in the district court, *giving notice to the adverse party*, and filing of a copy of the petition in the state court." (Emphasis supplied.) State v. Francis, 261 N. C. 358, 134 S. E. 2d 681 (1964).

There is absolutely no indication in the record that defendant served the "adverse party," the State, with notice of the filing of such petition for removal. As a matter of fact, defendant voluntarily proceeded with the selection of a jury on the morning of May 1, 1978, the date of the filing of the copy of the petition in the state District Court clerk's office, without ever mentioning to the court that such filing had been made. It could very well be assumed that such filing was not accomplished until after the jury se-

lection, which does not invalidate that proceeding. *Proper compliance* with the federal statute cited simply suspends the state court's jurisdiction. "However, the record does not disclose any of the Federal motions. An appellant has the burden of providing this court with a proper record * * *. [Citations omitted] Thus, it should be noted that the filing of the petition for removal is not shown in the record *nor does the record indicate whether removal was effectuated pursuant to 28 U. S. C. A. § 1446 by giving written notice to the adverse parties* and filing a copy of the petition with the clerk of the State court. Therefore, there is no indication that the State trial court was ousted from jurisdiction in the first instance." (Emphasis supplied.) Dorsey v. State, 357 N. E. 2d 280 (Ind. Ct. App., 1976).

At the risk of being redundant, the foregoing facts and legal citations leave us with one of two inescapable conclusions as to the status of this case at the time of the selection of the jury on May 1, 1978, i.e., either the copy of the petition for removal had not as yet been filed, or if it had, the removal process had not been completed in a proper manner. In either event, the state trial court continued to have jurisdiction throughout the jury selection process.

On May 2, 1978, a copy of an order remanding the case back to the state trial court, signed by United States District Court Chief Judge Warren K. Urbom, was filed in the office of the clerk of the District Court for Sheridan County, Nebraska. *If* the jurisdiction of the state court had ever been suspended, it was certainly free to proceed after the above filing. The record in the trial court indicates that before anything else was done on the morning of May 2 with regard to proceeding with the trial, the presiding judge took notice of the filing of a copy of the above-mentioned order. True enough, defendant advised the court that he planned to appeal the order of remand and continued to object to the jurisdiction of

the state court. 28 U. S. C. A., § 1447 (c) provides: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."

"Moreover, it should be noted that after the State court is notified of the remand, it resumes jurisdiction and the defendant who desires to appeal the remand order must obtain a stay of proceedings." Dorsey v. State, *supra*. "However, since an appeal does lie in section 1443 cases, and since, absent a supersedeas, an appeal does not vacate orders of the district court, further state proceedings are not avoidable * * *." Fosdick v. Dunwoody, 420 F. 2d 1140 (1st Cir., 1970), 1141 n. 1. No such stay order or supersedeas appears in the record, and therefore the state trial court properly resumed jurisdiction and has had continuing jurisdiction until this appeal.

All of the assigned errors are wholly without merit. There being no claim that the jury's verdict was not supported by the evidence or that the sentence was excessive, the action of the trial court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND FORBES, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. NEVA FORBES, APPELLANT.

278 N. W. 2d 615

Filed May 8, 1979. Nos. 42210, 42211.

1. **Criminal Law: Pleas: Arraignments.** A claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by a plea in abatement.

2. **Criminal Law: Indictments and Informations: Arraignments.** District Courts are without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same.
3. **Criminal Law: Indictments and Informations: Arraignments: Lesser-Included Offenses.** If a defendant is accorded a preliminary hearing and thereafter an amended information is filed charging a crime that includes some of the elements of the original crime charged without the addition of any element irrelevant to that original charge, no new preliminary hearing is required.
4. **Criminal Law: Indictments and Informations: Tax Evasion: Intent.** A complaint that accused willfully attempted to evade an income tax or the payment thereof without specifying the means employed to attempt such evasion, does not include on its face the crime of filing a false return.
5. **Criminal Law: Indictments and Informations: Evidence: Arraignments: Lesser-Included Offenses.** Without a certified copy of the transcript of the evidence introduced at the preliminary hearing, and in the absence of a stipulation, no determination can be made in District Court that probable cause is established by an amended information, which on its face does not appear to be a lesser-included offense.

Appeals from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Raymond and Neva Forbes, pro se.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The defendants are husband and wife, and were charged in separate informations after preliminary hearings that each did "willfully attempt to evade an income tax imposed by the provisions of Secs. 77-27,101 to 77-27,135, R. R. S., [1943] or the payment thereof." Later on, amended informations were filed, charging that each did: "Count 1. wilfully make and subscribe an [sic] State Income Tax re-

turn, which contains or is verified by a written declaration that is made under penalties of perjury, which the defendant did not believe to be true and correct as to every material matter, for the taxable year ending December 31, 1974, Count 2. The defendant, being a person required under the provisions of Sec. 77-2701 to 77-27,135 R. R. S. 1943 as amended, to make a state income tax return, did unlawfully and willfully fail to make a valid return for the year 1974 pursuant to the provisions of said statutes of Nebraska." Their cases were consolidated for trial to a jury and each was convicted and sentenced to a term of 15 days imprisonment in the "Nebraska State Penitentiary near Lincoln, Nebraska" as to Raymond Forbes and in the "Women's State Reformatory at York, Nebraska" as to Neva Forbes on count 1, a felony; and each was ordered to pay a fine of $250 and costs of suit on count 2, a misdemeanor. Although separately docketed on appeal, the two cases, together with State v. Lehman, *ante* p. 341, 278 N. W. 2d 610, were argued together.

With one exception, all of the issues here are identical with those in State v. Lehman, *supra*, and are disposed of by our decision in that case. With that one exception, all of the procedural facts are identical. The exception, as undoubtedly is apparent from a reading of the statement of the preliminary facts above, is that in the present cases, after the bind overs to District Court on the original information, leave was given the State to file the amended informations as stated above.

Upon being arraigned on the amended informations, the defendants refused to plead, objecting to the jurisdiction of the court generally, and pleas of not guilty were entered for them by the trial court. Thereafter, and before trial, defendants filed a "Demand for Dismissal," which was essentially a plea in abatement in that it objected to the jurisdiction

of the court because of the failure to provide a preliminary hearing after the filing of the amended informations. "It is fundamental that a claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by plea in abatement." State v. Moss, 182 Neb. 502, 155 N. W. 2d 435 (1968). It is likewise true that the District Court is without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. Latimer v. State, 55 Neb. 609, 76 N. W. 207 (1898). "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his right to such examination; except as otherwise provided in the Uniform Criminal Extradition Act." § 29-1607, R. R. S. 1943.

The State contends the amended informations merely charged lesser-included offenses of the crimes charged in the original informations, upon which preliminary hearings were held. "The District Court, before trial, may in its discretion permit amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the amended information does not charge a crime other than the one on which the accused has his preliminary hearing." State v. Costello, 199 Neb. 43, 256 N. W. 2d 97 (1977). It is true that if a defendant is accorded a preliminary hearing and thereafter an amended information is filed charging a crime that includes some of the elements of the original crime charged without the addition of any element irrelevant to that original charge, no new preliminary hearing is necessary. State v. Comer, 199 Neb. 762, 261 N. W. 2d 374 (1978).

The elements necessary to prove the original charge of willfully attempting to evade an income tax, or the payment of the same, are that the defend-

ants owed a tax and in some manner attempted to evade payment. This could be proved, after establishing that a tax was owed, by demonstrating that the defendants filed false returns, that they filed no return at all, or that they simply refused to pay the same. If the original complaints, addressed at the preliminary hearings, were that the defendants attempted to evade a tax by the filing of false returns, obviously such bind overs would support the amended informations charging the filing of a false return. However, no specific means was alleged in the original informations as to how the evasion was attempted. Similarly, if there was a transcript of the preliminary hearing in the record here, which provided evidence that a false return was the means by which the defendants attempted to evade a tax, it would undoubtedly support the amended informations without further preliminary hearings.

Be that as it may, nothing in the record, including the bill of exceptions in the District Court, showed that the filing of false returns was the means by which defendants attempted to willfully evade a tax which they owed, nor for that matter was it shown that defendants in fact owed any tax at all.

It was the State's position, and the one which the trial court apparently adopted, that if a new preliminary hearing was held on the amended informations, the same evidence would again be presented. Examine the following colloquy between the court and the prosecuting attorney during the pretrial conference. According to the State, "It's certainly * * * the same quantum and elements of proof * * *" and "If it is not related and it is not a lesser included or substantially the same or similar offense, then the only alternative available would be to proceed *as requested by the defendant and have a preliminary hearing.*" (Emphasis supplied.) The trial judge manifested substantial skepticism, when in reply he stated, "Well, I want you to submit a memorandum

on this because I have trouble finding this as an included offense, but that's not to say you're wrong." Later on, the trial court, after being informed that there was a preliminary hearing in both of these cases on the original informations, was told by the prosecuting attorney, "If we have a preliminary hearing or were to have one in this case, we'll present exactly the same evidence as we did before and there wouldn't be any bearing [sic]." To this the court replied: "All right. That takes care of the problem as far as I can see." Some 20 days later at a further hearing the trial judge stated: "Now, I regard — at this point, the only thing I regard as critical is whether or not evidence was offered at the preliminary hearing establishing probable cause on these two counts. That's the only thing I regard as significant." To which the county attorney replied: "Well, if that's the only significant thing, Your Honor, as I say, it's the same evidence that was offered that would be offered if we were to have a new one." "Well, did it touch on these two things?" replied the court. "Yes, it does, Your Honor." replied the county attorney. The trial court finally disposed of the question by stating, "Well, in that case, my ruling will stand."

However, as earlier stated, the only problem with the foregoing position is that there is no record of what the "same evidence that was offered that would be offered if we were to have a new one" would be. There is no question but what *both* parties could stipulate the evidence for a new preliminary hearing in the District Court. Also it *might* be said that if a certified transcript of the testimony from the county court preliminary hearing, which did contain proof of filing a false return, was introduced in evidence on the hearing resisting defendants' motion for a new preliminary hearing, and the defendants were given opportunity to refute the same, that would justify the denial of a new pre-

liminary hearing in this case. However, the mere statement by a prosecuting attorney as to what the evidence was and will be does not establish one offense as a lesser-included offense of another and does not constitute a preliminary hearing.

Finally, and although not specifically raised in the assignments of error, is the fact that count 2 charged the offense of willfully failing to make a valid return of income for the same year. The specific statute is section 77-27,115, R. R. S. 1943, which provides that anyone being required to do so, who willfully fails to make an income tax return, shall be deemed guilty of a misdemeanor. Defendants did raise the absence of a preliminary hearing on this count as reversible error. The fact that an information charging a misdemeanor does not require a preliminary hearing is so elementary that no citation of authorities is necessary. However, there is a question as to the efficacy of such a charge. It is difficult to understand how the State can charge that the filing of a false return is supported by the same facts that will support the charge of filing of no return, or, as the State contends, the filing of a false return is tantamount to failure to file a valid return. Count 2 is either repetitious of or inconsistent with count 1, and the same set of facts can hardly support a guilty verdict as to both.

For the foregoing reasons, the judgments of the trial court are reversed and the causes are remanded for new trials in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF RALPH SAATHOFF V. JBH & ASSOCIATES, INC. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. GRAND ISLAND MOVING & STORAGE CO., INC., APPELLANT, IMPLEADED WITH BEE LINE MOTOR FREIGHT, INC., ET AL., AND IDEAL TRUCK LINES, INC., INTERVENORS-APPELLEES.

278 N. W. 2d 762

Filed May 8, 1979. No. 42216.

1. **Public Service Commission: Statutes: Notice: Motor Carriers.** Under the provisions of section 75-315, R. R. S. 1943, the Nebraska Public Service Commission may, upon complaint or on the Commission's own initiative after notice and hearing, suspend, revoke, or change a certificate of a common carrier for willful failure to comply with any of the provisions of sections 75-101 to 75-801, R. R. S. 1943.
2. **Public Service Commission: Motor Carriers: Statutes: Words and Phrases.** The term "willful failure," as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. A failure through oversight to file the annual report required by section 75-116, R. R. S. 1943, would not justify the revocation of an authority.
3. **Public Service Commission: Motor Carriers: Statutes.** An act or failure to act within the provisions of section 75-315, R. R. S. 1943, may be willful within the meaning of the statute even though a decision to cease operations under the certificate may be the consequence of circumstances over which the carrier may have no absolute control such as financial failure.
4. **Public Service Commission: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
5. **Privity: Time.** Ordinarily a party in privity with a party to an action, in the sense that he will be bound by the judgment, is one who acquired his interest after commencement of the action or rendition of the judgment.
6. **Public Service Commission: Motor Carriers: Bankruptcy: Statutes.** A trustee in bankruptcy, receiver, custodian in possession

under a bankruptcy arrangement, etc., of a carrier, has the rights in the certificate of convenience and necessity of the carrier which are provided by section 75-322, R. R. S. 1943, and these rights must be respected by the Nebraska Public Service Commission.

7. **Property: Bankruptcy.** The question of what property belongs to the bankrupt as of the date of the filing of the petition in bankruptcy is determined by state law.
8. **Public Service Commission: Jurisdiction: Bankruptcy.** The mere filing of a petition in bankruptcy does not deprive a state court or agency such as the Nebraska Public Service Commission of jurisdiction in a pending action against the bankrupt.

Appeal from the Nebraska Public Service Commission. Affirmed.

Peterson, Bowman, Larsen & Swanson and Lavern R. Holdeman, for appellant.

Nelson & Harding, Michael J. Ogborn, and Jack L. Shultz, for intervenor-appellee Ideal Truck Lines, Inc.

James E. Ryan, for intervenors-appellees Bee Line Motor Freight, Inc., et al.

Heard before BOSLAUGH, CLINTON, BRODKEY, and HASTINGS, JJ., and BARTU, District Judge.

CLINTON, J.

Grand Island Moving & Storage Co., Inc. (hereinafter Grand Island), an alleged secured creditor of JBH & Associates, Inc. (hereinafter JBH), by reason of having succeeded by merger to the interest of Arrow Freight Lines, Inc. (hereinafter Arrow), has appealed from an order of the Nebraska Public Service Commission (hereinafter Commission), overruling its motion for rehearing on an order of the Commission revoking the certificate of public convenience and necessity of JBH as a common carrier of goods. The proceedings commenced with the filing of a complaint by the director of the motor transportation department of the Commission which alleged that JBH had willfully failed to file an annual report with the Commission as required by sec-

tion 75-116, R. R. S. 1943, and had willfully suspended operations under its certificate without permission of the Commission contrary to the provisions of section 75-316, R. R. S. 1943. The authority for the proceedings is section 75-315, R. R. S. 1943, which provides, among other things, that the Commission "*may*, upon complaint or on the commission's own initiative, after notice and hearing," (emphasis supplied), suspend, revoke, or change a certificate of the carrier "for willful failure to comply with any of the provisions of sections 75-101 to 75-801."

Grand Island assigns as error: (1) The action of the Commission in revoking the certificate was arbitrary, unreasonable, not supported by substantial evidence, and contrary to the public interest. (2) The action was arbitrary, unreasonable, and unlawful because it failed to consider the interests of Grand Island, a secured creditor of JBH. (3) The Commission's action was void because the federal bankruptcy court held the operating "authority" as an asset of the estate of JBH and was therefore under exclusive jurisdiction of that court. We affirm.

Regrettably, it is necessary to outline the chronology of the proceedings in this case in order to understand the contentions. After we have done that, we will discuss the evidence and the law.

The amended complaint was filed on September 7, 1977, notice of hearing was given to JBH on October 11, 1977, and hearing was set for October 19 of that year. On October 19, JBH filed a suggestion of bankruptcy with the Commission indicating that it had, on the preceding day, October 18, 1977, filed in the United States District Court for Nebraska a petition for an arrangement under Chapter XI of the Bankruptcy Act. This suggestion filed by JBH informed the Commission that it was enjoined from proceeding by reason of the bankruptcy filing. Arrow made an appearance by counsel at the hearing where a copy of JBH's suggestion of bankruptcy

was received. To the suggestion was attached copies of a petition under Chapter XI, and a list of creditors. The list did not name Arrow as a creditor. The hearing then proceeded with only the Commission offering evidence. After the Commission rested, counsel for Arrow then made argument to the court and, in the course thereof, referred to the existence of a temporary lease of the authority from JBH to an organization referred to as North Iowa Express, Inc., as well as to an agreement for transfer, with the approval of the Commission, of the authority from JBH to North Iowa Express, Inc. At the suggestion of the examiner for the Commission, copies of the temporary lease and the agreement were "left as exhibit(s)." No evidence was offered by either JBH or Arrow as to the identity of North Iowa Express, Inc., or its readiness, willingness, and ability either to perform the agreement or to operate under the certificate. Counsel for Arrow indicated in response to requests from the examiner that it had no evidence with reference thereto. The hearing was closed and it was stated: ". . . this will be brought before the full Commission for consideration, ..."

Thereafter on March 3, 1978, before the Commission had taken any further action, Grand Island filed a motion "To Postpone and To Consolidate." It alleged that JBH's certificate had been acquired from Arrow by purchase with commission approval on April 12, 1976; subsequently Arrow was merged (no date alleged) with Grand Island and Grand Island became the owner of Arrow's interest in the purchase agreement which was an installment contract; the balance owing on the contract was secured by "the certificate issued to JBH;" JBH was in default (no date alleged); on February 17, 1978, JBH was adjudged bankrupt; the trustee in bankruptcy had abandoned the certificate to the "secured creditor;" Grand Island and JBH had agreed on

some unspecified date in 1978 that the authority be transferred to Grand Island and that Commission approval would be sought for such transfer; Grand Island proposed to file with the Commission an application to have the certificate reassigned to it as successor to Arrow; and no action had been taken to date by the Commission on the complaint against JBH. Grand Island further alleged that cancellation of the certificate was not in the public interest or in the interest of Grand Island and alleged it would be monetarily damaged by such revocation. This motion was never ruled upon and no action by Grand Island to offer evidence in support of the factual allegations or to have the motion ruled upon is shown in the record.

On March 7, 1978, Grand Island filed an application to intervene in this case. The Commission granted this motion, noting that Arrow, Grand Island's alleged predecessor in interest, had appeared at the hearing on October 19, 1977, without filing a petition to intervene. The order further stated: "The Commission's rules permit an intervenor who files after a hearing to become a party of record to participate in oral argument on briefs only as to the evidence adduced and the law applicable thereto." This apparently refers to the evidence adduced at the prior hearing.

On March 27, 1978, the Commission entered an order revoking the certificate of JBH, finding willful failure in the two respects previously mentioned. The Commission order also recites: "October 27, 1977 the Commission was notified that Defendant had taken bankruptcy and that the Bankruptcy Court had stayed the commencement or continuation of any proceeding against the Defendant. February 21, 1978 the Commission was notified by the Bankruptcy Court that Defendant had been judged a bankrupt. March 1, 1978, the Commission was notified by the Bankruptcy Court that the Trustee in

Bankruptcy had abandoned the authority . . . ." The record contains no evidence of such notification or facts above described.

At the hearing on October 19, 1977, a Commission witness testified he could not find the annual report of JBH in the records of the Commission. The report in question would have been the first report required to be filed by JBH as it had acquired its authority on April 12, 1976, by transfer from Arrow. The witness made no investigation to determine whether or not JBH had prepared a report and, if one had been prepared, whether or not it had been transmitted to the Commission; nor, if one was not prepared, whether it was the consequence of oversight or some other reason indicating it was not intentional.

In Herman Brothers, Inc. v. Hennis Freight Lines, Inc., 192 Neb. 258, 220 N. W. 2d 230, we said: "The term 'willful failure' as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. Schmunk v. West Nebraska Express, Inc., 159 Neb. 134, 65 N. W. 2d 386." Had there been evidence of a repeated or continued failure to file reports, then there would have been some evidence of willfulness within the meaning of the statute. Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266. It is clear from our holding in Herman Brothers, Inc. v. Hennis Freight Lines, Inc., *supra*, that a failure through mere oversight to file the annual report would not be such willful failure as would justify revocation. The burden was on the complainant to show the requisite intent. It did not. The action of the Commission in basing its order on

the willful failure to file the annual report is not supported by substantial evidence.

As to the willful suspension of operations under the certificate without the permission of the Commission, the evidence was as follows. On August 10, 1977, a Commission inspector visited JBH's terminal in Grand Island, Nebraska. There he observed no freight on the docks and no tractors in the lot. There were some trailers. At that time, he spoke to Mr. Hellman, owner of JBH, and was told that JBH had closed down; he "wasn't trucking any more, and all the tractors were gone." On August 23, 1977, the inspector visited the terminal for the purpose of determining why a claim against JBH had not been paid. On this occasion he was told by an employee of JBH, a secretary, that a petition in bankruptcy had been prepared and would be filed. On the day of this visit there was no activity about the terminal which would indicate the firm was doing business. The witness had made occasional inspections at the terminal shortly before August 10, 1977, and the firm was doing business at that time. The above evidence, particularly the statement of Hellman, was sufficient to show a willful failure to operate without having obtained the consent of the Commission. An act or failure to act may be willful within the meaning of the statute even though a decision to cease operations may be the consequence of circumstances over which the carrier may have had no absolute control such as, as is inferable in this case, financial failure. In Safeway Cabs, Inc. v. Honer, *supra*, we held that a failure by a taxicab operator to use a certificate was willful although occasioned by an accident to his cab and injuries to himself, where over a period of time he made no effort to procure a replacement cab or driver and the evidence indicated he was interested only in disposing of his damaged cab and the certificate.

In our review of Commission findings we are lim-

ited by the following principle: "On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made." Herman Brothers, Inc. v. Hennis Freight Lines, Inc., *supra*.

We now turn to Grand Island's third assignment, i.e., the Commission should not have revoked the authority in order that Grand Island's interest as a secured creditor might be protected. Grand Island especially complains of the Commission's conclusion that it had no authority under the statutes "to enforce security interests." It further complains the Commission did not act on its motion to postpone the revocation matter and consolidate it with the proposed application to transfer the certificate of JBH to Grand Island.

It is evident from Grand Island's pleadings that, if Grand Island did acquire some interest from Arrow, the acquisition occurred after the hearing of October 19, 1977, and after the petition in bankruptcy was filed. The record shows Arrow appeared at the hearing and was allowed to offer evidence; in fact, evidence was solicited from Arrow by the Commission, but it had little to offer. It did not even offer evidence that it was a creditor, secured or otherwise. If we assume Grand Island was a creditor and the position of creditor gave it some standing in the revocation hearing, the claim must fail because there is no proof or offer of proof that Arrow, to whose interest in the security Grand Island claims to have succeeded, was a creditor. Arrow had an opportunity at the hearing of October 19, 1977, to offer whatever evidence it wished. It offered none. Grand Island is in no better position than its privy and is bound by whatever Arrow did or, in this case,

failed to do. Ordinarily a person in privity with a party to an action, in the sense that he will be bound by the judgment, is one who acquired his interest in the subject matter of the suit after the commencement of the action or the rendition of the judgment. Industrial Credit Company v. Berg, 388 F. 2d 835 (8th Cir., 1968); State ex rel. Beck v. Lush, 170 Neb. 376, 103 N. W. 2d 136.

Grand Island argues the action of the Commission is void because the Commission lost jurisdiction upon the filing of the petition in the bankruptcy court. This argument is not well founded and Grand Island cites no authority which supports that position. A certificate of convenience and necessity is, in a sense, an asset of the bankrupt carrier and is recognized as such by Nebraska statutes. § 75-322, R. R. S. 1943. That section permits a trustee, custodian, etc., to operate under the certificate for 90 days and to petition the Commission for authority to operate for an additional period of time. This is an obvious recognition that, in the case of a carrier, the value of the assets to the creditors of the carrier may well depend upon continued operations for a time. The certificate, however, is not property in the ordinary sense, as it is a license, and Commission authorization is required to transfer it. R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177. A debtor (such as JBH is alleged to be) in possession pursuant to an arrangement is a fiduciary charged with protection of creditor's assets and has the title and power of a trustee. 3 Cowans, Bankruptcy Law and Practice (2d Ed.), § 907, p. 92. In this case there is no evidence that JBH, as a custodian under an arrangement, or any trustee in bankruptcy sought to operate under the certificate during the 90-day period specified by section 75-322, R. R. S. 1943, nor that within that time anyone petitioned for authority to continue operations.

The record indicates the Commission acquired jurisdiction on October 11, 1977. The petition for arrangement was not filed until October 18, 1977. The Commission could not take any action which would interfere with or jeopardize the rights of the fiduciary to act for the debtors under the provisions of section 75-322, R. R. S. 1943. It did not. Even Grand Island pleads that before the Commission acted the certificate was abandoned by a trustee allegedly appointed.

Grand Island relies upon the following principle. " 'The doctrine of *custodia legis* refers to the power of the Bankruptcy Court to assume complete control over the assets of a bankrupt estate and to prevent any action that would tend to embarrass the Court in the equitable distribution of the estate. 1 Collier on Bankruptcy, ¶ 2.06 (14th Ed. 1971).' The jurisdiction of the Bankruptcy Court over the assets of a bankrupt is 'exclusive'. 1 Collier on Bankruptcy, ¶ 2.06, pp. 155-56 (14th Ed. 1974)." Grand Island cites no authority, however, which would give the bankruptcy court the authority to approve a transfer of an authority or to revoke an authority. We think it obvious that it had no such authority. The question of what property belongs to the bankrupt as of the date of the petition is determined by state law. Seymour v. Wildgen, 137 F. 2d 160 (10th Cir., 1943); Commercial Credit Co. v. Davidson, 112 F. 2d 54 (5th Cir., 1940). A license held by the bankrupt and which is transferable, vests in the trustee. In re Mitchell, 250 F. 1003 (E. D. Pa., 1918). However, a license which is a personal privilege and which the holder cannot transfer does not vest in the trustee. E. S. Bonnie & Co. v. Perry's Trustee, 117 Ky. 459, 78 S. W. 208. As we have already pointed out, in Nebraska a certificate is a license which may not be transferred without permission of the Commission. R. B. "Dick" Wilson, Inc. v. Hargleroad, *supra*. In this case the rights of the trustee were limited to

those provided by section 75-322, R. R. S. 1943.

The mere filing of a petition in bankruptcy does not deprive a state court of jurisdiction over a pending suit or action against the bankrupt. 1 Collier on Bankruptcy (14th Ed., 1968), ¶ 2.61 [2], p. 323, ¶ 2.62 [4], p. 338; Lents, Inc. v. Borstad, 251 Ore. 296, 445 P. 2d 597; Park v. Stryker, 6 F. 2d 457 (8th Cir., 1925).

We cannot decide whether the Commission erred in determining that, under its power to revoke, it could not consider the interest of a secured creditor. That question is not before us for the reason, as noted, there is no evidence which raises that issue.

Before closing the opinion, a few comments should be made about the briefs and the findings of the Commission in its various orders. Statements of counsel are not evidence. Statements of Commission members are not evidence. Matters of fact known to Commission members are not evidence and are not bases for findings of fact. If matters in the records of the Commission are to be considered by this court on review, they must be included in whatever part of the record, either the bill of exceptions or the transcript, is appropriate under the proper rules.

AFFIRMED.

IN RE VALUATION AND EQUALIZATION OF REAL AND PERSONAL PROPERTY IN THE STATE OF NEBRASKA FOR THE TAX YEAR 1978. JOHN W. DECAMP, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

278 N. W. 2d 619

Filed May 8, 1979. No. 42280.

1. **Administrative Law: Taxation: Property.** The power to equalize property valuations between counties is vested in the State Board

of Equalization and Assessment. The sole method of review in this court is by appeal.

2. **Administrative Law: Taxation: Statutes.** The right of an individual to appeal an order of the State Board of Equalization and Assessment is restricted to one who has demonstrated to the State Board that he is a "person affected" by the order. Only a taxpayer is a "person affected." § 77-510, R. R. S. 1943.
3. **Administrative Law: Taxation: Appeal and Error.** Where appeal is the sole method of review, failure to allege essential elements of standing to the State Board of Equalization and Assessment may not be corrected by affidavit in this court.
4. **Administrative Law: Taxation: Notice: Time.** Public hearings, and notice thereof, are a prerequisite to an order changing valuations by the State Board of Equalization and Assessment. While an appearance might properly be made in some manner other than personal appearance, it must be made within the time limits legally set by the State Board.

Appeal from the State Board of Equalization and Assessment. Appeal dismissed.

John W. DeCamp, pro se.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from a final order of the State Board of Equalization and Assessment (hereinafter "State Board") with regard to the equalization between counties of the valuation of real and personal property for the year 1978. The State Board issued an order on July 26, 1978, for various counties to show cause why the valuations of real property, railroad terminal property, and improvements on leased land reported on their 1978 abstracts of assessment should not be increased or decreased by a percentage, for purposes of intercounty equalization. Hearings were held after notice by the State Board on August 1, 2, and 3, 1978, for the purpose of taking evidence in regard to the July 26, 1978, order.

On August 7, 1978, the State Board entered an order raising or lowering the valuations in certain counties and leaving the remaining counties unchanged. On August 10, 1978, the appellant, pursuant to section 77-510, R. R. S. 1943, filed notice with the State Board of his intention to appeal the order of the State Board, and thereafter perfected this appeal.

We are faced initially with a determination of whether the appellant has standing in this court. The State asserts that he does not. Appellant, a member of the Nebraska Legislature, did not personally appear at the State Board hearings; however, he alleges by affidavit in this court that he is the owner of taxable real and personal property in several Nebraska counties and that he did appear before the State Board, "such appearance being in the form of a letter addressed to said State Board dated August 4, 1978."

Section 77-510, R. R. S. 1943, provides in part: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county or municipality affected thereby may prosecute an appeal to the Supreme Court." We have held that a taxpayer in a county where property was not valued in accordance with the law was a "person affected" within the meaning of the statute. In making that determination, this court held: "It was evidently the intention of the Legislature to afford relief to any person, county, or municipality by a direct appeal from a final order of the Board which denied relief *to one who had made a showing* requiring the affirmative action of the Board." (Emphasis supplied.) Laflin v. State Board of Equalization and Assessment, 156 Neb. 427, 56 N. W. 2d 469.

The State points to the language in Laflin, emphasized above, and the fact that the appellant there

appeared personally as a critical difference between that case and the present one. Appellant contends that his letter of August 4, 1978, was sufficient to satisfy any appearance requirement. For whatever reason, the letter does not appear in the record of the proceedings of the State Board.

The State refers to the letter "purportedly sent" by the appellant and argues in its brief that: "There is no showing the letter was ever received by the Board of Equalization of the State of Nebraska nor in fact that it was not received after the order was entered." However, the State has at no time actually denied that it received the letter. Since the fact of receipt of the letter is peculiarly within the knowledge of the State Board, we deem it appropriate to construe the failure to deny as an admission of receipt. Put quite simply, the contention of the State that the appellant's letter is not in the record is no answer to his argument that it *should* be in the record.

It is not clear whether the State argues that any showing required by the statute and the Laflin case could never be made except by personal appearance at the hearing. To the extent that argument is made, it is rejected, for written statements are widely recognized in Nebraska in both judicial and legislative hearings as an appropriate substitute, under certain circumstances, for oral testimony. Indeed, the bill of exceptions prepared by the Secretary of the State Board in this case contains the telegrams sent by two counties unable to attend the hearings.

It is the rule of Laflin that there is a right of appeal from such issues as were properly brought before the State Board. Granting, for the reasons set out above, that the appellant could raise those issues by letter rather than personal appearance and that the letter was in fact received by the Board, we are faced with the question of whether that letter did

in fact properly raise issues entitling him to relief here. For two reasons, we think that it did not.

First, the letter was dated, and presumably sent, August 4, 1978. That is too late. The hearings on the proposed order were held on August 1, 2, and 3, 1978, following full notice to the counties. All testimony, whether oral or written, should have been presented at the time of the hearings.

Second, the letter of the appellant fell far short of a "showing requiring the affirmative action of the Board." It referred only to the valuation of personal property and made no mention of the many issues, now raised in appellant's brief, relating to intercounty equalization of real property. But even as to personal property, the letter was not one of a "person affected" by the State Board's action. The letter did not reveal to the Board, as did the testimony of the appellant in Laflin, that the appellant was the owner of property, either real or personal, nor was it written in a tone mandating an inference that the appellant desired it to be considered in that light. It appeared under the letterhead of the appellant's official legislative stationery. It cited case law and merely expressed the appellant's legal opinion that: "A final determination of your tentative proposal to equalize property assessment without further taking into consideration other properties of the same class will be considered a failure to act upon a clear and specific legal duty." A statement of legal opinion does not constitute a "showing requiring the affirmative action of the board" nor does eventual disagreement by the Board with that opinion make the appellant a party "affected" by the order. It is required that the party seeking relief be an aggrieved property owner. Our refusal to allow on appeal the addition of these critical matters by affidavit is not a mere technicality.

The power to equalize valuations is vested in the State Board. Art. IV, § 28, Constitution of Ne-

braska; § 77-501, R. R. S. 1943. Its actions are subject to review in this court, but only by appeal. § 77-510, R. R. S. 1943. Where the interest of the appellant was not presented to the State Board, the action in this court is more akin to one for declaratory judgment than an appeal. We are without power to "review," in this court, matters relating to equalization which have not already been presented to the State Board. Having failed to make a showing before the State Board requiring its affirmative action, the appellant lacks standing in this court. The appeal is therefore dismissed.

APPEAL DISMISSED.

CLINTON, J., concurring.

I agree the record in this case fails to establish the necessary factual basis to give the plaintiff standing to sue, i.e., it does not show he is a person adversely affected by the order appealed from, and therefore the court cannot reach the merits of the case. Nonetheless, for reasons which will become apparent, I think it may be useful for me to express my individual views with reference to the usefulness, or lack thereof, of opinions by this court where the issue relates to statewide equalization of property values for ad valorem tax purposes. The point I wish to make is that, in the final analysis, the problem of equalization of property values can be solved only on the political level and, at this point in the history of this recurring problem, the repetition by this court of oft-repeated principles serves no purpose for the principles have long been established and repeatedly stated. Further, on the purely pragmatic level, this court, for reasons which I hereafter outline, cannot effectively order the members of the State Board of Equalization to do anything. By the time any appeal reaches this court, it is too late to undo that which has been done or to do that which has not been done. If the egg is scrambled on August 15, it can't be unscrambled thereafter.

Appellant asks this court to vacate the equalization order entered by the State Board of Equalization establishing values for the year 1978 and to direct the Board to enter another order establishing values in all counties at market value so that taxes may be levied uniformly and proportionately upon all tangible property as mandated by Article VIII, section 1, of the Nebraska Constitution. The Legislature has from time to time, for the purpose of carrying out the constitutional requirement above mentioned, enacted numerous statutes designed to facilitate and implement the requirements of the Constitution. Among the methods provided is the requirement of scientific reappraisal of all real property in the state. §§ 77-1301.01 to 77-1301.16, R. R. S. 1943. Reappraisal reports are required to be delivered to the State Tax Commissioner on or before February 1 following the year in which made. § 77-1301.06, R. R. S. 1943.

The basis for the appellant's complaint lies in the following facts which he asserts and which I accept as true. Sixty-two of the counties of the state revalued their property as required by law. The remaining counties did not. Thereafter, because some counties had not revalued, a substantial number of counties that had complied with the reappraisal statute rolled back their valuations in order to achieve some sort of equalization with those counties that had not followed the statutes. The State Board of Equalization resolved the matter in the following fashion. They decreased the valuation of some of the 62 counties and increased the valuation of others of the 62 so as to achieve a purported equalization at 70 percent of value. As to those counties that had not revalued, the Board did nothing, believing the evidence insufficient to support any change.

Let me first deal with the pragmatic aspects of this case.

The timetable of assessment date, valuation, es-

tablishment of budgets of the various governmental subdivisions, levy of tax, lien date, and tax due dates are such that it is too late, both as a matter of law and as a practical matter, to afford the relief which the appellant requests. Assessed value is to be determined as of January 1. § 77-1301, R. R. S. 1943. Assessment rolls, schedules, and returns of the county assessor must be filed with the county clerk on or before April 1. § 77-1315, R. R. S. 1943. Thereafter, the county boards of equalization must perform their function of equalizing individual properties and classes of property within the county. § 77-1501 et seq., R. R. S. 1943. Abstracts of the assessment rolls must be forwarded to the State Board of Equalization before July 1. § 77-1514, R. R. S. 1943. The State Board of Equalization then performs its function of equalization between counties. § 77-506 et seq., R. R. S. 1943. The valuation by the county boards of equalization as equalized by the State Board of Equalization binds the subdivisions of government. § 77-1338, R. R. S. 1943. The equalization order by the State Board of Equalization must be made by August 15, section 77-509, R. R. S. 1943, and certified to the county clerks. On or before September 1, the county board makes the levy of tax for the current year. § 77-1601, R. R. S. 1943. Personal property taxes become due and payable November 1 and the first half becomes delinquent on December 1. Real estate taxes become due and payable December 31 and become liens upon the property on that date. The dates are somewhat different in charter cities but the problem is the same. Of course, long before these dates the budgets of governmental subdivisions have been set, their needs determined, and the levy made based upon the valuations determined before September 1.

When an appeal is made to this court from an order of the State Board of Equalization, we are required to give the case precedence over all civil

cases. That precedence, however, depends in a large measure upon accelerated action by the parties to the litigation. This particular case was not at issue in this court until January 17, 1979. By that time the rights of individual taxpayers were set in concrete.

It is evident from the timetables that if the equalization and taxing process is to function equitably and as it is supposed to, it must meet the timetables established by the statutes of this state. There is no way the whole process can be rolled back and new tax statements sent unless it occurs long before November 1. Additional taxes cannot be levied after they have been paid except in the single instance of omitted property. As a practical matter, there can be no wholesale revaluation or levy after September 1, simply because the statutes make no provision for it.

Let us now deal with the theoretical aspects, i.e., those of principles.

No new principles of law are involved in this case. We are not asked to interpret any applicable statute. The duties and powers of the State Board of Equalization are well defined by the Constitution, statutes, and prior decisions of this court. Anything we might say on the matter is something that has previously been said on numerous occasions.

This court has over the years answered a multitude of questions on appeals from the State Board of Equalization. The more recent cases began with Laflin v. State Board of Equalization and Assessment, 156 Neb. 427, 56 N. W. 2d 469, in the year 1953, and continued with great regularity through 1970, ending with County of Hooker v. State Board of Equalization & Assessment, 185 Neb. 772, 178 N. W. 2d 785. These two cases and all those in between enunciated the applicable principles. There is no reason to suppose, however, that these decisions ever bore any practical fruit by implementation.

The reasons, of course, are those already outlined. We have pointed out several times: "We cannot, on an appeal, sit as a super board of equalization and assessment. Our function is solely to determine the legality of the action of the Board and, after a finding of illegality, to vacate and set aside the action of the Board and leave to it the matter of entering an order meeting the requirements of the law." Laflin v. State Board of Equalization and Assessment, *supra*; Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272. Practically, of course, what this means is that when an order is vacated, the decision of this court is implemented, if at all, only in subsequent years.

STATE OF NEBRASKA, APPELLEE, V. LEONARD L. BELITZ, APPELLANT.

278 N. W. 2d 769

Filed May 8, 1979. No. 42366.

1. **Municipal Corporations: Ordinances: Statutes.** Under sections 14-101, 14-102, and 14-102.01, R. R. S. 1943, the city of Omaha is given power by the State of Nebraska to enact ordinances relating to the safety and security of its citizens, and to impose fines, forfeitures, penalties, and imprisonment for the violation thereof.
2. **Municipal Corporations: Ordinances: Assault and Battery.** Section 25.11.010 of the Omaha municipal code, establishing the misdemeanor offense of "Assault; Battery" is a proper and valid exercise of the power granted to the city under its home rule charter to establish ordinances for the safety and security of the city and the citizens thereof.
3. **Municipal Corporations: Ordinances: Statutes: Sexual Assault.** Section 25.11.010, of the Omaha municipal code, and sections 28-408.01 to 28-408.05, R. R. S. 1943, the sexual assault felony statutes, define and constitute separate and distinct offenses under the law, notwithstanding they may encompass elements in common.
4. _____: _____: _____: _____. Section 29-615, R. R. S. 1943, does not mandate that a municipal judge, engaged in the trial of an offense charged under section 25.11.010 of the Omaha municipal code, must immediately stop further proceedings and act as an examin-

ing magistrate to determine if the defendant must be charged under the sexual assault statutes of the state.

5. **Criminal Law: Prosecuting Attorneys: Evidence.** It is the responsibility of the prosecutor to examine the evidence, the statutes, and the cases to make a proper determination of what charge to file. It is not always desirable that a prosecutor prosecute all crimes at the highest degree available; and in exercising his discretion in this regard, he does not neglect his public duty nor discriminate among offenders.

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

Walter J. Matejka, for appellant.

Herbert M. Fitle, City Attorney, Gary P. Bucchino, City Prosecutor, and Richard M. Jones, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

On December 23, 1977, the defendant below, Leonard L. Belitz, was charged in the municipal court of the city of Omaha, under a city complaint, for violating section 25.11.010 of the Omaha municipal code, of the offense of "Assault; Battery." Trial was had before Walter Cropper, judge of the municipal court of the city of Omaha, on defendant's plea of not guilty. The court found the defendant guilty and sentenced him to serve 180 days in the county jail. Defendant then appealed to the District Court for Douglas County, where, following a hearing before Judge Theodore Richling, defendant's conviction and sentence were affirmed. Defendant has now appealed to this court. We affirm.

Section 25.11.010 of the Omaha municipal code, under which defendant was charged and convicted, was enacted on July 18, 1967, and reads as follows: "25.11.010 Assault; Battery. It shall be unlawful for any person purposely or knowingly to: (a) strike or attempt to strike another person with the intent to

cause bodily injury; or (b) cause or attempt to cause bodily injury to another person; or (c) place another person in fear of imminent bodily harm; or (d) touch the sexual or other intimate parts of the body of another person without his consent for the purpose of arousing or gratifying the sexual desire of either party."

The foregoing ordinance was enacted by the city of Omaha pursuant to authority granted to it as a home rule city under the Nebraska statutes. See § 14-101 and 14-102, R. R. S. 1943. Section 14-102, R. R. S. 1943, provides in part: "In addition to the powers granted in section 14-101, metropolitan cities, as therein defined, shall have power by ordinance; * * * Police regulation in general. (25) To make and enforce all police regulations for the good government, general welfare, health, safety and security of the city and the citizens thereof, in addition to the police powers expressly granted herein; and in the exercise of the police power, they may pass all needful and proper ordinances, and shall have power to impose fines, forfeitures, penalties, and imprisonment at hard labor for the violation of any ordinance, and to provide for the recovery, collection and enforcement thereof; and in default of payment to provide for confinement in the city or county prison, workhouse or other place of confinement with or without hard labor as may be provided by ordinance; * * *." In addition subparagraph (22) of section 14-102, R. R. S. 1943, further provides: "Disorderly conduct. Rule (22) To provide for the punishment of persons disturbing the peace and good order of the city by clamor and noise; by intoxication, drunkness, fighting or using obscene or profane language in the streets or other public places, or otherwise violating the public peace by indecent or disorderly conduct, or by lewd and lascivious behavior; * * *." There can be little question that the city of Omaha had authority to enact the above-quoted ordinance under

which the defendant was convicted. The penalty provided for violation of the foregoing ordinance is set out in section 25.03.010 of the Omaha municipal code which provides as follows: "General Penalty. A person convicted of an offense under this title may be sentenced to pay a fine not to exceed $500 or to be imprisoned for a term not to exceed 6 months, or both, in the discretion of the court. * * *." Since the possible penalty includes imprisonment, it is clear that the offense involves a criminal prosecution both in form and substance. See State v. Kolosseus, 198 Neb. 404, 253 N. W. 2d 157 (1977). It is likewise clear that the offense with which the defendant was charged was a misdemeanor. Section 29-102, R. R. S. 1943 (Reissue 1975), in effect at the time of the commission of the offense involved in this case, provided as follows: "The term felony signifies such an offense as may be punished with death or imprisonment in the Nebraska Penal and Correctional Complex. Any other offense is denominated a misdemeanor."

It is clear from an examination of section 25.11.010 of the Omaha municipal code that it is primarily an assault and battery ordinance, though specifying four different ways in which the assault or battery may be consummated. Only the last of the four items specified is sexually related. Under the complaint against the defendant filed on December 23, 1977, by the city prosecutor, all four of the elements of the offense are alleged against the defendant. It is clear from a review of the evidence in the record that although most of the emphasis of the testimony was with reference to the defendant touching the sexual or other intimate parts of the victim, yet there was also evidence, sufficient to sustain the charge against the defendant under the ordinance, that he placed the victim in fear of imminent bodily harm, and also caused or attempted to cause bodily injury to her, as will be hereinafter discussed.

The record reveals that the defendant, who was a former friend and acquaintance of the victim and her husband, came to their home in Omaha on December 8, 1977, the victim's husband being absent at the time; and after a conversation with the victim, according to her testimony, asked her if she would make love to him which she refused to do. He persisted in his amorous advances over her protests and requests that he stop and leave her alone. He then picked her up and started to carry her toward the bedroom. She struggled and tried to get away from him. He subsequently succeeded in having sexual relations with her, although this is denied by the defendant. The victim testified as follows: "Q. What were you doing, resisting? A. I was kicking and pushing. Q. Were you saying anything to him? A. I was telling him to leave me alone. Q. Okay, and then what happened? A. He continued to try to get my clothes off me, *he was starting to really hurt me.* Q. Were you afraid at this time? A. Yes, I was very much afraid. * * * Q. What happened then? A. *By then I was very frightened that he was going to hurt me physically, very badly, so I stopped resisting, so as not to be hurt.*" (Emphasis supplied.) It seems clear the foregoing testimony of the prosecuting witness, if believed, would alone be sufficient to sustain a conviction of the defendant under the foregoing ordinance on the basis that he placed the victim "in fear of imminent bodily harm," and also "that he caused or attempted to cause bodily injury" to the victim.

Counsel for defendant has argued in his brief and also in his oral argument that prior to the filing of the assault and battery charge in the municipal court the matter had been reviewed by the county attorney's office in Douglas County, but that office had declined to file a rape or sexual assault charge, being a felony, against the defendant. This may have in fact been the case; however, we point out

that there is no evidence of this fact in the record, except the argument of defendant's counsel to the court at the conclusion of the trial in municipal court.

Defendant's principal assignment of error in this case is that under section 29-615, R. R. S. 1943, the court should have stopped the proceedings and sat as an examining magistrate to determine whether the defendant should have been bound over to District Court under the sexual assault statutes, sections 28-408.01 to 28-408.05 inclusive, R. R. S. 1943, his theory being that the offense for which the defendant was tried and convicted was in fact a felony under the sexual assault statutes, and hence not cognizable by the municipal court.

Section 29-615, R. R. S. 1943, relied upon by the defendant, provides as follows: "If, in the progress of any trial before a county or municipal court it shall appear that the defendant *ought* to be put upon his trial for an offense not cognizable before such court, the court *shall* immediately stop all further proceedings before him and proceed as in other criminal cases exclusively cognizable before the district court." (Emphasis supplied.) Several things may be said with regard to defendant's contention. In the first case, defendant states in his brief that he "reminded" the court that it had the power to bind the defendant over to the District Court for trial if it found that a rape had occurred. The record does not reveal, however, that he ever moved or requested that the court do so. The record reveals that during the trial the court sustained an objection made by opposing counsel to a question put to a witness by counsel for the defendant. Counsel for defendant then stated: "Well, I think it's material for this reason, Your Honor, this Court, on a charge like this, is not only sitting as a hearer of the facts for this particular charge, but as the Court's well aware, if they find from the evidence that a rape has

occurred, they *can* bind this Defendant to stand trial in the District Court. The Court has that type of jurisdiction." (Emphasis supplied.) The foregoing constitutes the only reference in the record to the issue raised by the defendant, and it is obvious that it falls far short of a request that the court stop the trial and proceed as an examining magistrate. However, it is apparently the contention of the defendant that under the foregoing statute, it was mandatory for the court to do so, whether requested or not. We do not agree. In the first place, we are of the opinion that the two offenses were separate and distinct offenses, notwithstanding there may have been sexual aspects contained in both offenses. We do not believe the foregoing statute necessarily requires that a defendant be charged with the more serious offense, even though the court has the discretion to do so. Although the use of the word "shall" in the foregoing statute might indicate that it was mandatory for the court to stop proceedings, yet we note the statute also contains a prior condition that if "it shall appear that the defendant *ought* to be put upon his trial for an offense not cognizable before such court * * *." (Emphasis supplied.) Black's Law Dictionary (4th Ed.), defines the term "ought" as follows: "This word, though generally directory only, will be taken as mandatory if the context requires it." We do not believe the context requires the word be interpreted in a mandatory sense as used in the statute under consideration, but only in a permissive sense allowing discretion to the trial judge. Larson v. State, 93 Neb. 242, 140 N. W. 176 (1913), relied upon by the defendant, is distinguishable because of the fact that in that case the county attorney had moved the court to stop all further proceedings and conduct a hearing for the defendant on an offense not cognizable before a magistrate; and the court acceded to the request. As previously stated this was not done in the instant case. There

are many offenses which contain elements, common to both misdemeanors and felonies, and which might legitimately be filed either as a misdemeanor or a felony. It is necessary then that some discretion lie with the prosecutor and the court. In State v. Williams, 188 Neb. 565, 198 N. W. 2d 187 (1972), we stated: "It is the clear responsibility of prosecutors to examine the evidence, the statutes, and the cases to make a proper determination of the charge which the evidence will support." In section 3.9(b) of the American Bar Association Standards Relating To The Prosecution Function it is stated: "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. * * *." In the commentary to that section it is stated: "Nor is it desirable that he prosecute all crimes at the highest degree available. Necessarily crimes are defined in broad terms that encompass situations of greatly differing gravity. Differences in the circumstances under which the crime took place, the motives or pressures activating the offender, mitigating factors of the situation or the offender's age, prior record, general background, his role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which he must carefully select the proper instrument to bring the charges warranted by the evidence. In exercising discretion in this way, the prosecutor is not neglecting his public duty or discriminating among offenders. The public interest is best served and even-handed justice best dispensed not by a mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of jus-

tice." We conclude that in this case the city prosecutor did not abuse his discretion in filing the charge against the defendant as a misdemeanor under the city ordinance, rather than a felony under the sexual assault statutes, as defendant's counsel contends should have been done.

Defendant also argues that the State of Nebraska has preempted the field of regulating conduct characterized as sexual assault, and therefore no assaults established by city ordinance and relating to or encompassing sexual acts are cognizable in municipal court. In support of this proposition he relies principally upon the case of Midtown Palace, Inc. v. City of Omaha, 193 Neb. 785, 229 N. W. 2d 56 (1975). That case is clearly distinguishable from the instant case as the applicable statute there, being 28-926.33, R. R. S. 1943, specifically provided that "* * * no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation relating to obscenity, or licenses or taxes respecting the obscene work, material, conduct or like performance as regulated by the state under sections 28-926.11 to 28-926.33. * * *." Here, the State of Nebraska specifically delegated to the city of Omaha the power to enact the ordinance in question.

In addition to the powers given to the city of Omaha under its charter previously cited, section 14-102.01, R. R. S. 1943, provides: "A city of the metropolitan class may make all such ordinances, by-laws, rules, regulations, and resolutions not inconsistent with the general laws of the state, as may be necessary or expedient, in addition to the special powers otherwise granted by law, for maintaining the peace, good government, and welfare of the city and for preserving order, securing persons or property from violence, danger, and destruction, for protecting public and private property, for promoting the public health, safety, convenience, comfort,

morals, and general interests, and welfare of the inhabitants of the city." We believe the ordinance under which the defendant was charged and convicted falls within the purview of the language of the above section and that the city's assault and battery ordinance is not inconsistent with, nor repugnant to, the general laws of the state; and that it is necessary for the maintenance of peace, good government and welfare of the city, and for preserving order. The defendant was convicted under that ordinance by a preponderance of the evidence, after a trial to the court. Finding no error, the judgment and sentence must be affirmed.

AFFIRMED.

MARY ALICE ABRAHAM, APPELLEE, V. SIDNEY DALE ABRAHAM AND BESS ABRAHAM, APPELLANTS.

279 N. W. 2d 85

Filed May 15, 1979. No. 41992.

Assignments. An assignment is not binding if obtained by misrepresentation, or if not supported by consideration.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Edward D. Hotz of Hotz, Kluver & Kizer, for appellants.

S. J. Albracht of Lathrop, Albracht & Swenson, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and RIST and WINDRUM, District Judges.

WINDRUM, District Judge.

Mary Alice Abraham, appellee, was the petitioner in the action originally filed. Sidney Dale Abraham was the respondent.

On October 8, 1976, petitioner filed her petition in the District Court for Cherry County, Nebraska, against respondent, Sidney Abraham, for a dissolution of marriage. In the answer, the respondent, Sidney Abraham, alleged among other things, that all of the personal property and effects of the parties had been evenly divided, but that there remained for distribution the unpaid balance of a certain contract for the sale of real estate and personal property to a Mr. and Mrs. Francke, on which there then remained a balance due of $39,000. The respondent further answered that he was indebted to Bess Abraham, his mother, in the sum of $25,000 for money advanced to the parties during the marriage, and that said indebtedness was due and should be considered by the court in making an equitable division of the contract of sale.

Thereafter, on June 30, 1977, the petitioner filed an application for permission to join a third party respondent, Bess Abraham, alleging that Bess Abraham claimed to have an interest in proceeds from the sale of property which the petitioner claimed as a marital asset. Permission to join Bess Abraham as a party was granted and an amended petition was filed by the petitioner on June 30, 1977. Petitioner alleged as follows: "Petitioner fears that unless restrained and enjoined, the respondent, Bess Abraham, will obtain possession of certain proceeds due and owing pursuant to the aforementioned land sale contract and appropriate funds to her personal use to the detriment of the petitioner herein." On July 13, 1977, petitioner filed an affidavit in which she stated that after the filing of her original petition, she learned there was in existence a purported assignment, of the proceeds due under the land contract above mentioned, to Bess Abraham, and that she, the petitioner, emphatically stated that any signature of hers on such an assignment was a forgery and not her true signature.

Bess Abraham answered the petitioner's amended petition and alleged that on or about December 2, 1971, petitioner and the respondent, Sidney Abraham, unconditionally assigned and transferred their rights to the proceeds of the land contract to Bess Abraham and alleged that the land contract was not a marital asset subject to distribution. The respondent, Sidney Abraham, likewise filed an amended answer to petitioner's petition and substantially agreed with his mother. After appropriate proceedings, the matter was transferred to the District Court for Douglas County, Nebraska, where a hearing was held, commencing on November 2, 1977. The court found that the marriage was irretrievably broken, and was, therefore, dissolved. The court awarded to each party the personal property then in his or her respective possession, free and clear of any claim on the part of the other, and ordered the assignment of the land contract by the respondent, Sidney Abraham, to the defendant, Bess Abraham, as being valid, but the assignment by the petitioner to Bess Abraham was invalid and of no force and effect for the reasons that: (a) Petitioner's assignment of the proceeds of the land sale contract was without adequate consideration, and (b) petitioner's assignment was procured by the misrepresentation that the purpose of the assignment was to place the proceeds of the land sale contract beyond the reach of Sidney's creditors.

After the overruling of a motion for new trial, both the respondents appealed.

Sidney and Mary Abraham were married in Omaha, Nebraska, on August 7, 1948. Between that date and 1967 they lived and worked in various places, a good part of their employment being in gambling casinos in Nevada. From October 1965 to June 1967 they lived mostly in Omaha, and their only employment during that period was an unsuccessful 3 months in a Sioux City, Iowa, restaurant venture.

In June of 1967, Mary and Sidney Abraham purchased a drive-in restaurant in Valentine, Nebraska. They were required to pay a $5,000 downpayment. There is a disagreement as to whether or not the mother, Bess, loaned them the downpayment. The husband and wife successfully operated the restaurant.

During the marriage of the parties, respondent Bess allowed her son, Sidney, to write checks upon her account. There is various testimony by the respondents and agreement between the two respondents that respondent Bess advanced several sums of money to respondent Sidney, and that on July 24, 1968, she assumed a $20,250 obligation of Sidney's at the First National Bank of Valentine. Bess testified she paid a substantial amount directly to the brokerage firms of Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Lamson Brothers on behalf of Sidney and Mary. She did not take notes from her son and daughter-in-law because they were family. Petitioner testified that she knew very little, if anything, about the loans and nothing of the stock purchases. At the trial, Sidney estimated the indebtedness to his mother at $50,000.

In October of 1971, respondent Sidney Abraham was convicted of purchasing stolen meat, a felony. On October 21, 1971, Sidney executed a mortgage conveying the real estate upon which the restaurant was located to his mother, as mortgagee, in the sum of $65,000. This mortgage was not signed by petitioner. On December 2, 1971, the petitioner and respondent Sidney entered into a contract selling the restaurant, including the real and personal property, for the sum of $65,000, plus inventory, payable $1,000 as downpayment, $15,240 to be paid on or before February 1, 1972, and the balance to be paid in installments. The contract provided that at the time the $15,240 payment was made by the buyers, the sellers would secure discharges from amounts owed

on a contract of sale due to Eve Eads, from whom they had originally purchased the property; a mortgage to the Small Business Administration; the mortgage due Bess Abraham; and an amount for inventory due Eve Eads. Shortly thereafter, petitioner and Sidney Abraham each assigned to Bess Abraham his or her respective interest in the contract of sale. In consideration of such assignment, Bess Abraham agreed to pay the indebtedness due Eve Eads under a contract of sale of real estate; to pay the indebtedness due the Small Business Administration secured by a mortgage on the real estate covered by the contract of sale; and to discharge of record her own mortgage dated October 21, 1971. While originally petitioner denied signing said assignment, it is quite evident that she did so. An escrow agreement was entered into providing that all the payments due under the contract of sale were to be paid into the escrow account. The $15,240 payment was made by the sellers into the escrow account on December 2, 1971. On December 8, 1971, payment to the Small Business Administration was made. Conversation was had with the attorney who handled the sale of the property on December 2, 1971, concerning the preparation of an assignment. There is a dispute as to whether or not petitioner was present or discussed the matter. There is likewise a dispute as to whether or not there was conversation concerning the purpose of the assignment, that is, that it would protect the petitioner and the respondent, Sidney Abraham, from losing the proceeds on the contract if a civil suit were brought for stolen meat that was purchased by respondent, Sidney Abraham, for which he was convicted and later incarcerated. Be that as it may, the attorney prepared the assignment and, by letter dated December 15, 1971, conveyed the assignment to the petitioner at her address in Omaha. Petitioner called her hus-

band concerning the assignment and obeyed his orders to sign it.

On August 1, 1972, a special account entitled "Bess Abraham Special" was opened in the First National Bank of Valentine, and the $4,000 payment received from the purchasers of the contract of sale was therein deposited. The name of the account was later changed to that of the respondent, Sidney Abraham, but all three parties to this action were authorized to write checks thereon. The special account continued until October 29, 1975, at which time Bess Abraham terminated it. An examination of this special account reveals that both respondents wrote checks upon it repeatedly after the initial opening thereof and, at a later date, petitioner wrote checks on the account. Respondent, Sidney Abraham, issued checks totaling $21,337; respondent, Bess Abraham, issued checks totaling $20,238; and petitioner issued checks totaling $3,677 from the time the special account was opened until the action was brought for dissolution of marriage. Petitioner wrote checks for $2,500 for a new automobile (after getting permission to do so from respondent, Sidney Abraham), for power company bills, telephone bills, etc., and for $1,000 when she filed for divorce. A similar examination of the account shows there were many deposits of currency and various deposits of salary checks by the respondent, Sidney Abraham.

Further, cancelled checks appearing in the account indicate the payment of at least two substantial debts due from respondent Sidney to third persons. Respondent Sidney testified that one of the debts was paid by his mother, so, in effect, he was attempting to count the indebtedness twice. He further testified concerning another substantial debt, alleging it was he who paid it. All of this, even though both of the checks were written from the special account.

An examination of the tax return of petitioner and respondent Sidney indicates the interest due on the contract of sale was reported by them as income. No later tax returns were presented.

In addition to all the above outlined facts, the respondent Sidney admitted that at the time he executed a mortgage to his mother in the amount of $65,000, the amount thereof was arrived at, not by estimation of how much he owed his mother, but rather, what he felt the security was worth. This near a time when he alleged his total indebtedness to his mother was $25,000.

Petitioner maintains, in her brief, that to be valid and binding, an assignment must be: (1) Supported by consideration and (2) free from the elements of fraud, duress, or coercion.

There is sufficient evidence in the record that there was indebtedness due from respondent, Sidney Abraham, to respondent, Bess Abraham, which would constitute consideration. However, the Small Business Administration loan was paid before the assignment was executed. Presumably the amount due on the contract of sale due Eve Eads was likewise paid before the assignment, as it was to be paid out of the downpayment. Petitioner was in no way indebted to respondent Bess. In that event, unless petitioner intended that the assignment was to constitute payment of her husband's debts to his mother, which, of course, would constitute consideration, there was no consideration for her assignment.

Consideration for an agreement or a promise is sufficient if there is any benefit to the promisor or any detriment to the promisee. There must be an assumption of a duty or obligation by the assignee, and a benefit conferred upon the assignor. Dorland v. Dorland, 175 Neb. 233, 121 N. W. 2d 28; Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311.

The court's determination that there was no con-

sideration for the assignment by petitioner is supported by the evidence. The court could, in arriving at such a determination, determine from the evidence that not only was there not to be any benefit flowing to petitioner, but that there was no assumption of a duty or obligation by the assignee, because none of the parties ever intended that the assignment be enforceable.

"Assignments may be void or voidable at the option of the injured party if procured by fraud, duress, coercion, or undue influence. In determining whether fraud, duress, or undue influence was brought to bear upon the assignor, resort must be had to the rules governing contracts generally. Thus, in determining whether fraud or undue influence exists, with respect to assignments, the court must of necessity look to the surrounding circumstances such as the situation of the parties that control their actions, but a mere suspicion of fraud or undue influence is insufficient to vitiate the assignment." 6A C. J. S., Assignments, § 58, p. 684.

In cases of fraud, as between assignor and assignee, the payment of an adequate or inadequate consideration for the assignment is an important circumstance as bearing upon the fairness of the entire transaction. 6A C. J. S., Assignments, § 60, p. 687.

Where consideration is grossly and shockingly inadequate, inadequacy is generally regarded as fraud. 6A C. J. S., Assignments, § 61, p. 690. In this case there could be found no consideration at all, but if so, it was grossly inadequate when compared to the value of the interest of petitioner's one-half of the contract of sale.

From the recitation of all the above-described facts, and considering the fact that respondents' documentation of the various alleged loans from mother to son was lacking in many respects, we cannot say that the trial court was wrong in determining that the assignment by the petitioner of her

one-half interest in the contract of sale of the restaurant, including the land upon which it sat, was obtained by a misrepresentation of a material fact upon which petitioner relied and acted.

Petitioner is awarded $750 in this court for attorney's fees to be paid by the respondent, Sidney Dale Abraham.

AFFIRMED.

IN RE ESTATE OF FLORENCE MILLER CORBETT. WILLIAM DEVRIES, APPELLANT, V. ELMER RIX ET AL., APPELLEES, LEE GRIMES ET AL., INTERVENORS-APPELLANTS.

279 N. W. 2d 89

Filed May 15, 1979. No. 42015.

1. **Courts: Judgments: New Trial.** A trial court has always had inherent power over its judgments to correct errors and mistakes therein, even to the extent of granting a new trial whether requested or not, as long as such action is taken within the same term of court at which the judgment was entered.
2. **Courts: Public Policy.** It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice.
3. **Probate and Administration: Property: Intent.** The Nebraska Probate Code should be liberally construed to discover and make effective the intent of a decedent in distribution of his property.
4. **Statutes: Words and Phrases.** "Good cause shown" as used in section 30-2437, R. R. S. 1943, means to demonstrate a logical reason or legal ground, based on fact or law, why an otherwise final order of the county court should be vacated or modified.
5. **Statutes: Motions, Rules, and Orders: Appeal and Error: Time.** A motion to vacate or modify which is filed within the time limitation contemplated by section 30-2437, R. R. S. 1943, is similar in nature to a motion for a new trial in District Court, and the overruling of such motion is a final order itself which extends the 30-day appeal time from the entry of the original order complained of to the date upon which the motion to vacate or modify is overruled.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant and intervenors-appellants.

Brian Schmid of Schmid, Ford, Mooney, Frederick & Caporale, for appellee Rix.

Ray C. Simmons, for appellees Hammang and Belanos.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and KUNS, Retired District Judge.

HASTINGS, J.

This is an appeal from the order of the District Court sustaining a demurrer to the petition on appeal and dismissing contestant's appeal from the order of the county court of Dodge County which overruled contestant's motion filed under the provisions of section 30-2437, R. R. S. 1943.

The decedent, Florence Miller Corbett, an elderly widow and a resident of Dodge County, Nebraska, died on July 21, 1977, leaving as her only next of kin two sisters, five nephews, and one grand-nephew. Pursuant to the Nebraska Probate Code, a petition for the formal probate of a purported last will and testament dated March 31, 1975, and a purported codicil dated December 22, 1976, was filed in Dodge County court on July 26, 1977, by Alice Devries, the executrix and now denominated personal representative named in said instruments, and a sister of the decedent. The testamentary instruments left small amounts to the various next of kin but the bulk of the estate was left to a tenant farmer by the name of Elmer Rix and a housekeeper and companion of the decedent, Rita Belanos Canino, and to the housekeeper's sister, Maria Teresa Hammang.

On the same day the petition for probate was filed, an order was entered by the county judge directing

that a hearing be held on the petition on August 22, 1977, at 10 o'clock a.m., and that notice be given to all interested persons. Accordingly, such a notice was published as required by law stating that "a petition for formal probate of will of said deceased, determination of heirs, and appointment of Alice M. Devries as personal representative has been filed and is set for hearing in the Dodge County Court on August 22, 1977 at 10:00 o'clock a.m. * * *." According to an "Affidavit of Mailing Notice" filed by the attorney for the executrix, a copy of said notice was mailed to, among others, William Devries, contestant-appellant here, who is a nephew of the decedent and a son of the executrix. No objections to the probate as provided for by section 30-2428, R. R. S. 1943, were filed by anyone, including the contestant. On August 22, 1977, upon consideration of the petition for formal probate and without any evidence being offered as to the due execution of the will, the same was admitted to probate by order of the county court of Dodge County. The determination of the validity of the codicil was continued. On the same date the executrix filed her acceptance of appointment and bond in the amount of "0" dollars, and letters of personal representative were issued by the court. Notice of the foregoing was mailed to all interested parties, including the contestant, by U. S. mail on August 25, 1977. On September 20, 1977, a "Demand for Notice" of inventory, all filing of petitions, motions, and deeds of distribution was filed by the contestant, and on the same date, some 28 days following the order admitting the will to probate, contestant filed a "Motion to Vacate Order Admitting Will to Probate." The motion alleged, among other things, the foregoing facts and that contestant knew he was a devisee under a will of the decedent dated September 9, 1968; that after the order of August 22, 1977, admitting the 1975 will to probate, he learned for the first time that he had been disinherited; that

decedent lacked testamentary capacity when she executed the 1975 will; and that the same was the result of undue influence exercised upon her by Rita Belanos Canino and Maria Teresa Hammang. On the same date, an application for admission of the codicil to probate was filed by the executrix and, by order of the county court of September 22, 1977, was so admitted.

Contestant's motion to vacate the order admitting the will to probate was heard on October 20, 1977. In addition to the foregoing information, that hearing brought out the facts that the attorney for the estate read the will to several members of the family a day or two after the funeral; that contestant was not present at that reading, and that he first learned the will had been changed so that he no longer was a principal heir during the course of a long-distance telephone conversation with his mother, the executrix, a day or so after "the reading of the will;" that contestant first received a copy of the will in mid to late August or early September, he wasn't certain; that contestant heard sometime in mid-August that some of the other disinherited next of kin contemplated some action opposing probate of the will; that he was on the road through most of August; that the first opportunity he had to consult legal counsel was in September when he returned to his home in Washington, D. C., and the attorney advised him to talk to the attorney for the estate which he did. He then learned the will had already been admitted to probate. Contestant admitted he received a copy of the notice mailed to him as to the August 22 hearing to propose the will for probate.

The county court then denied the contestant the right to introduce evidence as to want of capacity or undue influence, refused an offer of proof in this regard, and found that proper notice of the initial hearing for probate of the will had been given, that the proceeding had been unopposed, and that the will

and later the codicil were duly admitted to probate upon the strength of the pleadings as provided for by section 30-2429, R. R. S. 1943. Finally, the court found that contestant "*failed to proceed with due diligence and timeliness to raise objection to will and codicil prior to admission.*" (Emphasis supplied.)

A notice of appeal from the order denying the motion to vacate the order of August 22, 1977, admitting the will and the order of September 22, 1977, admitting the codicil, was filed in county court on October 28, 1977, and an appeal bond was filed on November 4, 1977. A petition on appeal was filed in District Court on November 14, 1977, repeating the allegations of the motion to vacate, but instead of mentioning a will of September 9, 1968, he asked that a will of October 17, 1969, together with a codicil of May 1, 1974, be admitted to probate. Lee Grimes and others, being nephews and a grandnephew of decedent, filed a petition to intervene, adopting the allegations of contestant's petition on appeal. Proponents Rix, Canino, and Hammang, appellees here, filed motions to strike, to dismiss the petition in intervention, and a demurrer to contestant's petition, all of which were sustained. Contestant elected to stand on his petition and the same was dismissed. Contestant and intervenors appeal.

The critical question in this case is the meaning of section 30-2437, R. R. S. 1943: "*Formal testacy proceedings; vacation of order for other cause.* For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal." The proponents contend that "good cause" means the same thing that it did in the statute of nonclaim, formerly section 30-605, R. R. S. 1943, and still does in the modern version, section 30-2485, R. R. S. 1943, which states that a "creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional time and the court, *upon good cause shown,*

may allow further time not to exceed thirty days; * * *." (Emphasis supplied.) This court in applying the original section seemed to consistently require a showing of "diligence and of unavoidable mistake or accident, or of fraud * * *." Nebraska Wesleyan University v. Bowen, 73 Neb. 598, 103 N. W. 275 (1905). Thus the proponents urge the rule adopted by the lower courts that "good cause" requires one to show that although he acted with due diligence, through no fault of his own he was prevented from acting within time. Contestant, on the other hand, although stating in his brief that "good cause" simply requires him to show a substantial reason for not appearing at the original hearing, which the proponents are quick to point out was not even done, his assignment of error makes it obvious he is arguing that "good cause" goes to the merits of the case, i.e., that showing a sufficiently legal ground or reason for vacation of the order — lack of capacity and undue influence — is good cause if brought to the attention of the court within the time limit contemplated by section 30-2437, R. R. S. 1943.

Proponents cite a line of cases in which the court refused to set aside the probate of a will because the contestant failed to "show that the failure to obtain a just decision is not attributable to his own fault or negligence," Flint v. Panter, 187 Neb. 615, 193 N. W. 2d 279 (1971); and it is "not sufficient to allege generally that due diligence has been used, but the facts constituting due diligence must be set out," In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379 (1944); and to the same effect, Gleason v. Poore, 167 Neb. 312, 92 N. W. 2d 705 (1958). However, these and other similar cases had their beginnings in Miller v. Estate of Miller, 69 Neb. 441, 95 N. W. 1010 (1903), which in turn borrowed from Secord v. Powers, 61 Neb. 615, 85 N. W. 846 (1901). The petitions to vacate filed in the latter two cases were under the provisions of section 602 of the Code of Civil Procedure,

now essentially section 25-2001, R. R. S. 1943, and the rule announced by the court in both instances must be viewed against the backdrop of that statute and the particular facts of the cases.

The statutes, former section 602 of the Code of Civil Procedure and section 25-2001, R. R. S. 1943, provide in part as follows: "A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made * * * (4) for fraud practiced by the successful party in obtaining the judgment or order; * * *." Obviously, as stated in Miller v. Estate of Miller, *supra*, and Secord v. Powers, *supra*, this applies to county courts as well. There is no specific time limit within which to act, except that it applies to vacation after term. A trial court has always had inherent power over its judgments to correct errors and mistakes therein, even to the extent of granting a new trial whether requested or not, as long as such action is taken within the same term of court at which the judgment was entered. Harman v. Swanson, 169 Neb. 452, 100 N. W. 2d 33 (1959).

In Secord v. Powers, *supra*, plaintiff lost the case on the first trial and filed a petition under section 602 alleging that the verdict against him had been obtained by perjury and asking that the judgment be set aside and a new trial awarded. There was a trial which resulted in a decision denying the application to vacate the judgment. This court said: "The trial court was right in refusing to vacate the judgment, not only because Secord did not make a sufficient showing of diligence, *but also for the reason that the witness upon whose evidence he mainly relied, was utterly unworthy of credit or confidence.* * * * He did not testify like a person having any sentimental attachment to truth, but rather like one who felt no moral restraint and was willing and anxious to render both litigants good service. * * * We do not think the evidence given on both trials,

when considered together, shows anything more than a balance of probability against the correctness of the conclusions reached in the replevin case." (Emphasis supplied.)

Although it seems rather obvious that the court placed considerable emphasis on the untrustworthiness of the witness, nevertheless, it furnished the basis for promulgation of the rule of "due diligence" when seeking to vacate the probate of a will *after term*, as was done in Miller v. Estate of Miller, *supra*. In that case, a will was admitted to probate on June 2, 1900. Almost 7 months later, on December 26, 1900, appellants filed a petition to vacate the decree admitting the will to probate asserting that testator lacked testamentary capacity and was subject to undue influence. The petition was denied in both the county court and District Court. This court, in affirming, there said: "It is the settled rule, in this state at least, that under section 602 of the code a judgment clearly shown to have been obtained by fraud or false testimony, which it would be against conscience to enforce, will, on the application of the unsuccessful party *and a showing of due diligence*, be vacated and set aside. *Secord* v. *Powers*, 61 Neb. 615." (Emphasis supplied.) Within the concluding paragraph of the Miller opinion appears the primary reason for the rule when dealing with a vacation statute with no time limit as was, and is, the case in section 602 and section 25-2001, R. R. S. 1943: "But the peace and repose of society forbids that litigation should be prolonged indefinitely. The law, therefore, requires a litigant to present his defense seasonably. If, through his own negligence or want of diligence, he fails to do so, equity will not relieve him from the consequences of his own neglect or want of care. Were it otherwise, *no man could know with certainty that any controversy was finally settled and at rest.*" (Emphasis supplied.)

The same reasoning does not apply to section 30-

2437, R. R. S. 1943, which very definitely limits the time within which a motion to vacate may be filed by the language "within the time allowed for appeal." That time is, of course, 30 days as provided for in section 30-1602, R. R. S. 1943: "All appeals shall be taken within thirty days after the decision complained of is made." This certainly does not leave any great period of uncertainty "that any controversy was finally settled and at rest."

The "period of uncertainty" is provided for in section 30-2436, R. R. S. 1943, which allows petitions for modification after appeal time because of unawareness of the existence of another will and no notice of the proceedings, or unawareness of death and no notice except by publication. Such petitions must be filed prior to the earlier of the following time limits: (1) Entry of an order of final distribution; (2) not more than 6 months after the filing of a closing statement, if the estate is closed by statement; (3) when it is no longer timely to initiate an original probate proceeding; or (4) not more than 12 months after entry of the order sought to be vacated. That section of the statute specifically sets out conditions of due diligence. Also, this is not to say that under certain circumstances an order could not be vacated at some indefinite time in the future under the provisions of section 25-2001, R. R. S. 1943, upon a showing of "due diligence." Section 30-2203, R. R. S. 1943, provides: "Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions."

Proponents argue that repealed section 30-605, R. R. S. 1943, as to late claims, permitted the same only upon a strict showing of due diligence. This is generally true. They also argue that according to the Nebraska Comment to the new nonclaim statute, section 30-2485, R. R. S. 1943, the language "upon good cause shown, may allow further time not to exceed thirty days" was adapted from repealed sec-

tion 30-605. It follows, according to their argument, that the Nebraska Legislature was aware of the "due diligence" interpretation applied to "good cause" by this court as to section 30-605, and therefore, in borrowing that language for section 30-2485, intended the same "due diligence" meaning. That may very well be true. However, the minor premise of their syllogism as to section 30-2437 following 30-605 is not true and the conclusions accordingly not sound. Quoting from their briefs: "And — the term 'for good cause shown' in being carried from the old 30-605 to the new *30-2437* at issue here requires the same strict interpretation as was given to that term by decisions of this Court in interpreting the old 30-605." (Emphasis supplied.) Section 30-2437 was carried verbatim from section 3-413 of the Uniform Probate Code, not from section 30-605, and unfortunately, entered our body of law without the benefit of prior interpretations of this court, or of any other court. There is not so much as a comment following it. Likewise, section 30-2220, R. R. S. 1943, arrived substantially unchanged from the Uniform Probate Code, section 1-401, and that language "(b) The court *for good cause shown* may provide for a different method or time of giving notice for any hearing," (emphasis supplied), did not come from the "old 30-605." It would take a strained interpretation indeed to extract "due diligence" from "good cause shown" as used in section 30-2220, R. R. S. 1943.

In effect, the situation that existed here was no different than where default judgment is entered and a timely application (within the limitation contemplated by section 30-2437, R. R. S. 1943), to vacate is filed together with a tendered defense — lack of testamentary capacity and undue influence — which, if true, would require the vacation of the decree admitting the will to probate. As stated in Steinberg v. Stahlnecker, 200 Neb. 466, 263 N. W. 2d 861 (1978), the most recent of a long line of Nebraska cases on

the same point: "Our law is well settled. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable grounds sustain the motion and permit the cause to be heard on the merits." To the same effect is Beliveau v. Goodrich, 185 Neb. 98, 173 N. W. 2d 877 (1970): "It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. Consequently this court has long held that a district court has inherent power to vacate or modify its own judgment any time during the term in which it is rendered. * * * Mere mistake or miscalculation of a party or his attorneys is not sufficient, in itself, to warrant the refusal to set aside a default judgment, *when there is a good defense pleaded or proved and no change of position or substantial misjustice [sic] will result from permitting a trial on the merits.*" (Emphasis supplied.) No hearing was ever had on the admission of this will to probate, no witnesses were ever called, and the same witnesses to the will and codicil, according to the county court hearing on contestant's motion, who were available on the date when the hearing to admit the will to probate was set, were still available at the time of the hearing on contestant's motion. Other than the fact that proponents might lose their inheritances under the will because of the possibility of lack of testamentary capacity, or of undue influence on the part of one or more of them, it could hardly be said that under those circumstances a "substantial injustice will result from permitting a trial on the merits."

The purposes and rules of construction to be ap-

plied to the Nebraska Probate Code are expressed in section 30-2202, R. R. S. 1943: "(a) *This code shall be liberally construed* and applied to promote its underlying purposes and policies. (b) The underlying purposes and policies of this code are: (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons; (2) *to discover and make effective the intent of a decedent in distribution of his property*; (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors; (4) to facilitate use and enforcement of certain trusts; (5) to make uniform the law among the various jurisdictions." (Emphasis supplied.)

To equate "good cause shown" with a "showing of due diligence" is hardly a liberal construction of the term "good cause shown." Proponents would have us deny contestant the opportunity to prove the allegations made in his motion to vacate, timely filed within the literal interpretation of the appropriate statute, which, if true, would compel a finding of no valid will. To do this, recognizing that the will was admitted to probate without hearing or formal proof of due execution, could hardly be said to encourage the policy "to discover and make effective the intent of a decedent in distribution of his property."

Webster's Third New International Dictionary defines "good cause" as "a cause or reason sufficient in law; one that is *based on equity or justice* or that would motivate a reasonable man under all the circumstances." (Emphasis supplied.)

The meaning of good cause must be determined in light of all of the surrounding circumstances. Therefore, without regard to its use in the nonclaim situation, which is inapplicable here, it is our opinion that good cause as used within the provisions of section 30-2437, R. R. S. 1943, means a logical reason or legal ground, based on fact or law, why an order should

be modified or vacated. Contestant advanced such reasons or grounds in his motion within the limited time specifically provided by statute, and which if proven true, would require the vacation of the particular order attacked. He should have had an opportunity to present his evidence.

Any suggestion that the appeal was not lodged within 30 days of the order admitting the will to probate is completely unsound. The filing of a motion to vacate, as was done here, is of a somewhat similar nature as that of filing a motion for a new trial in District Court. The ruling on the motion to vacate in effect supplants the decree of probate as the final order referred to in section 30-1601, R. R. S. 1943, which may be appealed within 30 days under section 30-1602, R. R. S. 1943. That was done in this case.

In reality, this is a situation of an appeal by an interested person from a proceeding at which he neither appeared nor contested. Any person affected by the probate of a will may appeal from a final order of the county court concerning the will whether or not he appeared and contested the probate in that court, and he is entitled to be heard in the District Court without diminution of rights as a party to the cause. Clutter v. Merrick, 162 Neb. 825, 77 N. W. 2d 572 (1956).

Proponents are correct as to the position of the intervenors — they must take the lawsuit as they find it and ordinarily cannot change the position of the original party. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683 (1945). However, the District Court should not have dismissed their petition in light of what we have said as to contestant's petition because in their prayer they simply joined in the prayer set out in contestant's petition to vacate the order admitting the will to probate.

Finally, proponents complain because contestant, in his motion to vacate, claimed that he was a devi-

see under a will of the decedent dated September 9, 1968, whereas in his petition on appeal he asked the District Court to probate a will of the decedent executed on October 17, 1969, together with a codicil executed on May 1, 1974. They also point to section 30-2434, R. R. S. 1943, which provides in part: "After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of section 30-2436." This is an obvious reference to the limitations and conditions contained in section 30-2436, R. R. S. 1943, previously referred to in general terms in this opinion. However, these contentions may be disposed of by pointing out that this is simply a will contest, an appeal to set aside the previous admission to probate of a particular instrument. All references to other particular wills, in either the motion, petition on appeal, or the request that the District Court admit a certain will to probate — which it has no jurisdiction to do in the first instance — are purely superfluous to this appeal and may be disregarded.

The judgment of the District Court is reversed and the cause is remanded with directions to grant appellants a new trial in accordance with this opinion and as provided by law.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. JOHN E. HALLORAN ET AL., APPELLANTS, V. ANITA HAWES, COUNTY CLERK OF ADAMS COUNTY, NEBRASKA, APPELLEE.

279 N. W. 2d 96

Filed May 15, 1979. No. 42040.

1. **Statutes.** A statute is open to construction only where the language

used requires interpretation or may reasonably be considered ambiguous.

2. _____. A proviso which operates to limit the application of the provisions of a statute general in terms should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms of the proviso.
3. **Legislature: Schools and School Districts.** The Legislature has complete power over the organization, function, and finances of school districts.
4. **Legislature: Statutes.** The Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. The power of classification rests with the Legislature and it will not be interefered with by the courts if real and substantial differences exist which afford a rational basis for classification.
5. **Mandamus: Public Officers and Employees.** To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.

Appeal from the District Court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

John A. Wagoner and Ralph A. Bradley, for appellants.

Arthur C. Toogood and W. G. Cambridge, for appellee.

Robert D. Westadt and Otradovsky & Bieber, for amicus curiae.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and CANIGLIA, District Judge.

MCCOWN, J.

This is an action in mandamus to require the respondent, the county clerk of Adams County, Nebraska, to call an election under the provisions of section 79-801, R. R. S. 1943. Peremptory writ of mandamus issued. Following trial the District Court for Adams County set aside the peremptory writ of mandamus and dismissed the relators' petition. The relators have appealed.

On July 26, 1976, the city council of Hastings, a first class city, duly adopted ordinances which annexed certain contiguous territory to the city. The parties to this proceeding have stipulated that the territory annexed was, at the time of annexation and had been for more than 1 year, a part of a Class VI high school district known as Adams Central High School, and was also located in either School District No. 15 of Adams County or School District No. 60 of Adams County, both of which were Class I rural elementary school districts. It was also stipulated that none of the territory involved here had ever been annexed by petition to any Class III, IV, V, or VI school district, and that the territory was included in the Adams Central High School district by virtue of having been originally included within that school district as the result of an election held for that purpose on July 29, 1966.

Relators filed their original petition for writ of mandamus on May 25, 1977. The petition alleged that relators were residents, voters, and taxpayers in the territory annexed and the school districts involved; that the school boards had not entered into negotiations as to which school district the annexed territory should be a part of; and that the Hastings district had refused to negotiate on that issue. The petition also alleged that relators had demanded that respondent set up an election as provided for under section 79-801, R. R. S. 1943, but that respondent had failed and refused to take any action. Relators alleged they had no adequate remedy at law and prayed that a peremptory writ of mandamus be issued requiring the respondent to begin the procedure for setting up an election immediately and to fulfill her obligations under section 79-801, R. R. S. 1943.

The District Court issued a peremptory writ of mandamus on June 8, 1977. On July 6, 1977, following trial and submission of briefs, the District Court

set aside the peremptory writ of mandamus and dismissed the relators' petition. This appeal followed.

Some historical perspective is necessary. With minor variations not relevant here, the statutes of Nebraska, since 1881, have provided that the territory embraced within the corporate limits of each first class city constitutes a school district of the third class, and any additional territory annexed to the boundaries of such city by ordinance automatically became part of the Class III school district of the city. See § 79-801, R. R. S. 1943, and its predecessors.

School districts in this state are presently classified into six categories. Class I includes any school district that maintains only elementary grades. Class II includes any school district embracing territory having a population of 1,000 inhabitants or less that maintains both elementary and high school grades. Class III includes any school district embracing territory having a population of more than 1,000 and less than 50,000 inhabitants that maintains both elementary and high school grades. Class IV includes any school district embracing territory having a population of more than 50,000 and less than 200,000 inhabitants that maintains both elementary and high school grades. Class V includes any school district embracing territory having a population of 200,000 or more that maintains both elementary and high school grades. Class VI includes any school district in this state that maintains only a high school. § 79-102, R. R. S. 1943.

The city of Hastings has a population of more than 1,000 and less than 50,000 and is a first class city. The school district of the city of Hastings is a Class III school district.

Prior to 1967, what is now section 79-801, R. R. S. 1943, provided: "The territory embraced within the corporate limits of each incorporated city or village in the State of Nebraska, together with such ad-

ditional territory and additions to such city or village as may be added thereto, as declared by ordinances to be boundaries of such city or village, having a population of more than one thousand and not more than fifty thousand inhabitants, including such adjacent territory as now is or hereafter may be attached for school purposes, shall constitute a school district of the third class and be known by the name of 'The School District of (name of city or village), in the county of (name of county), in the State of Nebraska.' As such in that name, the district shall be a body corporate and possess all the usual powers of a corporation for public purposes, and in that name and style may sue and be sued, purchase, hold, and sell such personal and real estate, and control such obligations as are authorized by law. The title to all school buildings or other property, real or personal, owned by any school district within the corporate limits of any city or village, shall, upon the organization of the district, vest immediately in the new district; and the board of education of the new district shall have exclusive control of the same for all purposes herein contemplated." That language remains intact as the basic portion of the current version of section 79-801, R. R. S. 1943. Provisional exceptions have been added. The main thrust of the statute remains the same.

In 1967 a proviso was added: "*Provided*, that where the territory annexed by a change of boundaries of such city has been a part of a Class III, IV, or V school district for more than one year prior thereto, having been annexed by petition, a merger of the area annexed with the Class III school district shall not become effective unless a majority of the board of education of such Class III, IV, or V district within ninety days after the effective date of the city annexation ordinance shall vote in favor of the merger." Laws 1967, c. 541, § 1, p. 1782.

In 1976, the proviso was expanded to include Class

VI school districts and the remaining language of the proviso was changed to its current form which is: "*Provided*, that where the territory annexed by a change of boundaries of such city has been part of a Class III, IV, V, or VI school district for more than one year prior thereto, having been annexed by petition, the question as to which district the annexed territory shall be part of shall be negotiated by the school boards of the school districts involved. If the majority of the members of each school board cannot reach agreement on such question within ninety days after the effective date of the city annexation ordinance, the question of which school district the annexed territory shall be a part of shall be placed on the ballot for the next primary or general election. The registered voters of all Class I districts which form the annexed territory shall then vote on the question at such election. * * *." The amendment to the proviso also included provisions dealing particularly with the ownership and disposition of property of Class VI school districts affected.

It is the contention of the relators that the 1976 amendment to the proviso is unconstitutional because it is special legislation and does not operate uniformly upon Class VI school districts, but distinguishes between Class VI districts formed by the election process and those formed by petition. We disagree.

It is tacitly conceded that the operative language: "*Provided*, that where the territory annexed by a change of boundaries of such city has been part of a Class III, IV, V, or VI school district for more than one year prior thereto, having been annexed by petition, * * *" is not ambiguous. Relators' argument that such language creates two kinds of Class VI school districts is unfounded. The classification created by the proviso does not apply to school districts or their method of formation. The proviso applies only to territory which was annexed to a Class III,

IV, V, or VI school district by petition. It does not apply to territory which was an original part of a district and was never annexed. It is a general statute and is not special legislation. In effect the relators contend that the Legislature did not actually intend to limit the proviso to territory which had been annexed to a school district by petition, but intended to include all territory of the district, no matter how it became a part of the district. A statute is open to construction only where the language used requires interpretation or may reasonably be considered ambiguous. 73 Am. Jur. 2d, Statutes, § 194, p. 392. The language of the proviso is clear and not ambiguous.

It is a general rule of statutory construction that a proviso which operates to limit the application of the provisions of a statute general in terms should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms of the proviso. 73 Am. Jur. 2d, Statutes, § 319, p. 468.

This court has consistently held that the Legislature has complete power over the organization, function, and finances of school districts. Ratigan v. Davis, 175 Neb. 416, 122 N. W. 2d 12, appeal dismissed 375 U. S. 394, 84 S. Ct. 451, 11 L. Ed. 2d 411. The state may change or repeal all powers of a school district, take its property without compensation, expand or restrict its territorial area, unite the whole or a part thereof with another subdivision or agency of the state, or destroy the district with or without the consent of the citizens. School Dist. No. 74 v. School Dist. of Grand Island, 186 Neb. 728, 186 N. W. 2d 485.

The Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and sub-

stantial differences exist which afford a rational basis for classification. McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480.

The proviso of section 79-801, R. R. S. 1943, distinguishes only between territory annexed to a Class III, IV, V, or VI district by petition, and territory which was a part of the original district or later became a part of it by means other than by petition. The proviso does not distinguish between different methods of creation of school districts. There is a legitimate legislative purpose in the distinction as demonstrated by the legislative history. This court cannot say that the classification complained of will not promote those legitimate aims. Any doubts must be resolved in favor of the constitutionality of the statute. Kaup v. Sweet, 187 Neb. 226, 188 N. W. 2d 891.

To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. State ex rel. Goetz v. Lundak, 199 Neb. 585, 260 N. W. 2d 589.

The action of the District Court in denying the writ of mandamus and dismissing relators' petition was correct and is affirmed.

AFFIRMED.

IN RE CONDEMNATION BY THE STATE FIRE MARSHAL OF BUILDING LOCATED ON LOTS 7, 8, 9, BLOCK 24, GARDNER'S ADDITION, GERING, NEBRASKA: CONRAD SCHANEMAN, JR., AND DORIS E. SCHANEMAN, ROUTE 1, MINATARE, NEBRASKA, OWNERS. STATE FIRE MARSHAL OF THE STATE OF NEBRASKA, APPELLEE, V. CONRAD SCHANEMAN, JR., AND DORIS E. SCHANEMAN, APPELLANTS.

279 N. W. 2d 101

Filed May 15, 1979. No. 42047.

1. **Constitutional Law: Trial: Appeal and Error.** For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court or it will be deemed waived.
2. **Statutes: Public Officers and Employees: Police Powers.** The requirement of section 81-513, R. R. S. 1943, that a certificate of a building contractor, licensed architect, or licensed engineer be procured by the State Fire Marshal before ordering the demolition of a building applies only where the reason for destruction is other than fire protection.
3. **Trial: Appeal and Error.** Questions not presented to or passed upon by the trial court will not be considered on appeal.
4. **Statutes: Public Officers and Employees: Police Powers.** Actions instituted by the State Fire Marshal under section 81-517, R. R. S. 1943, are tried in the District Court and reviewed in this court as in equity.
5. **Public Officers and Employees: Police Powers: Time.** Where the evidence does not affirmatively show that a building is beyond reasonable repair, the order of the State Fire Marshal should be in the alternative, to wit, to make needed specified repairs within a fixed period of time, or, upon failure to so do, to direct the demolition of the building.
6. **Trial: Appeal and Error.** If the trial court views the premises, it is required to consider any competent and relevant facts revealed thereby; and, similarly, a duty is imposed on this court, on review of the findings made by the trial court, to give consideration to the fact that the trial court did view the premises.

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

Winner, Nichols and Meister, for appellants.

Paul L. Douglas, Attorney General, and C. C. Sheldon, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Defendants, the Schanemans, owners of an apartment building in the city of Gering, Nebraska, have appealed from a judgment of the District Court for Scotts Bluff County affirming an order of the State Fire Marshal made pursuant to the provisions of section 81-513, R. R. S. 1943, directing the demolition of the building.

The owners make and argue the following assignments of error: (1) The evidence is insufficient to support the demolition order. (2) An order of the State Fire Marshal directing the premises be vacated within 72 hours of service of the order was void because the statutes do not give the State Fire Marshal authority to make such an order. (3) The order for demolition was void because it did not have attached thereto an engineer, contractor, or architect's certificate claimed to be required by the provisions of section 81-513, R. R. S. 1943. (4) Sections 81-501.01 through 81-541, R. R. S. 1943, are unconstitutional. We affirm.

We discuss the assignments in reverse order. The issue of constitutionality of the statute was neither pleaded nor raised in any other manner in the District Court. The applicable rule is that for a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court or it will be deemed waived. State v. McConnell, 201 Neb. 84, 266 N. W. 2d 219.

The owners' third assignment is premised on the following provision of section 81-513, R. R. S. 1943: "Before he [the State Fire Marshal] . . . orders the destruction . . . of any building . . . for any other cause than fire prevention, he shall be required to obtain a written report from a building contractor, licensed architect, or licensed engineer stating the

condition of the building and the reason why such building . . . should be . . . destroyed . . . ." The plain language of the statute shows the certificate of the building contractor, licensed architect, or licensed engineer is required only where the reason for the order is a cause other "than fire prevention." The record and the order itself disclose in this case the reason for the order was fire prevention. The certificate provision of the statute is not applicable.

As to the second assignment, the owners are precluded from raising in this court the issue of the authority of the State Fire Marshal to issue the order for vacation and nonoccupancy because they have waived the right by stipulation, did not challenge that order in the trial in the District Court, and acquiesced in that order. Questions not presented to or passed upon by the trial court will not be considered on appeal. Ford v. County of Perkins, 190 Neb. 304, 207 N. W. 2d 694.

At this point we summarize pertinent portions of the proceedings in the District Court and the evidence insofar as they are pertinent to the above assignment and the claim of insufficiency of the evidence to support the judgment. The order of the State Fire Marshal was made on January 16, 1976, pursuant to the provisions of section 81-513, R. R. S. 1943, and the order listed 29 specific conditions or defects in the building which the State Fire Marshal claimed necessitated either specific repairs or the destruction of the building so that it did not present a hazard to life, limb, and property. The order alleged that because of the dilapidated condition of the building it was especially liable to fire. The order was filed with the clerk of the District Court pursuant to the provisions of section 81-517, R. R. S. 1943. The owners filed objections and answer through their attorney on January 19, 1976, together with a motion which questioned the authority of the State Fire Marshal to order the building evacuated

until repairs were made. Later, the owners filed another motion in which they asked that the order be made more specific and certain.

Thereafter, the owners and the State Fire Marshal consented to the entry of an order by the court which provided, among other things: (1) Clarification of the State Fire Marshal's specification of defects and hazards described in the order; and (2) the owners would, within 30 days after clarification, given written notice that they intended to effect repairs before occupation of the building, would do nothing, or would sell the building subject to the requirements of the order. In the event of election to repair, the order provided that all repairs, except electrical repairs, would be accomplished in 6 months and all repairs, including electrical, within 1 year. Both parties reserved rights to have the matter heard on the merits.

Later, the parties entered into a stipulation which, among other things, provided that pursuant to the provisions of the above-mentioned consent order: "Schaneman hereby gives notice . . . that they intend to effect repairs to the building to comply with the requested repairs before occupancy," and further agreed all repairs would be completed not later than July 1, 1977. To this time the Schanemans had been represented by counsel throughout. The record shows they then dismissed their counsel. They did not thereafter make the repairs in accordance with the stipulation, and the State Fire Marshal, pursuant to the provisions of the order, called for a hearing on the merits and the matter was tried. Mr. Schaneman appeared at the trial pro se. Evidence was offered by the State Fire Marshal and none by Schaneman. The trial judge made a personal inspection of the premises. On January 27, 1978, the court found that 20 of the deficiencies listed in the order of the State Fire Marshal still existed on the premises and entered an order directing the

building be demolished at the owners' cost.

Witnesses for the State Fire Marshal were a deputy state fire marshal, an officer of the Gering police department, and the building inspector of the city of Gering. Each of them had been in the building at various times in the year 1977 in connection with their official duties. The substance of their collective testimony was that the deficiencies noted in the order of the State Fire Marshal were largely uncorrected; the building was in a dilapidated condition; it constituted a fire hazard and was unfit for habitation unless repairs were made; and the condition of the building had in fact deteriorated since the date of the State Fire Marshal's order. The testimony of the deputy state fire marshal described the 29 defects so that the judge, when he made his personal inspection during trial, would be able to make his own judgment as to what defects existed and what portion of the order had not been complied with. As noted, the court after the inspection found that 20 of the specified items had not been remedied.

The owners complain that the qualifications of the witnesses to express their opinions that the building constituted a fire hazard had not been properly laid. However, no objections to foundation or qualifications were made by the owners. Such objections were therefore waived and the evidence was properly considered by the trial judge.

The owners cite In re Application of Iverson, 151 Neb. 802, 39 N. W. 2d 797, as follows: "We are not here dealing with the rule that applies in emergency situations. The remedy of total destruction of property under the police power without compensation is a drastic one. The existence of that power is not here challenged. The challenge goes to the necessity. The necessity for the total destruction of the building must clearly appear.

"Section 81-513, R. S. 1943, clearly contemplates an order for repair, alteration, or destruction as al-

ternatives. Other sections of the act show the same distinction. When the police power is exerted against property it is ordinarily to regulate its use, not to destroy it. Destruction is a last resort. The applicable rule is that where repairs or alterations can be made lawfully upon a building so as to eliminate the special dangers, arising from its location and condition, to surrounding property and to persons, such repairs or alterations should be ordered rather than ordering the destruction of the building." The owners point out there was no evidence the building could not be lawfully repaired so as to be habitable and not constitute an unreasonable fire hazard endangering life, limb, and other property in the vicinity and argue therefore that under the principle of In re Application of Iverson, *supra*, the court was not authorized to enter the order. This contention, however, overlooks the fact that the owners stipulated they would make an election either (1) to repair, (2) to do nothing, or (3) to sell, subject to the State Fire Marshal's existing order to either repair or demolish. The record shows the owners exercised their option to repair and stipulated they would make the repairs by July 1, 1977. The record further shows they did not make the repairs in any substantial degree. They presented no evidence as to why they had not done so. The record supports the inference that they had made no contractual or other arrangements to have the work done, they had no bona fide intention of complying with the order, and they were using the legal proceedings to bargain for modification.

The owners were bound by their stipulation and election to repair. Section 81-513, R. R. S. 1943, authorizes the State Fire Marshal, under the conditions described in the statute, to direct repair or demolition. In re Application of Iverson, *supra*, stands for the proposition that destruction may not be ordered when repairs are feasible. It does not, how-

ever, hold that an owner may avoid the alternative of demolition by refusing or neglecting to make the ordered repairs. We hold that under the provisions of section 81-513, R. R. S. 1943, if an owner agrees to make repairs and then neglects or refuses to do so, demolition may be ordered. This is the interpretation placed upon section 81-513, R. R. S. 1943, by this court in State Fire Marshal v. Village of Dorchester, 186 Neb. 94, 180 N. W. 2d 919, where we said: "Where the evidence does not affirmatively show that a building is beyond reasonable repair, the order of the State Fire Marshal should be in the alternative, to wit, to make needed specified repairs within a fixed period of time, or, upon failure to so do, to direct the demolition of the building."

In re Application of Iverson, *supra*, requires that the District Court, under the provisions of section 81-517, R. R. S. 1943, try the case as in equity. The trial court in this case announced it was going to do so and the record shows that is what it did. Review in this court is also de novo under the mandate of Iverson.

The trial court viewed the premises. If the trial court views the premises, it is required to consider any competent and relevant facts revealed thereby; and, similarly, a duty is imposed on this court, on review of the findings made by the trial court, to give consideration to the fact that the trial court did view the premises. Webb v. Lambley, 181 Neb. 385, 148 N. W. 2d 835. The record clearly contains competent evidence which supports the findings.

AFFIRMED.

PHILLIP L. HYDE, APPELLANT, V. HOWARD CLEVELAND, APPELLEE.

279 N. W. 2d 105

Filed May 15, 1979. No. 42086.

1. **Courts: Trial: Evidence: Witnesses.** In a trial de novo on the record, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court, with the caveat that where the evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying.
2. **Judgments: Evidence: Appeal and Error.** A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence.
3. **Motor Vehicles: Negligence: Damages.** A motorist who sees anything upon a highway at night which is abnormal and in itself a warning and takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negligence which will bar his recovery for damage contributed to by his lack of care.
4. **Motor Vehicles: Negligence.** As a general rule, it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision within the area lighted by his headlights.
5. **Statutes: Witnesses: Admissions Against Interest.** The requirement imposed by section 27-613 (2), R. R. S. 1943, that a witness be afforded an opportunity to explain or deny a prior inconsistent statement does not apply to admissions or statements offered against a party to the action, if the admissions or statements were made by that party.
6. **Evidence: Witnesses: Admissions Against Interest.** The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence and may be used as rebuttal evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay foundation for the admission of such evidence by cross-examination.
7. **Trial: Evidence.** Ordinarily the order of proof is a matter in the discretion of the trial court and error cannot be successfully asserted on account of any irregularity therein; prejudice in such case should first appear.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded with directions.

James E. Case, for appellant.

Francis M. Casey of Casey & Elworth, for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

HICKMAN, District Judge.

This motor vehicle accident case was commenced in the county court of Cass County, Nebraska. After trial to the court, the court found against the plaintiff, appellant herein, and for the defendant, appellee herein, and awarded the defendant a judgment on his cross-petition in the amount of the stipulated damage. Plaintiff appealed the decision to the District Court for Cass County, Nebraska, whereafter in a trial de novo on the record the District Court affirmed the judgment of the county court. The case comes to this court on further appeal by the plaintiff below after the overruling of plaintiff's motion for a new trial. The parties will be designated hereinafter as they were in the lower courts.

This action arose out of an accident which occurred at night on April 24, 1976, in Cass County, Nebraska, on U. S. Highway No. 73-75 approximately 1 mile west and 2 miles south of Plattsmouth, Nebraska. In the area of the accident the highway is 24 feet wide, runs straight, consists of two lanes, and is upgrade to the south to a hill crest, approximately 250 feet south of the scene of the accident. It was raining and had been most of the evening. Defendant had been traveling north on the highway and observed a car in the east ditch with its windshield wipers in operation. He passed by, turned around to see if he could help, and proceeded to a point somewhat north of the vehicle in the ditch. Defendant stopped his car, facing south, in the north lane partially off onto the shoulder at a point where his headlights would shine on the car in the ditch. Defendant was unable to get his vehicle completely off the east edge of the highway because of the slope of

the ditch and the wet condition of the ground. Defendant activated his four-way blinking flashers and placed his headlights in the dim or low-range position. On checking the vehicle in the ditch, he was unable to determine, because of the darkness, whether there was anyone inside the vehicle. Defendant returned to the highway and flagged down a southbound vehicle to secure a flashlight. The southbound vehicle had its headlights on and it stopped in the southbound lane alongside defendant's vehicle or relatively close thereto. At this point, both lanes of the highway were partially occupied. Plaintiff was proceeding north on the highway in the northbound lane at 45 to 50 miles per hour with his windshield wipers and headlights on and crested the hill approximately 250 feet south of the stopped vehicles. Plaintiff immediately saw the lights of the two aforementioned vehicles. Plaintiff testified he thought one vehicle was passing the other and that it would continue to pass or fall back in behind the other vehicle, so plaintiff applied his brakes lightly for some 200 feet at which time he realized the vehicles were stopped. Plaintiff then applied his brake pedal hard, but because the brakes were wet they did not hold and the vehicle traveled 50 feet before striking the defendant's left front end at a speed of 35-40 miles per hour as plaintiff was turning toward the ditch on the east side of the road.

In a trial de novo on the record, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court, with the caveat that where the evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying. Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50; Von Seggern v. Kassmeier Implement, 195 Neb. 791, 240 N. W. 2d 842.

The District Court, as was required, came to an

independent conclusion based on the evidence and found that the parking of the defendant's vehicle on the wrong side of the road was negligence, but that it had its headlights on and was visible. The court further found plaintiff was negligent in that his vehicle was not equipped with adequate brakes; he was traveling at a rate of speed in excess of that permitted by section 39-662, R. S. Supp., 1976, because of the special hazards occasioned by weather and highway conditions; and he failed to have his car under proper control.

The District Court proceeded to compare the negligence of the parties and found the negligence of the defendant was slight when compared with the negligence of the plaintiff, and found that the defendant should recover on his cross-petition.

Plaintiff assigns as error the District Court's determination that defendant's negligence was slight in comparison to the negligence of the plaintiff, and further assigns error in that the District Court based its decision on an improper determination of the evidence.

A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Stitt Constr. Co. v. Canine's Cupid, Inc., 199 Neb. 400, 259 N. W. 2d 29.

A motorist who sees anything upon a highway at night which is abnormal and in itself a warning and takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negligence which will bar his recovery for damage contributed to by his lack of care. Stocker v. Roach, 140 Neb. 561, 300 N. W. 627. Here, the plaintiff at approximately 250 feet observed the highway blocked and rather than applying his brakes immediately with sufficient force to slow and stop his vehicle, he allowed it to travel 200 feet before a forceful application of the brake pedal was made

and, at that point, he was only 50 feet from the collision. This conduct on the part of plaintiff was a total disregard of due care which the law exacts from a motorist.

The evidence reflects that defendant's vehicle was stopped partially on and partially off the east edge of the traveled surface of the highway and facing the wrong direction. It had been raining all evening prior to the accident and there was testimony that mud tracks would have been made by the vehicles when towed away following the accident. It is clear the slope of the ditch to the east of the highway was such that it would not be practical for a driver to drive his vehicle onto the slope due to the incline and wet conditions. The inference to be drawn from the evidence is that the defendant stopped his vehicle as far off the highway as was practical under the conditions existing. § 39-670 (1), R. R. S. 1943. It was at least 200-250 feet to the crest of the hill according to plaintiff's testimony, and defendant had left the southbound lane of traffic open.

The fact defendant was facing south partially in the northbound lane presents a more difficult problem; however, by reason of defendant's headlights being on and facing the plaintiff, the plaintiff should have become aware of the presence of defendant's vehicle in that position sooner than if defendant had stopped his vehicle facing north with only his taillights facing plaintiff. Plaintiff denied seeing any flashing lights on defendant's vehicle. Thus, although the District Court found defendant was guilty of negligence in stopping his vehicle on the wrong side of the highway, we cannot say defendant's negligence was more than slight when compared to the negligence of the plaintiff.

Plaintiff has not brought himself within any of the exceptions to the general rule that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop

in time to avoid a collision with an object within the area lighted by his lamps. Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572.

Plaintiff contends the range of vision rule should not be applied arbitrarily in this case for the reason that the night was rainy and the distance between the crest of the hill and the defendant's vehicle was 200-250 feet. He further contends that in the exercise of ordinary care plaintiff could not observe the danger in time and avoid the collision. However, we point out that plaintiff testified he saw two sets of headlights apparently coming toward him at a distance of about 250 feet, and that he applied his brakes slightly and did not apply them forcefully until he was 50 feet from the collision. Plaintiff recognized the danger upon cresting the hill, but failed to use due care to avoid an apparent dangerous situation.

The court permissibly found under the circumstances of this case that plaintiff's speed was in excess of that permitted under section 39-662, R. S. Supp., 1976, because of special hazards occasioned by the weather and highway conditions.

We are unwilling to say that the District Court was clearly wrong in the comparison of the negligence of the parties or that it made an improper determination of the evidence.

During the trial in the county court and after defendant rested his case, the plaintiff by way of rebuttal attempted to read into evidence portions of the deposition of the defendant for the purpose of showing declarations against interest. Defendant objected by stating "this is rebuttal" — not a proper place for declarations against interest — and the county court held such procedure was improper rebuttal evidence. The plaintiff then called the defendant to the witness stand and commenced to examine him in regard to the content of defendant's deposition. Defendant's counsel objected on the

basis of improper time and place for cross-examination. The objection was sustained. Plaintiff then made an offer of proof by reading a portion of defendant's deposition into the record. Defendants objection to the offer of proof on the same basis was sustained. On trial de novo the District Court held that the witness must be asked if the impeachable statement was made and if so, the reason for the apparent discrepancy, and be given the opportunity to explain any apparent errors or discrepancies in the testimony given in the deposition and that given at the trial. The court also found that the deposition may not be offered for the sole purpose of impeachment without giving the witness opportunity to explain the discrepancy and thus held the county court's ruling was correct.

Plaintiff assigns as error the ruling of the District Court upholding the ruling of the county court. Section 25-1267.04, R. R. S. 1943, provides: "At the trial * * * any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present * * * at the taking of the deposition * * * in accordance with any of the following provisions: (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness; * * *."

The District Court must have assumed that section 27-613 (2), R. R. S. 1943, applied to this situation. That section provides: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in subdivision (4) (b) of section 27-801."

Section 27-801 (1), R. R. S. 1943, defines a state-

ment in part as an oral or written assertion and (4) provides: "A statement is not hearsay if: * * * (b) The statement is offered against a party and is (i) his own statement, * * *."

Since plaintiff was offering portions of defendant's deposition to show declarations against interest or prior inconsistent statements or admissions for impeachment purposes against the defendant, it was not necessary that defendant be given an opportunity to explain or deny the statements.

The requirement imposed by section 27-613 (2), R. R. S. 1943, that a witness be afforded an opportunity to explain or deny a prior inconsistent statement does not apply to admissions or statements offered against a party to the action, if the admissions or statements were made by that party.

In Young v. Kinney, 79 Neb. 421, 112 N. W. 558, the plaintiff, as a witness in his own behalf, testified that he had known the animal in dispute from the time it was a suckling colt. On cross-examination, he was asked if he had not testified at the trial in county court that the first time he saw the animal to remember him was when the animal was 2 years old, coming 3. Plaintiff, in effect, answered that he didn't remember. Defendant subsequently called the county judge as a witness and offered to prove that at the county court trial the plaintiff had testified the first time he saw the animal in dispute was when the animal was coming 2 or 3 years old. Plaintiff objected that there was no foundation and that it did not tend to impeach the plaintiff. The objection was sustained. On appeal to this court, we held that the District Court erred stating: "The admissions and declarations of a party to an action against his own interest, in a material matter, may be proved as original evidence, and it is unnecessary to lay any foundation in the cross-examination of such party, where he has testified in his own behalf."

Berggren v. Hannan, O'Dell & Van Brunt, 116 Neb.

18, 215 N. W. 556, was an auto-pedestrian case where defendant's driver had denied he was operating the car at the time of the accident. Plaintiff called a witness who testified over objection that defendant's driver had said after the accident, and after he was no longer working for the defendant, that he was driving the car and "got into an accident." This court held that the evidence was admissible to make out a case against the defendant driver citing Young v. Kinney, *supra*, and said: "Had the declarations of Baker [defendant's driver] been offered by the plaintiff in rebuttal, for impeachment purposes, they should have been received." Defendant urged that no foundation was laid for impeachment by proof of contradictory statements or declarations by calling the attention of the witness to them on cross-examination. We stated: "The witness Baker being a party to the suit, against whom judgment was sought, it was not necessary to lay such foundation."

During the trial in Luikart v. Korbmaker, 128 Neb. 199, 258 N. W. 263, plaintiff offered, as part of his case-in-chief, certain questions and answers given by the defendant in proceedings before another court. Upon objection the evidence was not received. Later in the trial, the plaintiff offered certain parts of the evidence as rebuttal evidence, and objections to such offer were sustained by the court. On appeal the rulings of the District Court were assigned as error. This court held that the sustaining of the objections to the introduction of the evidence constituted prejudicial error, citing Young v. Kinney, *supra*.

It is thus clear the county court erred in not allowing the plaintiff to read the declarations against interest and/or prior inconsistent statements of the defendant into evidence as part of his case on rebuttal.

We hold that the admissions and declarations of a party to an action against his own interest, upon a

material matter, are admissible against him as original evidence and may be used as rebuttal evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay foundation for the admission of such evidence by cross-examination.

Ordinarily the order of proof is a matter in the discretion of the trial court and error cannot be successfully asserted on account of any irregularity therein; prejudice in such case should first appear. Berggren v. Hannan, O'Dell & Van Brunt, *supra.*

In this case, by the ruling of the trial court, plaintiff was denied the opportunity to attack the credibility of the defendant by impeaching him with his declarations against interest and prior inconsistent statements. Since a determination of the facts in this case is of paramount importance, the refusal of the court to allow plaintiff to use the deposition of the defendant in rebuttal was prejudical to the plaintiff.

Error having been committed by both the District Court and the county court prejudicial to the plaintiff, the judgment is reversed and the cause remanded to the District Court, which is ordered to reverse the judgment and remand the cause to the county court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES R. SINGLETON ET AL., APPELLEES, V. KIMBALL COUNTY BOARD OF COMMISSIONERS ET AL., APPELLANTS.

279 N. W. 2d 112

Filed May 15, 1979. No. 42173.

1. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a board of county commissioners but is not available if the duties are quasi-judicial or discretionary.

2. **Public Officers and Employees.** An act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
3. _____. When the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial; however, an act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain state of facts exists under which it is his duty to perform the act.
4. **Statutes: Public Officers and Employees: Highways.** The duty of the board of county commissioners under section 39-1716, R. R. S. 1943, to lay out a public road, upon a showing that the statutory conditions of section 39-1713, R. R. S. 1943, exist, is ministerial.
5. **Mandamus.** To warrant the issuance of a writ of mandamus to compel official action: (1) The duty must be imposed upon the official by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear.
6. **Appeal and Error.** Petition in error proceedings are not available to appeal from ministerial acts.
7. **Trial: Mandamus.** In a mandamus action, findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

Fred J. Hurlbut, for appellants.

Walter H. Radcliffe of Tews & Radcliffe, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and WINDRUM, District Judge.

CLINTON, J.

The Kimball County Board of Commissioners (hereinafter board) appeals from the granting to Charles and Betty Singleton of a peremptory writ of mandamus ordering the board to lay out a public road to the Singletons' land and to appraise the damages suffered by the owners of the real estate over which the road is laid. The Singletons brought the mandamus action after the board voted to deny their affidavit requesting that a road be laid out pursuant to section 39-1716, R. R. S. 1943.

The board's 12 assignments of error consolidate into the following: (1) The court erred in finding that mandamus was an available remedy since the board was exercising a quasi-judicial function; (2) the court erred in granting the writ of mandamus as petitioners had an adequate remedy at law; and (3) the court's order is not supported by the evidence. We affirm.

The statutes underlying this case are sections 39-1713 through 39-1719, R. R. S. 1943.

Section 39-1713, R. R. S. 1943, provides in pertinent part: "When any person shall present to the county board an affidavit satisfying it" that the person meets the conditions stated in the affidavit, "the county board shall appoint a time and place for hearing the matter, ..." The affidavit must show the affiant is the owner of real estate in the county which is shut out from all public roads, either by real estate belonging to others or by water. In addition, the affidavit must state that the affiant "is unable to purchase from any of . . . [the surrounding landowners] the right-of-way over or through the same to a public road or that it cannot be purchased except at an exorbitant price, ..." Finally, the affidavit must ask the county board to lay out a public road in accordance with section 39-1716, R. R. S. 1943.

Section 39-1715, R. R. S. 1943, provides for public notice of the hearing and requires that written notice be served on "all of the owners and occupants of the lands through which such road may pass."

Section 39-1716, R. R. S. 1943, states that the county board *shall* lay out the public road and appraise damages for the taking of property for the road if it finds that the required conditions exist.

Section 39-1719, R. R. S. 1943, is apparently the only appeal provision connected with these proceedings. It provides for appeal by the parties to the award of damages in the same manner as appeals

from appraisers' awards in eminent domain proceedings. There is no provision for appeal by the affiant if his petition for a road is denied.

In April 1977, the Singletons presented the board with an affidavit stating that they owned land which was isolated from all public roads by real estate belonging to other persons and by a waterway. They further stated they were unable to purchase a right-of-way from the adjacent landowners and petitioned the board to lay out a public road to their property. The board set a date for a public hearing.

At the hearing, Mr. Singleton testified his property was isolated from public roads by a lake on one side and by real estate belonging to two other owners on the other side. He stated he had been unable to purchase a right-of-way from either property owner and described occasions when he had attempted to do so.

Both adjoining property owners were present at the hearing. One did not testify at the hearing and later stated during the mandamus proceedings that there were no circumstances under which he would sell a right-of-way to Singleton. The other property owner, Mr. Tomich, testified at the hearing that Singleton had had informal access through his land for several years "for grazing and agriculture." Tomich did not state that he would be willing to sell a right-of-way to Singleton or that he would permit access for anything other than agricultural uses.

In June 1977, the board voted to deny the Singletons' petition because Mr. Singleton had not attempted to purchase a right-of-way from other property owners before filing his affidavit. This mandamus action ensued.

After a full hearing on the merits, which hearing included testimony from each of the county commissioners as to the basis for his vote to deny the Singleton petition, the court concluded the conditions described in the Singleton affidavit had "existed at all times pertinent to this action." The court also

concluded the board's duties under the statutes were ministerial in nature, but that even if its duties were deemed judicial, the denial of the Singleton petition, "on the evidence presented in this case, would be so arbitrary and capricious as to amount to the exercise of no discretion at all." The court then ordered that the peremptory writ of mandamus issue.

The first issue to be determined on this appeal is the nature of the duties imposed on the board by sections 39-1713 through 39-1719, R. R. S. 1943. If the duties are ministerial in nature, mandamus is available to enforce performance. State ex rel. Agricultural Extension Service v. Miller, 182 Neb. 285, 154 N. W. 2d 469. If the duties are quasi-judicial or discretionary, mandamus is generally not available as a remedy. § 25-2156, R. R. S. 1943; State ex rel. Goossen v. Board of Supervisors, 198 Neb. 9, 251 N. W. 2d 655.

The general rule is that an act is ministerial if there is absolute duty to perform in a specified manner upon the existence of certain facts. State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341. Section 39-1716, R. R. S. 1943, does impose such an absolute duty if the conditions specified in section 39-1713, R. R. S. 1943, exist. Thus the duty to lay out a road must be considered ministerial unless the process of ascertaining that the conditions of section 39-1713, R. R. S. 1943, have been met requires the board to act in a quasi-judicial manner: "When the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial." State ex rel. School Dist. v. Ellis, 163 Neb. 86, 77 N. W. 2d 809. However, an act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain state of facts exists under which it is his duty to perform the act. Little v. Board of

County Commissioners, 179 Neb. 655, 140 N. W. 2d 1.

Sections 39-1713 and 39-1716, R. R. S. 1943, require only one factual determination of any complexity, i.e., the county board must determine that the affiant is unable to purchase a right-of-way to a public road or can purchase one only for an exorbitant price. Previously, this court has held duties requiring the ascertainment of residency to be ministerial. State ex rel. Rittenhouse v. Newman, 189 Neb. 657, 204 N. W. 2d 372; Little v. Board of County Commissioners, *supra*. Ascertaining ability to purchase a right-of-way is no more complex than ascertaining residency and cannot operate to transform the duties imposed by these statutes into quasi-judicial ones.

The fact that the board is required to hold a hearing also does not transform the proceedings into quasi-judicial ones. Ruwe v. School District, 120 Neb. 668, 234 N. W. 789, which is cited for this proposition, involved a far different statute which permitted school boards to make discretionary changes in school district boundaries under certain conditions. The issue in that case was whether a hearing was required, and we held it was since financial burdens were being imposed on property owners by the exercise of judicial power. We have not held that a proceeding is quasi-judicial whenever a hearing is required by statute and decline to do so now.

The board correctly urges that laying out the road and appraising damages are quasi-judicial acts. However, it does not necessarily follow that these acts are not severable from the initial duty to accept or deny the petition for a road, particularly where the statute itself treats these acts as severable in its appeal provisions. § 39-1719, R. R. S. 1943.

We hold that the duty of the board of county commissioners under section 39-1716, R. R. S. 1943, to lay out a public road upon a showing that the statutory conditions of section 39-1713, R. R. S. 1943, exist is ministerial.

In addition, to warrant the issuance of a writ of mandamus to compel official action: (1) The duty must be imposed upon the official by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. State ex rel. Goetz v. Lundak, 199 Neb. 585, 260 N. W. 2d 589. These conditions have been met.

Finally, mandamus is available only where there is no adequate remedy at law. § 25-2157, R. R. S. 1943. We have already noted that the statutes do not provide for direct appeal from the decision to deny an affidavit. As the duty is ministerial, petition in error proceedings are also not available. Little v. Board of County Commissioners, *supra*. Clearly, there is no other remedy at law, and the board's assignment of error on this point is without merit. Mandamus is available in this case.

All of the other assignments of error relate to the sufficiency of the evidence to support the judgment of the trial court. In a mandamus action, findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong. State ex rel. Frasier v. Whaley, 194 Neb. 703, 234 N. W. 2d 909. We have examined the record and cannot conclude that the findings of the trial court are clearly wrong in any respect.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LANNY D. FRENCH, APPELLANT.

279 N. W. 2d 116

Filed May 15, 1979. No. 42244.

1. **Criminal Law: Constitutional Law: Searches and Seizures.** When the defendant is not in custody and the State attempts to justify a search on the basis of defendant's consent, the Fourth and Fourteenth Amendments to the Constitution of the United States re-

quire that the State demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied.

2. **Criminal Law: Searches and Seizures.** Whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding it.
3. **Criminal Law: Burden of Proof: Searches and Seizures.** The State has the burden of establishing the legal sufficiency of a consent to a search and seizure.
4. **Criminal Law: Custody: Burden of Proof.** Whether a person whose consent is sought was in the custody of the police at the time the consent was given is an important consideration in determining voluntariness, duress, or coercion, and custody makes the prosecution's burden heavier.
5. **Criminal Law: Searches and Seizures.** While a consent to search is not terminated merely by a worsening of the consenting party's position, a consent may be withdrawn or limited at any time prior to the completion of the search.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Judgment and sentence vacated. Cause remanded to District Court.

Hal W. Anderson of Berry, Anderson & Creager, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was convicted on a charge of possession of marijuana with intent to deliver and sentenced to imprisonment for 1 year. The defendant has appealed. The issue on appeal is whether evidence was obtained as the result of an illegal search and seizure and should have been suppressed.

At about 9 p.m., on September 28, 1977, Jefferson County deputy sheriffs Earhart and Anderson responded to a telephone report of a possible trespass at a vacant farmhouse located near Reynolds, Nebraska. The deputies arrived about dusk and stopped

their car at the gate to the farmhouse lane. When they stopped at the gate they heard a motor running, saw some lights on in the farmhouse, saw a fire in the area outside the front of the house, and noticed three or four people in the area. Deputy Earhart radioed their location to the sheriff's office and reported that the deputies would check out the trespass complaint.

As the deputies got out of their car they noticed that the lights went out in the farmhouse and people were moving around, and as the deputies started up the lane on foot they saw people running. The deputies, as they approached the farmhouse, called out and identified themselves as officers and announced that they wanted to talk to the people. As they approached the house the deputies noticed two pickup trucks and a motorcycle parked in front of the house. The deputies saw a pistol, a shotgun, and a radio scanner on the seat of one of the trucks. The deputies made a cursory search of the premises outside the house. Deputy Earhart then discovered the defendant under one of the trucks. The defendant was frisked and handcuffed and Deputy Earhart then took the defendant down the lane and put him in the police car, while Deputy Anderson remained at the house. Using his flashlight, Deputy Anderson looked through the windows of the house, saw sleeping bags, personal effects and clothes, and also saw a shotgun in the kitchen. The kitchen door was locked with a padlock on the outside. Thinking that someone might still be in the house, Deputy Anderson kicked or knocked the kitchen door in, went into the kitchen, picked up the shotgun, and carried it outside.

Meanwhile, Deputy Earhart was taking the defendant to the police car. They disagree as to what they heard on the way to the car. The defendant testified he heard Deputy Anderson kick in the door and the splintering of wood, and recognized the

sounds of the opening of the kitchen door, and assumed that Earhart heard them also. Deputy Earhart did not remember hearing any noises. On the way to the car the defendant told Earhart he had some identification and a lease to the property in his wallet. When they reached the police car they got in the car, Deputy Earhart examined the lease and identification, and determined that the lease was made out to the defendant.

At this point again the evidence is in conflict. Earhart did not mention any purpose for entering the house, nor tell the defendant he had a right to refuse. Earhart testified he asked defendant if the officers could have permission to go into the house and that the defendant said: "Yes." The defendant testified he assumed that Earhart had also heard Anderson break into the house and in response to the request for permission to go into the house the defendant said: "Well, yeah. It wouldn't matter anyway." Earhart confirmed that response, but said it was made in response to a second request.

Earhart then drove the car up to the house and they saw that Deputy Anderson had already broken the door in. Deputy Earhart walked from the car over to the house and talked to Anderson. Earhart then returned to the car and said to the defendant: "You would have given us consent anyway, wouldn't you?" The defendant answered: "No." The officers nevertheless went into the house and conducted a room by room search looking for trespassers. They gave no other reason to search the house. They found no trespassers in the house but they discovered a quantity of marijuana. The officers confiscated approximately 1,000 pounds of processed and unprocessed marijuana which was used as evidence in this case.

Motion to suppress was overruled and jury trial was waived. Upon trial to the District Court the evidence was received over objection, and the defend-

ant was found guilty and sentenced to imprisonment for 1 year. The issue on appeal is whether or not the physical evidence seized at the farmhouse was the result of an illegal search and seizure.

The defendant contends that he did not voluntarily consent to the search; that his words, which were interpreted as consent were not intended as such, but were the result of duress or coercion, express or implied; and that whatever consent might have been inferred by the officers was revoked before the search began. The State concedes the officers had no warrant to search the farmhouse, nor any probable cause or reason to suspect there was marijuana in the farmhouse at the time. The sole justification for the search in this case rests on the consent of the defendant.

In Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854, the United States Supreme Court held: "[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

Whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding it. State v. Van Ackeren, 194 Neb. 650, 235 N. W. 2d 210. The State has the burden of establishing the legal sufficiency of a consent to a search and seizure. State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85.

In the present case the evidence established that

Deputy Earhart pulled the defendant out into the open, frisked him, handcuffed him, led him 100 yards down the lane, and put him in the police car. During that walk the defendant heard Deputy Anderson break open the kitchen door. While the defendant was sitting in the police car handcuffed he was asked for permission to go into the house, although no purpose for such entry was suggested. The defendant responded: "Well, yeah. It won't make any difference anyway."

Whether a person whose consent is sought was in the custody of the police at the time the consent was given is an important consideration in determining voluntariness, duress, or coercion. "While some courts, particularly on the federal level, have deemed 'consent' by one in police custody as almost per se invalid, the prevailing view falls somewhat short of this, although there is general agreement that custody makes the prosecution's burden particularly heavy." 2 LaFave, Search and Seizure, § 8.2, at p. 643.

Even if Deputy Earhart might have believed, at that point, that the defendant had given voluntary, knowing, and intelligent consent to enter the house, Earhart discovered very shortly thereafter that Deputy Anderson had already broken into the house without any authorization whatever. Deputy Earhart was sufficiently uncertain about the consent situation, in view of the circumstances, that he returned to the defendant and said: "You would have given us consent anyway, wouldn't you?" The defendant answered: "No." Earhart confirmed that answer on cross-examination.

Under the circumstances here the defendant's unequivocal "no" could only be reasonably interpreted as revoking whatever consent might have previously been given, if any. The better view is that while a consent to search is not terminated merely by a worsening of the consenting party's position, a con-

sent may be withdrawn or limited at any time prior to the completion of the search. See, 2 LaFave, Search and Seizure, § 8.1, at p. 634. At the time the defendant responded "no" to the question as to whether he would have given any consent if Deputy Anderson had not already broken into the house, the officers had not yet begun the search of the house. It was neither reasonable nor justifiable for them to conclude that they had the voluntary and intelligent consent of the defendant to make a search. The search was unreasonable. The motion to suppress should have been granted.

The judgment and sentence of the District Court are vacated and the cause remanded to the District Court.

JUDGMENT AND SENTENCE VACATED.
CAUSE REMANDED TO DISTRICT COURT.

STATE OF NEBRASKA EX REL. GARY B. PARTIN, APPELLANT AND CROSS-APPELLEE, V. LESTER L. JENSEN, SHERIFF OF DAWES COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

279 N. W. 2d 120

Filed May 15, 1979. No. 42278.

1. **Criminal Law: Extradition: States.** In an extradition proceeding where the Governor of the asylum state has granted extradition, a court of the asylum state 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.
2. **Criminal Law: Bail.** Courts have the inherent power to consider the propriety of bail under special circumstances in the light of modern concepts of fundamental fairness, even though there is no statute specifically authorizing bail.
3. **Criminal Law: Extradition: States: Habeas Corpus.** In a habeas corpus proceeding challenging extradition, in the absence

of specific statutory authorization, the trial court or the District Court has power, in its discretion, to grant bail during the pendency of the proceedings, including an appeal to this court, in the same cases and under the same terms and conditions authorized by statute in preliminary extradition proceedings, or in other habeas corpus proceedings.

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

Charles A. Fisher and David E. Veath, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a habeas corpus action challenging the extradition of the petitioner, Gary B. Partin, to the State of California on two counts of child abduction. The county court of Dawes County quashed the writ of habeas corpus and the District Court affirmed the judgment. The petitioner has appealed, and the respondent has cross-appealed as to the granting of bail on appeal.

Petitioner, Gary B. Partin, and Grace Marie Partin were divorced on July 29, 1975, in Garfield County, Colorado. The divorce decree granted custody of the two minor children of the parties to the wife, with visitation rights to the husband. In April 1976, petitioner became a resident of Chadron, Dawes County, Nebraska, and thereafter Grace Marie Partin became a resident of California. The Colorado court amended the divorce decree on November 10, 1976, and granted petitioner the right to have the children visit at his residence for 1 month each year when the children were not in school.

Pursuant to the divorce decree, and with the consent of his former wife, petitioner went to California

and on June 26, 1977, took the children from California to his residence in Nebraska for the 1-month visitation. He did not return the children to California.

In September 1977, a felony complaint was filed in California, and on November 14, 1977, an amended felony complaint was filed, charging petitioner with two counts of violation of section 278.5, California Penal Code. Section 278.5 provides: "Every person who in violation of a custody decree takes, retains after the expiration of a visitation period, or conceals the child from his legal custodian, and every person who has custody of a child pursuant to an order, judgment or decree of any court which grants another person rights to custody or visitation of such child, and who detains or conceals such child with the intent to deprive the other person of such right to custody or visitation shall be punished by imprisonment in the state prison for a period of not more than one year and one day or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both."

The amended complaint charged that the petitioner, on or about September 6, 1977, did "take, retain after the expiration of a visitation period and conceal a child, to wit: Jonathan Partin, from his legal custodian, in violation of a custody decree." Count II set out a charge of the same offense with respect to Chasen Partin. An affidavit detailing the facts upon which the complaint was issued was attached. An application for requisition for the arrest and extradition of petitioner was filed and the Governor of California issued a requisition for arrest and extradition on December 31, 1977. On January 17, 1978, the Governor of Nebraska issued a warrant for the arrest and extradition of the petitioner. On March 1, 1978, petitioner was taken into custody pursuant to the warrant and on the same date filed

his petition for writ of habeas corpus.

At the hearing on that date the petitioner testified that he was not present in the State of California on September 6, 1977; that he was divorced pursuant to a Colorado divorce decree; and that there was no complaint against him for any crime in Colorado. He also alleged and testified he was not a fugitive from justice, had been a resident of Dawes County, Nebraska, for almost 2 years, and the complaint was so vague and uncertain that it did not charge a crime. Authenticated documents were introduced in evidence to establish compliance with requirements for extradition under the Uniform Criminal Extradition Act.

On March 15, 1978, the county court of Dawes County held that petitioner was not entitled to relief and quashed the writ of habeas corpus. Petitioner appealed to the District Court and was released on his own recognizance. On June 28, 1978, the District Court for Dawes County affirmed the judgment of the county court quashing the writ of habeas corpus and admitted petitioner to bail pending appeal to this court. The petitioner has appealed, and the respondent has cross-appealed as to the granting of bail on appeal.

Petitioner's principal contention is that the California legislation under which he was charged was not effective until July 1, 1977. He contends that because he took the children from California on June 26, 1977, and was not in the State of California on September 6, 1977, he committed no criminal act within the state and therefore cannot be a fugitive from justice nor subject to extradition. In effect his argument is that section 278.5 of the California Penal Code, as applied to him, would be ex post facto.

The fatal defect in petitioner's argument is that section 278.5 of the California Penal Code became effective on January 1, 1977, rather than on July 1, 1977. The particular section under which petitioner

was charged was a part of Chapter 1399, Cal. Stats. of 1976, designated section 11 of Chapter 4, which was approved by the Governor on September 30, 1976, and became operative on January 1, 1977, although other portions of Chapter 1399 did not become operative until July 1, 1977. There was no ex post facto problem here.

In Michigan v. Doran, 439 U. S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521, just released, the Supreme Court of the United States 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." See, also, West v. Janing, 202 Neb. 141, 274 N. W. 2d 161. In the case now before us the requisite facts are established by the record and the writ of habeas corpus was properly quashed.

On cross-appeal, it is contended that the District Court had no power to grant bail to the petitioner during the pendency of the appeal in this habeas corpus proceeding. The respondent and cross-appellant relies primarily upon In re Application of Campbell, 147 Neb. 382, 23 N. W. 2d 698. That case was decided in 1946 and held that a fugitive from justice who is in custody by virtue of a rendition warrant issued by the Governor in an extradition proceeding, and has been denied release in a habeas corpus proceeding, may not be admitted to bail pending appeal. The Campbell case affirmed a denial of bail by the District Court and was in accord with the then general rule that in the absence of a statute authorizing bail, bail may not be granted for a prisoner held under a warrant of rendition in an extradition proceeding. See, 35 C. J. S., Extradition, § 19, p. 445; Annotation, 63 A. L. R. 1460, at p.

1502; Annotation, 143 A. L. R. 1354, at p. 1361.

At the time of the Campbell case some states had treated the granting of bail pending appeal in habeas corpus arising out of an extradition proceeding as being authorized under constitutional and statutory provisions dealing with bail generally. See Winnick v. Reilly, 100 Conn. 291, 123 A. 440. The United States Supreme Court in Wright v. Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. Ed. 948, stated: "We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief." The Campbell case considered that language dictum and affirmed the denial of bail on the ground the government would be seriously embarrassed if the accused failed to appear as agreed and the government could not meet its obligation to surrender the accused to the extraditing state.

Federal courts have consistently followed the doctrine of Wright v. Henkel, *supra*, that courts have the inherent power to consider the propriety of bail under special circumstances in the light of modern concepts of fundamental fairness, even though there is no statute specifically authorizing bail. Even in a recent line of international extradition decisions, bail has generally been granted during the completion of pending proceedings despite the lack of any specific statute. See West v. Janing, 449 F. Supp. 548, at p. 552, and cases there cited.

Some states have held that since habeas corpus is a civil proceeding and general statutes provide for a supersedeas bond on appeal in civil cases, a petitioner charged with a bailable offense in an extradition proceeding may be admitted to bail during the pendency of the habeas corpus proceeding at the dis-

cretion of the court. See Ruther v. Sweeney, 137 N. E. 2d 292 (Ohio App.).

Section 29-2823, R. R. S. 1943, provides in part: "The proceedings upon any writ of habeas corpus shall be recorded by the clerk and judges respectively, and may be reviewed as provided by law for appeal in civil cases."

Section 25-1916, R. R. S. 1943, provides for supersedeas bond in civil cases and specifies the terms and conditions of such supersedeas bonds in various kinds of judgments, decrees, or final orders. This court has held that the trial court may, in its discretion, grant supersedeas in cases not specified in section 25-1916, R. R. S. 1943, in such an amount and on such conditions as the court determines necessary, and that an absolute right to supersedeas does not exist except when it is allowable under the express provisions of section 25-1916, R. R. S. 1943. Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839; Carson v. Jansen, 65 Neb. 423, 91 N. W. 398.

Nebraska statutes authorize the court to grant bail to an accused in an extradition proceeding prior to the issuance of the governor's warrant. §§ 29-744 and 29-745, R. R. S. 1943. Statutes also authorize admission to bail in a habeas corpus proceeding on appeal by the State. § 29-2823, R. R. S. 1943. Those statutes do not specifically authorize a petitioner who has been denied release in a habeas corpus proceeding challenging extradition to be admitted to bail pending appeal.

Modern notions of due process and fundamental fairness demand that a citizen should not arbitrarily be denied bail solely because there is no statute specifically authorizing the granting of bail. Obviously there is no absolute right to bail in an extradition case. The inherent power of a court may be exercised as to bail although it is not specifically vested by statute. An automatic arbitrary denial of bail to an accused who attempts to appeal an order re-

manding him to custody for delivery to an extraditing state effectively destroys the right of appeal granted to him by statute. To place extradition between states of the United States on the same plane as extradition between international governments where "serious embarrassment" to a government outweighs an individual's loss of liberty and a right of appeal is neither just nor reasonable.

In a habeas corpus proceeding challenging extradition, in the absence of specific statutory authorization, the trial court or the District Court has the power, in its discretion, to grant bail during the pendency of the proceedings, including an appeal to this court, in the same cases and under the same terms and conditions authorized by statute in preliminary extradition proceedings or in other habeas corpus proceedings. To the extent In re Application of Campbell, 147 Neb. 382, 23 N. W. 2d 698, is in conflict, it is overruled.

The judgment of the District Court was correct in all respects and is affirmed.

AFFIRMED.

WILLIAM ROELFS ET AL., APPELLEES, V. LOREN SPECHT ET AL., APPELLANTS.

279 N. W. 2d 124

Filed May 15, 1979. No. 42290.

1. **Schools and School Districts: Statutes: Burden of Proof.** The petitioners for the transfer of land from one school district to another school district have the burden of proving by a preponderance of the evidence each of the statutory requirements for such transfer provided in section 79-403 (1), R. R. S. 1943.
2. **Schools and School Districts.** Where petitioner's residence is closer to the schoolhouse in their own school district than that of an adjoining district, and both districts maintain a bus route, the distance to the school bus route of the district to which transfer is sought must be ½ mile closer to petitioner's residence for their land to be transferred.

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

James B. Gessford of Perry, Perry, Witthoff & Guthery, for appellants.

Robert F. Lammers, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and RONIN and HAMILTON, District Judges.

RONIN, District Judge.

This is an action brought by appellees to transfer real estate owned by them from School District No. 103, a Class II district of Jefferson County, Nebraska, hereinafter referred to as the Diller District, to School District No. 8, a Class III district of Jefferson County, Nebraska, hereinafter referred to as the Fairbury District. Appellees filed their original freeholders' petition on February 9, 1978, under the provisions of section 79-403 (1), R. R. S. 1943. Appellees also own 40 acres of real estate which was already in the Fairbury District and adjoined the real estate which they sought to be transferred.

A hearing was held on February 27, 1978, on appellees' original petition before the freeholders board, which consisted of the county superintendent of schools, county clerk, and county treasurer of Jefferson County. The board granted the petition and directed that the subject real estate of appellees be transferred to the Fairbury District.

The appellants are taxpayers of the Diller District and appealed the action of the freeholders board to the District Court for Jefferson County. On July 27, 1978, after trial, the District Court affirmed the action of the board. We affirm the judgment of the District Court.

Section 79-403 (1), R. R. S. 1943, states the necessary requirements which must be met before a freeholder may be allowed to transfer real property

from one school district to another. The record in this case is not disputed that the appellees have fully complied with the following statutory requirements: (1) That appellees are the owners of the subject real estate in the Diller District which they seek to transfer to the Fairbury District; (2) that the Diller District adjoins the Fairbury District; and (3) that Lorie Roelfs is the 17-year-old daughter of the appellees, Harold and Norma Roelfs, and has resided with her parents on the subject real estate for more than 40 days prior to the filing of the petition.

In Klecan v. Schmal, 196 Neb. 100, 241 N. W. 2d 529 (1976), our court held that, in addition to other requirements, the statutory language of section 79-403 (1) (d), R. R. S. 1943, that the board may attach land to an adjoining district "whenever they deem it just and proper and for the best interest of the * * * petitioners so to do," meant that the transfer would be in the best educative interest of the student for whom the benefit of transferring was being considered. The parties have stipulated in the record in this case that it was in the best educative interest for Lorie to attend high school in the Fairbury District.

The only issue in dispute, which was tried in the District Court, is whether the school bus route of the Fairbury District is at least ½ mile closer to the lane to Lorie Roelfs' home than the Diller District school bus route as required under section 79-403 (1) (d), R. R. S. 1943, which, as relative to this issue, provides that the petitioners must establish they are either: "* * * each more than two miles from the schoolhouse in their own district, *and at least one half mile nearer to the schoolhouse or a school bus route of the adjoining district, which distance shall be measured by the shortest route possible upon section lines or traveled roads open to the public* or that the route to the schoolhouse in the adjoining district is more practicable and, * * * the distance to the schoolhouse in the adjoining district does not exceed

the distance to the schoolhouse in their own district by more than six miles * * *." (Emphasis supplied.)

In Rebman v. School Dist. No. 1, 178 Neb. 313, 133 N. W. 2d 384 (1965), our court held that the petitioners had the burden to prove this essential distance requirement by the preponderance of the evidence, even though all the other requirements of section 79-403, (1), R. R. S. 1943, had been met.

The undisputed evidence in this case is that the petitioners reside 6 miles from the Diller school and 9 miles from the Fairbury school. The evidence is also undisputed that the Fairbury school bus route has, for several years, run directly by the lane to Lorie Roelfs' home, and that she has ridden the Fairbury school bus during her junior high school year of 1977-1978. The evidence discloses the Diller school bus route went by the same Roelfs' lane until Lorie stopped riding that bus during the latter part of her sophomore school year. While the evidence is conflicting, the weight of the evidence is that some time after Lorie ceased to ride the Diller bus, its regular route was altered to stop 140 feet over ½ mile south of the center of the Roelfs' lane, in accordance with the testimony of Layton Hein, a licensed surveyor, who measured the distance. There was evidence that on some occasions the Diller school bus would go past the Roelfs' lane, but the preponderance of the evidence is that its regular route was just over ½ mile from the Roelfs' lane. The court finds from the evidence that throughout the school year of 1977-1978, and at the time of the filing of the original petition, the appellees were more than ½ mile closer to the school bus route of the Fairbury District than the school bus route of the Diller District, within the meaning of section 79-403 (1) (d), R. R. S. 1943, and that the appellees have complied with the only disputed statutory requirement.

The record in this case supports the finding of the District Court that the appellees maintained their burden of proof and met the requirements of section 79-403 (1), R. R. S. 1943, and that the action of the freeholders board transferring the subject real estate from the Diller District to the Fairbury District should be affirmed.

AFFIRMED.

FIRST ASSEMBLY OF GOD CHURCH, A NEBRASKA CORPORATION, APPELLEE, V. THE CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

279 N. W. 2d 126

Filed May 22, 1979. No. 41960.

1. **Constitutional Law: Municipal Corporations: Notice.** There is no constitutional requirement that property owners be given notice of the creation of an improvement district although creation of the district may foreclose any opportunity of the property owners to protest the making of the improvement.
2. **Constitutional Law: Municipal Corporations: Notice: Assessments.** The constitutional requirement is that there be notice to the property owners of a special assessment and an opportunity to contest its validity and amount before the assessment becomes a charge on the property.
3. **Statutes: Municipal Corporations: Waters: Notice.** Section 16-667, R. R. S. 1943, as it existed in 1975, authorized a city of the first class to create a water district to extend water service within the city limits without giving notice of the creation of the district to property owners affected.
4. **Case Overruled.** Matzke v. City of Seward, 193 Neb. 211, 226 N. W. 2d 340, overruled in part.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded.

Loren G. Olsson, for appellant.

Allen L. Graves of Cline, Williams, Wright, Johnson & Oldfather, for the League of Nebraska Municipalities, amicus curiae.

Robert M. Brenner, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant, City of Scottsbluff, Nebraska, appeals from a summary judgment vacating and setting aside a special assessment levied against the property of the plaintiff, First Assembly of God Church, for the construction of water mains in water main extension district No. 58.

The defendant created water district No. 58 by ordinance No. 2118 on June 16, 1975. After the work had been completed, the mayor and city council, sitting as a board of equalization, fixed and determined the special benefits to the property within the district. On January 26, 1976, the defendant levied special assessments against the property in water main extension district No. 58, including the property owned by the plaintiff, by ordinance No. 2164.

This action was commenced on February 27, 1976. The petition alleged that within 10 days from the levy of the special assessment the plaintiff filed a notice of appeal and a cost bond with the city clerk of the defendant. The petition prayed that the special assessment be vacated or modified or that the matter be remanded to the board of equalization for rehearing; that the title to the plaintiff's property be quieted and confirmed in the plaintiff or against the city council of the defendant; that the city council of the defendant be enjoined from attempting to enforce the assessment against the property of the plaintiff; and for such other further and different relief as the court might deem just and equitable.

The petition alleged that ordinance No. 2164 was null and void because of (1) insufficient notice; (2) insufficient action and approval of the public; (3) insufficient enactment of the ordinances; (4) insuffi-

cient compliance with the public meeting laws; and (5) "Insufficient of the Ordinance for water main extension, District Number 58."

The defendant's answer was substantially a general denial.

The plaintiff moved for a partial summary judgment "on the validity of the Ordinance No. 2164" on one or more of the following grounds: (a) No proper notice was given as required by section 18-401 et seq., R. R. S. 1943; (b) no proper notice was given, as required by statute, for ordinance No. 2164 or 2118; (c) no proper passage of ordinance No. 2164 or ordinance No. 2118 or notices in compliance with sections 19-2402 to 19-2407, R. R. S. 1943; (d) no proper passage of ordinance No. 2118 or notices of ordinance No. 2118 creating water main district No. 58; and (e) no proper enactment or levy of special assessments under water main district No. 58.

The trial court found there was no material issue of fact as to whether proper notice had been given by the defendant, that the plaintiff was entitled to judgment as a matter of law, and that the special assessment levied against the property of the plaintiff should be vacated and set aside.

There are no issues of fact and the appeal presents only questions of law. The principal issue is whether the defendant was required to give any notice to the property owners in the district at the time ordinance No. 2118 creating water district No. 58 was enacted. The plaintiff attempts to distinguish between a "Water District" and a "Water Main Extension District" and contends that the defendant was required to proceed under either section 18-401 or section 19-2402, R. R. S. 1943. The defendant contends that it proceeded under section 16-667, R. R. S. 1943, as it existed on June 16, 1975, and there was no requirement that notice of the creation of the district be given to the property owners in the district.

Prior to the 1977 amendments, there was no requirement for notice to property owners upon the creation of a water district under that section. Section 16-667, as it existed in 1975 and 1976, authorized a city of the first class, such as the defendant, to "lay off the city into suitable districts for the purpose of establishing therein a system of sewerage and drainage and water service." Section 16-668 authorized the city council to order water mains laid and assess the cost to abutting property.

There is no constitutional requirement that property owners be given notice of the creation of an improvement district although creation of the district may foreclose any opportunity of the property owners to protest the making of the improvement. Jones v. Village of Farnam, 174 Neb. 704, 119 N. W. 2d 157; Elliott v. City of Auburn, 172 Neb. 1, 108 N. W. 2d 328; Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67; Chicago, etc. R. R. v. Risty, 276 U. S. 567, 48 S. Ct. 396, 72 L. Ed. 703; 70 Am. Jur. 2d, Special or Local Assessments, § 147, p. 956. The constitutional requirement is that there be notice to the property owners of a special assessment and an opportunity to contest its validity and amount before the assessment becomes a charge on the property.

Section 18-401, R. R. S. 1943, first enacted in 1921, authorizes cities of all classes to create water main districts and cause extensions or enlargements of water mains to be made. Section 18-409, R. R. S. 1943, provides that a city may, by resolution of the city council, "*elect and determine to proceed* under the provisions of sections 18-401 to 18-411, in the matter of ordering and making and causing to be made extensions or enlargements of water or gas mains, * * * *but are not required to do so.*" (Emphasis supplied.)

Section 19-2402, R. R. S. 1943, authorizes cities of the first or second class to extend water service by creating water extension districts.

We think the proper construction of these statutes is that they provide alternative methods for a city of the first class to construct and finance improvements to the water system. The language of section 18-401, R. R. S. 1943, clearly provides that it is optional whether a city shall proceed under sections 18-401 to 18-411 in making extensions of water mains. Prior to 1921 there was no method for a city of the first class to extend its water service except under section 16-667 and its antecedents; and prior to 1961, there was no method other than under section 16-667 or section 18-401.

A similar situation exists in regard to the extension of sewer service. See State, ex rel. City of Columbus, v. Price, 127 Neb. 132, 254 N. W. 889. See, also, Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, 163 Neb. 687, 81 N. W. 2d 159, relating to paving districts in cities of the second class and villages.

In Matzke v. City of Seward, 193 Neb. 211, 226 N. W. 2d 340, we held that the city should be enjoined from levying special assessments in four water extension districts created under section 19-2402, R. R. S. 1943. The opinion stated that a water extension district, as described in section 19-2402, was an area of land or contiguous tracts of land located apart and outside any area served and benefited by an existing municipal water service system, wherein water extension mains are to be constructed and municipal water service extended. The districts involved did not meet that test because land in each district was either partly served or wholly served by the water system of the city at the time the districts were created.

The opinion in the Matzke case further stated: "Although not argued by the parties, there is the question of the legality of the city's acts under any statutory authority. We find none. The work done in all four districts was in the nature of extending

and enlarging the existing water system, which would lend itself to applying sections 18-401 to 18-411, R. R. S. 1943; however, the city did not give the notice required in section 18-403, R. R. S. 1943."

We believe the statement in the Matzke case that an extension or enlargement of an existing water system can only be accomplished under the authority granted in sections 18-401 to 18-411, R. R. S. 1943, was in error. After the initial construction of a water system has been completed, any addition to the system is an extension of water service. As previously mentioned, the only authority prior to 1921 for the extension of water service in cities of the first class was under section 16-667 and its antecedents. In 1913, when the Legislature amended what is now section 16-667 to authorize the creation of districts for the construction of water mains, the title to the act stated in part: "AN ACT * * * providing for the extension of water mains * * *." Laws 1913, c. 161, § 1, p. 500.

The Matzke case involved a somewhat different factual situation than is involved in this case. In the Matzke case the improvements included two new wells, an elevated storage tank, the replacement of some mains, and the addition of new water mains with larger capacity. The record in this case shows that water district No. 58 involved no replacement or enlargement of existing mains, but new construction extending water service to an area not previously served.

A part of the new construction in water district No. 58 proceeds along the south side of Block 1 of Scotts Bluff County College Tract which had an existing 8-inch main running along its west boundary. The extension along the south boundary of the college tract was necessary to connect the existing system with the construction in the new areas which had not had service. The plaintiff owns no part of the college tract and there is no issue in this case

concerning the amount of the assessment or benefit to any particular tract.

To the extent that the opinion in Matzke v. City of Seward, *supra*, may imply that a city of the first class had no authority to create a water extension district under section 16-667, R. R. S. 1943, and is in conflict with our decision in this case, it is overruled.

Ordinance No. 2118, which created water district No. 58, was adopted by the city council of the defendant on June 16, 1975. A regular meeting of the council had been held on June 9, 1975. The agenda for that meeting included the consideration of a request to create a water district in Indian Hills subdivision. The meeting was adjourned to June 16, 1975, and the agenda for that date included an ordinance creating a water district in Indian Hills. The plaintiff's property is Block 1 in Indian Hills subdivision. We think the record is sufficient to show the defendant satisfied the agenda requirements of the open meeting law.

Ordinance No. 2164, which levied the special assessment, was adopted on January 26, 1976. The meeting of the board of equalization was held on January 12, 1976. Notice of the meeting was published on December 19, 1975. The plaintiff appeared by counsel and participated in the hearing. The council sitting as a board of equalization took the matter of the assessments under advisement until the next regular meeting of the council on January 26, 1976, at which meeting ordinance No. 2164 was adopted. The ordinance was published on February 4, 1976. The record shows substantial compliance with all requirements of the open meeting law with respect to ordinance No. 2164.

The plaintiff contends that the titles to the ordinances were defective because ordinance No. 2118 referred to "Water District No. 58" and ordinance No. 2164 referred to "Water Main Extension District No. 58." We think the discrepancy in the title was of

no importance. As previously noted, every addition to the original system constitutes an extension of service. There is nothing in the record to indicate anyone was misled or prejudiced by the variance in the description of the district and the variance was immaterial.

The judgment of the District Court finding that the special assessment levied by the defendant against the property of the plaintiff should be vacated and set aside is reversed and the cause remanded.

REVERSED AND REMANDED.

IRENE PALMA, APPELLANT, V. SHIRLEY ANN BARTA AND JOSEPH FRANK BARTA, JR., APPELLEES.

279 N. W. 2d 130

Filed May 22, 1979. No. 42058.

1. **Juries: Voir Dire.** There was no reversible error where a juror on voir dire examination inadvertently failed to answer a question put to him as to whether any claim for personal injuries had ever been made against him, where the juror voluntarily called attention to his omission to the trial judge and informed him that notwithstanding the omission he could render a fair and impartial judgment in the action.
2. **Juries: Evidence.** Where evidence improperly received during a trial is afterwards stricken by the judge and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured.
3. **Appeal and Error.** While a collection of individual errors, each of which standing alone is insufficient to constitute prejudicial error, may under certain circumstances be sufficient to warrant a granting of a new trial, the mere collection of errors in itself does not necessarily mandate this result, the test being whether under the totality of the circumstances prejudice has resulted.
4. **Verdicts: Evidence.** A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Daniel G. Dolan of Dolan, Dinsmore & Davis, for appellant.

J. Thomas Rowen of Miller & Rowen, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, BRODKEY, and HASTINGS, JJ., and WHITEHEAD, District Judge.

BRODKEY, J.

Plaintiff below, Irene Palma, appeals to this court the verdict of the jury and judgment rendered thereon awarding her the sum of $4,000 as damages for injuries she received on October 28, 1976, in an intersection collision between an automobile driven by her husband, Victor Palma, and an automobile driven by the defendant, Shirley Ann Barta, owned and maintained by her husband, Joseph Frank Barta, Jr. We affirm.

At the conclusion of the evidence, the trial court sustained a motion by plaintiff's counsel for a directed verdict on the issue of defendants' negligence; and submitted to the jury only the issue of the amount of damages. The court instructed the jury that the burden was upon the plaintiff to prove by a preponderance of the evidence: "1. That the plaintiff sustained personal injuries and other damages resulting from said personal injuries. 2. That the accident was the proximate cause, or a proximately contributing cause of such injuries and damages. 3. The nature, extent and amount of the damages thus sustained by the plaintiff." As previously stated, the jury returned a verdict for the plaintiff in the sum of $4,000.

In her brief on appeal, plaintiff alleges as grounds for a new trial: (1) That the court erred in failing to grant plaintiff's motion for mistrial based upon the fact that during the selection of the jury one of

the jurors, Stanley Blakito, failed to admit on voir dire that a claim had been made against him in a personal injury action; (2) that the court erred in overruling an objection by plaintiff's counsel, and in denying plaintiff's motion for mistrial made subsequent thereto, on the basis of evidence elicited by defendants' counsel concerning plaintiff's gross-net income differences; (3) that the court erred in overruling an objection by plaintiff's counsel, and in denying the motion for mistrial made subsequent thereto, on the basis of introduction into evidence of plaintiff's income tax records, which reflected her gross earnings including sick pay benefits, in violation of the "collateral source" rule; (4) that the court erred in failing to convey to the jury supplemental instruction No. 1 in which the court informed the jury that it had stricken from the record and withdrawn from evidence the aforementioned income records, and directed the jury that they need not concern themselves with those exhibits nor with the reasons for their withdrawal from evidence; (5) that the court erred in failing to grant plaintiff's motion for mistrial at the conclusion of final argument because of improper and prejudicial remarks made by defendants' counsel; and (6) that the court failed to grant a new trial on its own motion because of the numerous errors in the record. It should be noted that the plaintiff has not specifically assigned as error that the amount of damages awarded her by the jury was inadequate; although she argues that issue at great length in her brief, pointing out that the award of the jury was less than one-half of the amount of the special damages she allegedly proved at the trial.

We discuss first plaintiff's contention that the court should have excused the juror, Stanley Blakito, who subsequently became foreman of the jury, because of his failure to correctly answer the inquiry put to him during voir dire with reference to any

claims which may have been made agaist him in a personal injury action. It appears that the accident which the juror neglected to discuss had occurred some 20 years prior to the accident involved in the instant case, and that the juror had voluntarily advised the court of that fact before the commencement of the trial, when he recollected the incident. The court voluntarily informed counsel for both parties of that fact, stating: "Let the record show that prior to the beginning of the trial this morning I have advised counsel here in chambers that a juror, Stanley Blakito, approached me outside of the courtroom and advised me that as he was driving home last night he remembered an accident that he had in the 1950's that he had not brought up in response to voir dire examination yesterday; that he was driving an automobile for his employer, and that after the accident he learned that a lady in the other car was making a claim for personal injuries against both himself and his employer. He does not know whether the claim ripened into a law suit or not. He says that that is the last he has heard of it. He told me, in response to my asking him, that he could set the matter aside and pay no attention to it, as far as his ability to decide the issues of this case." At that time, the trial court offered to allow counsel for both sides to examine the juror further as to the matter in question, but that offer was refused by both counsel. In response to a question of the defendant as to whether the juror was actually a defendant in the previous court action, the court stated that Blakito told him he was involved in an accident and learned through his employer that a lady had made a claim for injuries, but he didn't know whether or not it had ripened into a lawsuit and that was the last he heard about it. Plaintiff argues, however, that to remove the juror in question would have required her to use one of her peremptory challenges. She did not do so. Under the facts revealed in the record, and par-

ticularly in view of the statement of the juror that he could render a fair and impartial judgment in the matter, and also because of the fact that the incident in question occurred at a point in time remote from the accident in the instant case, we conclude that no prejudice resulted to the plaintiff which would warrant the sustaining of a motion for mistrial.

Plaintiff's second and third assignments of error will be discussed together, as they both involve the admission of evidence during the trial, over objection of plaintiff's counsel, where the trial judge subsequently changed his mind, ordered the evidence striken from the record, and instructed the jury to disregard it. Plaintiff testified on direct examination with reference to loss of wages or income from Western Electric, her employer, which she claims resulted from the injuries she sustained in the accident. She testified that prior to the accident in question she was receiving $4.80 per hour plus "incentive payments" in a fluctuating amount. On cross-examination, counsel for the defendants inquired with reference to her general take-home pay during that period. Plaintiff's counsel interposed an objection based upon immateriality, irrelevancy, and incompetency, which objection was overruled; and the plaintiff was allowed to testify as to the amount of her gross and net pay. The court subsequently recognized its error and vacated its previous ruling regarding the admission of the testimony, and admonished the jury as follows: "Let me state for the record, ladies and gentlemen of the jury, that with regard to previous evidence concerning the plaintiff's wages and evidence that was admitted concerning the amount of her net earnings, or take home pay, so to speak, I previously overruled an objection made by the plaintiff to that evidence. I have reconsidered that ruling, and I am vacating that ruling, and I am sustaining the objection made; and therefore, must now strike from the record all

such evidence that was offered and received on that point. So that evidence is stricken from the record and, as I will later instruct you in writing, you must disregard that evidence that has been stricken." Furthermore, in its instructions to the jury, the court stated: "In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence. *You should not consider any evidence which has been stricken from the record*; you should not be influenced by statements of counsel not supported by evidence." (Emphasis supplied.) In Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635 (1951), we stated: "Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured." We conclude that plaintiff's claim of reversible error by the action of the court in the above matter is without merit.

Plaintiff's third assignment of error involves the admission by the court into evidence of exhibits 21, 22, and 23, which were the Federal and State of Nebraska income tax returns of the plaintiff covering the years 1977, 1976, and 1975, respectively. Plaintiff contends that since those returns include, in the total of the income received by her during the years in question, sick pay benefits paid to her by her employer, the introduction of those records violated the "collateral source rule" and resulted in prejudicial error to her. Plaintiff's counsel objected to the introduction of those exhibits on the general ground that they were immaterial, but subsequently changed the basis of the objection to include the collateral source rule. There is no clear evidence in the record that the exhibits were ever seen or inspected by the jury. The question of the admissibility of the income tax statements was argued at length by both

counsel, following which the trial court vacated its previous ruling and sustained the motion of the plaintiff to withdraw the exhibits from evidence, stating: "I agree with you, I sustained your motion, I'm going to have to give them a supplemental instruction. Mr. Rowen: You are going to give them another instruction in that regard? The Court: Just that I am withdrawing these three exhibits, just so they won't be wondering where they are at. Mr. Dolan: Are you going to instruct them to disregard those exhibits? The Court: I will dictate it right now. Supplemental Instruction No. 1: The Court has withdrawn from evidence Exhibits 21, 22 and 23; therefore, you need not concern yourselves with those exhibits, nor should you concern yourselves with the reasons for their withdrawal from evidence.

"Would you gentlemen be interested in waiving the reading of that supplemental instruction in open court? Mr. Dolan: Yes. Mr. Rowen: Yes, I am agreeable to that." The court's trial docket entry for Wednesday, February 8, 1978, also contains the following notation: "Before Exhibits #21, 22, and 23 are given to jury, supplemental Instruction No. 1 is submitted to jury; parties having waived reading of instruction to jury in open court." Also in the court's written order following argument of plaintiff's motion for a new trial, he states as follows: "In addition, however, the income tax returns referred to were never shown to the jury, the court having decided that the returns should not be admitted into evidence, and thereupon by supplemental instruction No. 1 given to the jury, withdrew those exhibits from their consideration. Again, the jury was instructed in written instruction No. 1 not to be influenced by statements of counsel not supported by evidence." The court, in its order, also found: "The withdrawal of the exhibits and the supplemental instruction to the jury adequately corrected any error in their admission."

In her fourth assignment of error, however, plaintiff contends that the court erred in failing to convey to the jury supplemental instruction No. 1, above referred to, which informed the jury that the court was withdrawing the income tax records from evidence and instructing the jury to disregard them. Plaintiff argues in her brief that it is very questionable whether the jury did receive supplemental instruction No. 1, and also that the jury probably did review the income tax returns. A subsequent hearing was held by the court to determine from the testimony of those involved whether supplemental instruction No. 1 was, in fact, ever actually delivered to the jury. A review of the testimony given at that hearing convinces us that the instruction in question was undoubtedly given them. The court administrator for the Fourth Judicial District testified that on the day in question he recalled a meeting in chambers between the judge and counsel with regard to exhibits 21, 22, and 23, the tax records, and that at that time the judge prepared a supplemental instruction, which was given to him by the court reporter. He took the instruction to the clerk's office, filed it, returned it for checking, and then gave it to the temporary bailiff, Kathy Severson; and that he watched the bailiff take it into the jury room pursuant to his instructions. He did not, however, see her physically hand it to the jury, but saw her go to the jury room and come back without it. The temporary bailiff, Kathy Severson, also testified that she received the supplemental instruction with directions to transmit it to the jury. She was asked: "Do you remember who you handed it to?" and she replied: "I went in and I just laid it on the table in there. I didn't hand it to anybody specifically, you know. I knocked on the door and I went in and I set it on the table, you know. I didn't hand it to anyone." She was then asked if she said anything when she did that, and replied: "I believe I said that this

instruction would explain the exhibits they did not have, or something that they were questioning. I don't recall my exact words. Something to that effect." Stanley Blakito, the foreman of the jury, was also called as a witness and testified as follows with reference to what transpired at that time: "Q. I want to ask you this: Do you recall, though, calling out and asking for the income tax returns, sending a note out? A. Calling out? Q. Sending a note out by way of the bailiff saying, 'Where are the income tax returns?' Do you recall that happening? A. Yes. I think, ya, come to think of that, I think we asked for the latest ones. There was some old ones from way back, and we asked for the new ones, the latest ones, and there wasn't. Q. Do you recall then after sending that note out that the bailiff then brought you back an instruction instructing you to disregard that? A. That's right. And then we referred * * * back to, the other stuff. We came out once into the courtroom and we were having instructions, and we went back in there, and as we sat in there we were going through the whole case, and then we came up, one thing, so we wrote a note and had it come out to see if we could get some clarification on that matter. Then we didn't get nothing back. We got a note back just to review the evidence that we had on our table. Q. What I'm talking about, initially, after you retired, right after the instructions were read to you, do you remember sending the note out asking for the tax returns, right after you retired? A. Well, to answer your question, I believe the note that went out was asking, like I stated, was for the latest years, which would have been probably '77 or '76. Q. Then do you remember after you sent that note out that the bailiff brought you back an instruction or a piece of paper or note or something telling you to disregard the tax returns? A. Yes. We were told just to go back and refer to our list of stuff that we had from the

Judge on our sheets. Q. You do recall that occurring? A. Yes." It seems clear from Mr. Blakito's testimony that during the deliberations of the jury, supplemental instruction No. 1, directing the jury to disregard the tax returns, was delivered to them. Plaintiff's fourth assignment of error is without merit.

Plaintiff's fifth assignment of error is that the court should have granted plaintiff's motion for mistrial at the conclusion of the final arguments because of improper and prejudicial remarks made by defendants' counsel. Plaintiff argues that defendants' counsel stated to the jury that the reason we are here is because we couldn't get the case "settled." Recollection of the incident by defendants' counsel was that his comments were "[W]e had a dispute which we cannot resolve," and he did not recall using the word "settle." The trial court stated his recollection of the incident as follows: "On the motion for mistrial, my recollection is that Mr. Rowen did state to the jury, 'We try to settle these cases,' or might have said, 'We tried to settle this case.' He did use the [word] 'settle' in my recollection. Objection was made promptly by plaintiff, and I stated to the jury, to the best of my recollection, that efforts to resolve issues — I deliberately avoided the use of the word 'settle,' I always do, as a matter of fact, telling the jury the case is 'settled.' 'Attempts to resolve issues are irrelevant to this trial and the objection is sustained,' I believe those are almost identically my words.

"The objection was timely made, the jury was told the objection was sustained, and I don't believe I told them to disregard the comment, but I don't believe with that objection made and the sustaining of the objection that there was any prejudicial error at that point. The motion is overruled." In view of the court's action in sustaining the objection at that time, we do not believe prejudicial error resulted.

Finally, plaintiff argues that although the individual errors allegedly committed by the trial court may not, standing alone, be sufficient to warrant a new trial, yet a collection of individual errors can accumulate to result in prejudice to the complaining party such that a new trial is proper. She cites in support of this proposition Faught v. Washam, 329 S. W. 2d 588 (Mo., 1959). While it is possible that some jurisdictions have adopted the rule advanced by plaintiff, we do not find that the State of Nebraska has ever done so, nor has our attention been directed to any Nebraska cases so holding. While it is possible that the proposed rule may, under certain circumstances, have a salutary effect, yet we do not see that the facts of the present case present such a situation. Although the plaintiff has alleged numerous assignments of error, we do not believe that the number of assignments alleged is controlling. We have not found merit in any of the assignments of error alleged to the extent, even considered collectively, they would warrant a new trial. We believe the record in this case amply sustains the conclusion that no prejudicial error resulted to the plaintiff.

Although not specifically assigned as error, we discuss one further matter, as it appears that in reality the substance of all of plaintiff's contentions and claims of error is in fact based upon her contention that the verdict of the jury in this case was inadequate. She points out that the damages awarded her in the amount of $4,000 is less than one-half of the amount of her claimed special damages; and therefore argues that she is entitled to a new trial because of that fact. She contends that her evidence established lost wages in the amount of $7,606 and medical expense of $1,506 or total special items of damage amounting to over $9,000. The record does not contain an itemized explanation by plaintiff as to how she computed her lost wages in the amount of

$7,600, but her counsel did admit he argued to the jury that plaintiff sustained lost wages in that amount as the result of the accident. In this connection, plaintiff contends defendants' counsel, in his final argument to the jury, made reference to the income tax records of the plaintiff and instructed the jury to "* * * look in there to see if you can find a loss of $7,600." However, since the tax records referred to were withdrawn from evidence by the court and the jury was instructed to disregard them, we conclude the error, if any, was not prejudicial.

Notwithstanding the above, we believe it is clear there is ample evidence in the record to justify the verdict of the jury in the amount of $4,000. The record is replete with evidence, including hospital records and medical records of plaintiff's employer, showing that plaintiff had experienced the same or similar medical problems for several years prior to the accident in question, and had an extensive history of prior medical problems, including chronic backaches, and pain in the upper neck and right arm. We, of course, do not know what motivated the jury to bring back a verdict in the amount they did, as their discussions and reasons inhere in the verdict itself and may not be inquired into. We note, however, the court did instruct the jury that one of the elements they must find, before the jury could assess damages in favor of the plaintiff, was that the defendant's negligence was the proximate cause of the damages to plaintiff. It is altogether possible, in view of the plaintiff's past history of medical problems, the jury concluded that not all of her personal injuries and medical expenses were the proximate result of the accident in question, and may have reduced the size of their verdict as the result thereof. Evidence of doctors in the record indicates the injury suffered by plaintiff, described as a cervical sprain, was a soft tissue injury, not unlike a sprained ankle; and there was no permanent dis-

ability involved. X-ray and myelogram films showed no evidence of any abnormality. The jury could have concluded that even if plaintiff did incur the medical expense and was absent from work for the length of time claimed, the loss was not reasonably necessary as the result of the injury sustained. The rule is well-established that triers of fact are not required to accept as absolute verity every statement of witnesses not contradicted by direct evidence, and the persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Magdaleno v. Nebraska Panhandle Community Action Agency, 195 Neb. 783, 241 N. W. 2d 114 (1976); K & R, Inc. v. Crete Storage Corp., 194 Neb. 138, 231 N. W. 2d 110 (1975). The rule is likewise well-established that a verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. Cover v. Platte Valley Public Power and Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133 (1962); Schweitz v. Robatham, 194 Neb. 668, 234 N. W. 2d 834 (1975). This court cannot say that the verdict was clearly against the weight of the evidence presented to it, nor that it indicated that the verdict resulted from passion, prejudice, or mistake.

Finding no reversible error in the record, the verdict of the jury and the judgment of the trial court must be affirmed.

AFFIRMED.

MARY A. BATEMAN, APPELLEE AND CROSS-APPELLANT, V. HAROLD W. LIGGETT ET AL., APPELLANTS AND CROSS-APPELLEES.

279 N. W. 2d 137

Filed May 22, 1979. No. 42081.

Assignments: Interest: Usury: Licenses and Permits. Where, in the process of liquidating and terminating the business of an installment loan licensee, a legal and valid installment loan obligation is assigned to a creditor of the licensee in satisfaction of an indebtedness of the licensee, the assignee acquires all the right, title, and interest of the licensee and may sue for, collect, and receive any lawful rate of interest provided for in the installment loan agreement although the assignee does not have a license to engage in the installment loan business.

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

Padley & Dudden, P.C., and Thomas J. Holmes, for appellants.

Firmin Q. Feltz, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and IRONS, District Judge.

MCCOWN, J.

This is an action to foreclose a real estate mortgage. The original lender and mortgagee was a licensee under the installment loan statutes. The plaintiff, Mary A. Bateman, is the assignee of the note and mortgage, and the defendants are the makers and mortgage debtors. Both parties filed motions for summary judgment. Plaintiff's motion for summary judgment was granted, and judgment entered against the defendants for $3,755.08, and foreclosure ordered. Defendants have appealed and the plaintiff has cross-appealed.

On June 11, 1973, the defendants, Harold W. and Betty Liggett, executed a note and mortgage in the principal sum of $2,500 to Commercial Service Company, a partnership composed of A. L. Riedesel and

A. R. Johnson. The partnership was a licensee under the installment loan laws of Nebraska at all times relevant here. The note and mortgage provided for interest pursuant to statute of 2½ percent a month on the unpaid principal balance not in excess of $300; 2 percent a month on that part of the principal balance in excess of $300 and not in excess of $500; 1½ percent a month on that part of the principal balance in excess of $500 and not in excess of $1,000; and 1 percent per month on any remainder. The note was due and payable in full June 11, 1974. At some date a credit of $196.13 was shown on the books of Commercial Service Company as a credit on the note, and except for such credit no payments on the note and mortgage were made.

A. R. Johnson, one of the two partners of Commercial Service Company, died March 22, 1976. In August 1976, Commercial Service Company, by A. L. Riedesel, the surviving partner, assigned and transferred the note and mortgage to the plaintiff. In winding up the affairs of the partnership A. L. Riedesel also made an assignment of other assets for the benefit of creditors in favor of the Keith County Bank & Trust Company, as trustee.

All the transactions here, including the interest rate provided for, were in compliance with the requirements of the installment loan statutes if done by a licensee. The plaintiff does not have an installment loan license, and is not engaged in the installment loan business. This foreclosure action was filed by the plaintiff on November 10, 1977.

Both parties filed motions for summary judgment. On March 23, 1978, after hearing, the District Court found that the credit of $196.13 should be allowed as of the date of execution of the note, making a principal balance of $2,303.87. The court allowed interest on that amount at the prescribed installment loan rates from June 11, 1973, to the date of the assignment of the note to plaintiff on August 26, 1976, in the

sum of $1,233.48, and interest thereafter to the date of judgment, March 23, 1978, at 6 percent per annum in the sum of $217.73, entered judgment for the plaintiff for $3,755.08, and ordered foreclosure of the mortgage. Defendants have appealed and the plaintiff has cross-appealed.

The sole issue on appeal is the amount of interest, if any, that plaintiff is entitled to recover. The defendants contend that the plaintiff cannot collect any interest on the note and mortgage because plaintiff does not have an installment loan license. Plaintiff, on cross-appeal, contends that she should be entitled to collect interest at the rates provided in the note and mortgage.

Under the general usury statute, section 45-105, R. R. S. 1943, if a greater rate of interest than the maximum legal rate (now 11 percent) is contracted for, received, or reserved by a person not an installment loan licensee, the plaintiff can recover only the principal without interest. Licensees under the installment loan statutes are not bound by the regular maximum legal interest rate but if any amount in excess of permitted installment loan charges is charged, contracted for, or received, except as a result of an accidental or bona fide error, the contract or loan is not void but the licensee has no right to collect or receive any interest or other charges whatever. See § 45-137 (5), R. R. S. 1943. In this case the principal is recoverable in any event, no matter which interest statute is held to be applicable.

Defendants rely on the cases of B. A. C. Corp. v. Darr, 176 Tenn. 67, 138 S. W. 2d 420, and South Shreveport Finance & Loan Co. v. Stephenson, 184 La. 916, 168 So. 100, to support their position. Those cases are clearly distinguishable. In the B. A. C. case the assignee of the obligations was engaged in the business of purchasing and collecting notes and mortgages and took over the assets of the finance

company which had made the original loan. The assignee had no license.

In the Shreveport case the finance company was licensed when it originally made the loan and was engaged in the business of making small loans, but failed to maintain its license in effect. There was not even an assignee involved in that case, and there was a provision that noncompliance with the Small Loan Act would make a specified interest rate applicable. In both cases the persons seeking to collect the loans and interest were persons engaged in the business of making loans, and in both cases they had no license to engage in that business.

The Louisiana court reached the opposite result in the case of Morris Plan Bank v. Schmidt, 164 So. 270 (La. App.). In that case Morris Plan Bank, in liquidation, was the assignee of a promissory note made payable to Community Credit Corporation, a small loan licensee. The defendants contended that since the plaintiff was not licensed under the Small Loan Act it had no right to sue and collect interest of more than 8 percent. The court affirmed a judgment for the assignee bank and said: "[W]e cannot see why in the present instance the defendants should escape payment of what they have promised on the technicality that the transferee and present holder of the note given by him happens not to be licensed under the Small Loan Act."

The present case is one of first impression in this state. The installment loan act contains no prohibition against the assignment of loans to a nonlicensee. Our statutes permit any person to engage "in the business" of making loans of money and charging, contracting for, and receiving the maximum installment loan interest after procuring a license. The statutes prohibit persons from engaging in or continuing in the "kinds of business or enterprise permitted to licensees without having a license." See, §§ 45-116 and 45-128, R. R. S. 1943.

In the case now before us the note and mortgage were made in compliance with the installment loan statutes, and the note and mortgage were executed by the defendants voluntarily. The obligations were legally enforceable at the time of execution and are legally enforceable now in the hands of any installment loan licensee. The only obstacle which stands in the way of enforcing the note and mortgage in accordance with their terms is the fact that the person now attempting to collect on the obligations does not have an installment loan license.

The licensee partnership which made the original loan terminated with the death of an individual partner, and the affairs of the partnership were being wound up. The surviving partner assigned and transferred all right, title, and interest of the licensee in the note and mortgage here to the plaintiff, and also made an assignment of other assets for the benefit of other creditors. Although the assignment of the note and mortgage to the plaintiff creditor was not made as a part of the general assignment for the benefit of creditors, we find no justifiable reason to treat plaintiff any differently than an assignee for the benefit of creditors or a trustee in bankruptcy. The note and mortgage here are being collected by the plaintiff as an individual creditor in connection with the liquidation of an installment loan licensee. It would be exalting form over substance to hold that if plaintiff assigned the note and mortgage to an installment loan licensee for collection it could be collected in accordance with its terms, but that if she attempted to collect it directly without reassignment she must forfeit all interest.

Where, in the process of liquidating and terminating the business of an installment loan licensee, a legal and valid installment loan obligation is assigned to a creditor of the licensee in satisfaction of an indebtedness of the licensee, the assignee acquires all the right, title, and interest of the licensee

and may sue for, collect, and receive any lawful rate of interest provided for in the installment loan agreement although the assignee does not have a license to engage in the installment loan business.

The District Court was correct in determining the principal sum due and in accruing interest on that sum at the rate specified in the note and mortgage from June 11, 1973, to the date of the assignment of the note and mortgage to the plaintiff, and in ordering foreclosure. The decree should be modified by vacating that portion of the decree fixing interest at 6 percent from August 26, 1976, to March 23, 1978, and instead substituting the interest rate provided for in the note and mortgage to the date of decree.

AFFIRMED AS MODIFIED.

AVELINO HERRERA, JR., APPELLEE, V. AMERICAN STANDARD INSURANCE COMPANY, APPELLANT.

279 N. W. 2d 140

Filed May 22, 1979. No. 42085.

1. **Insurance: Declaratory Judgments: Verdicts.** Under the facts of this case the insurance company issuing an automobile policy containing "uninsured motorist" coverage is held not entitled to relitigate, in a subsequent declaratory judgment action filed against it by its insured, whether the general verdict for damages returned by the jury, in a prior action brought by the insured against an uninsured motorist, contained any amounts for property damage, where counsel did not request a special verdict itemizing the type of damages included therein.
2. **Juries: Verdicts: Damages.** Where a general verdict is returned by a jury not delineating the type and amount of damages included within the verdict, the court has no means of ascertaining what elements were considered by the jury, nor the basis on which the jury determined the amount of damages awarded. Where that information could have been obtained by requesting a special verdict, the information in question may not later be obtained by extended or subsequent litigation.
3. **Declaratory Judgments: Insurance: Words and Phrases.** The use of a declaratory judgment remedy is proper in this state to de-

termine the rights and obligations of the insured and the insurance company under an uninsured motorist clause following the rendition of a final judgment against the uninsured motorist.

4. **Insurance: Attorney's Fees: Statutes.** Reasonable attorney's fees may properly be awarded in actions upon insurance policies under section 44-359, R. R. S. 1943. The amount to be allowed rests in the sound discretion of the court, considering the elements of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the professional diligence and skill required, and the result of the services performed.

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

Timothy J. Pugh of Boland, Mullin & Walsh, for appellant.

Frank Meares, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and IRONS, District Judge.

BRODKEY, J.

Plaintiff-appellee, Avelino Herrera, Jr., was the named insured under an automobile policy containing motorcycle coverage issued him by the defendant-appellant, American Standard Insurance Company. The insurance policy provided the plaintiff with uninsured motorist protection. On June 25, 1975, the plaintiff, while riding his motorcycle, was struck by an automobile owned and operated by one Ronald Jefferson. Jefferson was an uninsured motorist. Plaintiff brought a suit against Jefferson for his personal injuries and property damage. A jury returned a $5,000 verdict for the plaintiff against Jefferson. The plaintiff then issued garnishment proceedings against American Standard Insurance Company to recover a $5,000 judgment entered against Jefferson. After a hearing, the District Court found that American Standard was not subject to any liability to plaintiff "at this time."

Plaintiff then brought suit against American

Standard for a declaratory judgment as to liability under the insurance policy issued him by American Standard. Counsel for defendant filed an answer for American Standard, admitting the validity of the policy, and the judgment against Jefferson, but averring that the judgment included property damage which was not recoverable under the uninsured motorist coverage of Herrera's policy. American Standard also averred in its answer that it had tendered $4,039 to Herrera, which he rejected. It also deposited $4,105 with the clerk of the District Court, which it claimed represented the amount due and owing under its insurance policy, with interest and costs. Plaintiff Herrera then filed a motion for summary judgment, with an affidavit and the insurance policy attached to the motion.

A hearing on plaintiff's motion for summary judgment was held and briefs were submitted. Plaintiff also applied for an award of attorney's fees, and evidence on this issue was heard by the District Court. The District Court then entered a memorandum and order finding that there was no real issue of fact, and that there was no factual basis by which the court could reduce the jury's verdict entered in the plaintiff's suit against Ronald Jefferson. The District Court entered a judgment for the plaintiff Herrera against the defendant American Standard for the full $5,000, plus interest and costs. The District Court also allowed plaintiff's counsel a $2,000 fee for his services in the declaratory judgment action. Defendant American Standard then perfected this appeal.

Plaintiff filed his original suit against Ronald Jefferson on January 8, 1976. At that time the law firm presently representing defendant insurance company entered an appearance for Ronald Jefferson and filed an answer on his behalf. Jefferson's privately retained attorney also appeared for him. On August 20, 1976, defendant insurance company's

present counsel withdrew as Ronald Jefferson's counsel, and entered an appearance for American Standard, filing a petition in intervention in the action. Discovery was had, but on September 20, 1977, just before the jury was to be selected, counsel for American Standard dismissed its petition in intervention, and then reentered its appearance as counsel for Jefferson. Trial was held, after which the jury returned a verdict for plaintiff and against Ronald Jefferson in the amount of $5,000. No special verdict instruction was requested nor given to the jury. The District Court entered judgment on the jury's verdict.

The defendant has alleged two principal assignments of error. First, that relief should not have been granted under a declaratory judgment action, claiming that a suit could have been brought on the insurance contract, and hence an equally serviceable remedy was available; and second, summary judgment should not have been granted because there was a question of material fact as to whether the judgment entered against Ronald Jefferson included property damage which American Standard should be entitled to deduct, and the amount thereof.

Defendant American Standard first argues that the uninsured motorist coverage provision in the policy issued to Herrera does not include coverage for property damage. Section 60-509.01, R. R. S. 1943, provides that every motor vehicle insurance policy issued or delivered in Nebraska must include coverage for bodily injury or death for the protection of the insureds "who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of *bodily injury, sickness or disease*, including death, resulting therefrom; *Provided*, that the named insured shall have the right to reject such coverage * * *." (Emphasis supplied.) The foregoing statute, providing for uninsured motorist cover-

age, only states that bodily injury or death coverage be provided. It does not specifically require that property damage be provided under uninsured motorist coverage. However, the statute merely sets forth minimum requirements, and the issued policy may provide for greater coverage.

The uninsured motorist clause in the policy American Standard issued Herrera provides in pertinent part as follows: "DAMAGES FOR BODILY INJURY CAUSED BY UNINSURED AUTOMOBILES The company shall pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured, caused by accident and arising out of the ownership, maintenance, or use of such uninsured automobile * * *." Nowhere does the policy specifically provide for property damage coverage.

Plaintiff argues, however, that even though section 60-509.01, R. R. S. 1943, the Nebraska uninsured motorist statute, does not specifically mention insurance against "property damage," this court has held that a person with uninsured motorist coverage has the same protection he would have had if he were injured in an accident covered by a standard liability policy. State Farm Mut. Auto. Ins. Co. v. Selders, 187 Neb. 342, 190 N. W. 2d 789 (1971); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133 (1968). We have also held that the statute in question was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Protective Fire & Cas. Co. v. Woten, 186 Neb. 212, 181 N. W. 2d 835 (1970). Plaintiff also points out that we have held an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations. Stephens v. Allied Mut. Ins. Co.,

supra. In short, plaintiff contends that uninsured motorist coverage in this state covers property damage, whether specifically mentioned or not.

We do not deem it necessary to decide that issue at this time, for the reason that even assuming, without deciding, that property damage is covered under the Nebraska statute and defendant's policy issued to plaintiff, it would not change the result in this case in view of our conclusion, hereinafter discussed, that there is no way of knowing in the instant case how much, if any, property damage was included in the verdict of the jury.

American Standard argues in its brief that it paid the plaintiff for his property damage, less a deductible, under his collision coverage. Its counsel also filed an affidavit in response to plaintiff's motion for summary judgment, stating therein that the sum of $4,105, deposited with the clerk of the District Court, "represented the $5,000.00 judgment taken against Ronald Jefferson by Avelino Herrera minus $1,050.00 property damage, plus taxable Court costs and interest on $5,000.00 judgment to the date of filing the Answer."

In his petition filed against Ronald Jefferson in District Court, plaintiff prayed for judgment in the sum of $4,228.23 special damages and also for general damages. He alleged he had suffered and will continue to suffer pain, and also a diminution of earning capacity. He further alleged that his motorcycle was of the fair and reasonable value of $1,650 before the accident and that the salvage value after the accident was $550, or a total loss of $1,100. He also alleged the incurring of doctor bills, hospital bills, and loss of wages; and alleged he suffered permanent injuries. We have no way of knowing what evidence was adduced in support of these various items of damage in the original trial as the bill of exceptions was not made part of the record in the appeal in this case. Defendant insurance com-

pany did, however, introduce what it designated a "partial" bill of exceptions consisting of one page, and three question and answers relating to the "before" and "after" value of plaintiff's damaged motorcycle. The above constitutes the only evidence in the record as to any of the property damage allegedly suffered by plaintiff.

American Standard urges this court to adopt a rule that would allow insurance companies to deduct the amount paid an insured, plus the deductible, under the collision insurance, from any judgment entered against an uninsured motorist. We decline to do so in this case. The jury returned a general verdict. Although evidence of property damage was presented to the jury, the verdict did not delineate what amount, if any, was for the plaintiff's property damage and what amount was for his personal injuries. The jury may or may not have included an amount in its verdict for the plaintiff's property damage. Many types of damages were claimed by plaintiff, and we have no way of knowing what elements were considered, or the basis on which the jury determined the amount of damages finally awarded. Their reasons inhere in their verdict, and may not be inquired into. Defendant is asking this court to grant it the opportunity to relitigate and recompute the amount of its insured's bodily injuries by showing that property damage may have been included in the jury's verdict in the original suit against the uninsured motorist. That result could have been reached by means of a request for a special or itemized verdict; and if deemed material as a defense should have been done in the original trial, and not by extended litigation.

Defendant's assignment of error that summary judgment should not have been granted here because there was a question of fact whether, and in what amount, the jury verdict against the uninsured motorist contained an award for the plaintiff's prop-

erty damage, is also without merit. We believe the District Court correctly stated in its memorandum and order that "it cannot be assumed that the jury verdict included all of the plaintiff's money loss because of bodily injury and property damage; and that there is no legal or factual basis for this Court reducing the amount of the jury's verdict and the Court's judgment in the original case." Defendant American Standard became a party to Herrera's original suit against the uninsured motorist, Jefferson, by its petition in intervention. Later it voluntarily, and of its own accord, withdrew as an intervenor, shortly before the jury was selected. Counsel for defendant insurance company then reentered its appearance as defense counsel for the uninsured motorist. As previously mentioned no special verdict was requested. Defendant at this late date cannot claim that it has the right to relitigate the amount of plaintiff's damages.

Defendant has also assigned as error that relief should not have been granted in a declaratory judgment action because a suit could have been brought on the insurance contract. This contention is also without merit. Plaintiff brought this suit for a declaratory judgment under section 25-21,149 et seq., R. R. S. 1943, and prayed for "a determination of the obligations and liabilities of the parties under the policy * * *." Defendant relies on Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447 (1960), in support of its contention that this declaratory judgment action was not proper. However, Scudder is distinguishable by its own language. In that case we stated: "The plaintiff contends that the declaratory judgment act provides for a declaration of rights and status where the record shows a plain mistake in the appraisal and assessment of property. We do not agree with this contention. The act does not create a new cause of action where one did not previously exist. The purpose of the act is to

provide a method for having issues speedily determined which would otherwise be delayed to the possible injury of those interested, if they were compelled to await the ordinary course of judicial proceedings. Stewart v. Herten, 125 Neb. 210, 249 N. W. 552. *Where an exclusive remedy is provided, the declaratory judgment act does not provide an additional remedy.* A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and *exclusive statutory remedy.* In fact, the general rule is that an action for a declaratory judgment will not be entertained when another equally serviceable remedy has been provided. Stewart v. Herten, *supra.* It certainly was never intended as a cumulative remedy to one who has failed to pursue a full, adequate, and *exclusive remedy.*" (Emphasis supplied.)

No exclusive statutory remedy is available to plaintiff in this case. Declaratory judgment actions have frequently been used in this state to determine the liabilities of the parties under insurance policies. In Workman v. Great Plains Ins. Co., Inc., 189 Neb. 22, 200 N. W. 2d 8 (1972), we stated: "The defendant contends that a declaratory judgment action is not an action 'at law' unless it involves the recovery of a money judgment. It is of course correct that generally speaking declaratory judgment proceedings are probably neither legal nor equitable but sui generis. In any event, this court has previously treated a declaratory judgment action seeking to determine whether insurance coverage is applicable in particular instances or to particular persons as an action at law. See, Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623; State Farm Mutual Auto. Ins. Co. v. Kersey, 171 Neb. 212, 106 N. W. 2d 31. A jury was specifically waived in the trial court. The nature of the action here is not to impose equitable terms on disputing parties, but to determine fixed legal rights. *The action here takes the place*

of what would be a later action for money damages. That does not change the nature of the action nor make the statute inapplicable." (Emphasis supplied.) See, also, Truck Ins. Exchange v. State Farm Mut. Auto. Ins. Co., 182 Neb. 330, 154 N. W. 2d 524 (1967). The use of a declaratory judgment remedy was proper in the instant case to determine the rights and obligations of the insured and the insurance company under an uninsured motorist clause after final judgment had been entered against the uninsured motorist.

Defendant's final argument is that the award to plaintiff of $2,000 in attorney's fees was excessive. Reasonable attorney's fees may properly be awarded in actions upon an insurance policy under section 44-359, R. R. S. 1943.

In Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133 (1968), we stated: "The amount allowed [for attorney's fees] rests in the sound discretion of the district court, considering the elements of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the professional diligence and skill required, and the result of the services performed." In this case the award of attorney's fees to the plaintiff could be and was made only for services rendered in the declaratory judgment action.

Plaintiff called as a witness, Jon Okun, a practicing trial attorney in Omaha, with 13 years of experience. Okun testified that the hourly fee of an experienced attorney in Omaha would range from $60 to $100 an hour. He also testified that he had reviewed all three actions brought by the plaintiff and it was his opinion that $2,500 was a "fair and reasonable charge" for the plaintiff's attorney for services in the declaratory judgment action. He testified he had calculated that the plaintiff's attorney had expended 40 hours in connection with the declaratory

judgment action. We note that defendant's attorney was also called as a witness by the plaintiff. He testified that he charged his client $60 an hour in defending the declaratory judgment action. Although this declaratory judgment action only involved a claim for approximately $1,000 above the $4,000 offered by the defendant, we are unable to say after carefully reviewing the record that the District Court abused its discretion in its allowance of attorney's fees to the plaintiff. We also find that he should be awarded an additional fee of $750 for services in this court.

Finding no reversible error, the judgment of the District Court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODDESS M. MAYS, APPELLANT.

279 N. W. 2d 146

Filed May 22, 1979. No. 42127.

1. **Criminal Law: Indictments and Informations.** No information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits.
2. **Criminal Law: Indictments and Informations: Bailment.** An information which charges theft from the person in the actual possession of personal property, as bailee, is sufficient.
3. **Criminal Law: Larceny: Statutes.** For purposes of determining the value of the property alleged to have been stolen, the value of money or property stolen by a series of acts from the same person may be aggregated. § 28-506, R. R. S. 1943.
4. **Criminal Law: Larceny: Bailment.** For purposes of determining the value of the property alleged to have been stolen, the State may aggregate the value of property entrusted to the victim, as bailee, by another person and of property in which the victim has complete ownership.
5. **Criminal Law: Attorneys at Law.** To meet the test of effectiveness, trial counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Dennis R. Keefe of Naylor & Keefe, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

The defendant-appellant, Roddess M. Mays, was charged by information in the District Court of the crimes of grand larceny and of furnishing false information to a law enforcement officer. The jury returned a verdict of guilt on both counts. Defendant appeals. The factual context of this case is somewhat complicated.

On October 25, 1977, the defendant, Roddess M. Mays, who was separated from her husband Michael, reported an engagement-wedding ring as stolen to Officer Ginsberg of the McCook police department. The date of the alleged theft was noted as October 11, 1977. On November 19, 1977, Officer Ginsberg was given a green metal box by one Jeanette Hansen, a friend of the defendant, who testified that the box was given to her by the defendant. The contents of the box were inventoried at the police department. In addition to a ring, which appeared similar to the one which the defendant had reported as missing, the box also contained three other rings. Jeanette Hansen testified that all of the contents in the box were present at the time the rings were surrendered to her by the defendant. The defendant testified there were no rings other than her own rings in the box when it was given to the witness Hansen. At trial, there was evidence which would have allowed the jury to find that the three rings, other than that which is acknowledged to have belonged to the defendant, had been in the custody of

one Chester Johnson, doing business as Johnson's Jewelry, earlier in the year 1977. Mr. Johnson positively identified one of the rings as that which had been left at the store for repair by John Jones. The ring belonged to Jones' wife. When Jones left it at the store it had a value of $1,500. When it was turned over to the police, and at the time of trial, the diamond stone was missing. Without the stone, its value, according to Johnson, was approximately $300. The other two rings were new and of a type that was sold by Johnson's Jewelry and at no other jewelry stores in the vicinity of McCook, Nebraska.

The defendant had worked for Johnson's Jewelry store from January to August 1977. Chester Johnson testified that it was the practice in his store to keep only one of a kind of a particular ring set in stock at any one time; that on the receipt of new merchandise, he would fill out a card with a description of the ring and when the ring was sold, he would transfer it to a "sold" file; that he was confident he should have had in stock such rings as were found in the green box but that the cards which would have been expected to be in the inventory file or the sold file were not present in his store. Johnson's testimony clearly permitted an inference that the rings had been surreptitiously removed from his store by Roddess M. Mays sometime during the period of her employment.

Defendant argues that the information filed by the State was fatally defective. The information filed in this case charged that: "Roddess M. Mays, late of the county aforesaid, did, between January 1, 1977, and August 31, 1977, in the County of Red Willow and State of Nebraska aforesaid, feloniously steal money, goods, or chattels of a value greater than $300.00, the personal property of *Jack Jones and Johnson's Jewelry*, contrary to Neb. R. R. S. 28-506; * * *." (Emphasis supplied.) The defendant's argument is two-pronged: First, that sections 29-1603

and 29-2002, R. R. S. 1943, require that separate offenses be set out in separate counts of an information, while in this information, the defendant is, in effect, being charged with the theft of property from Jack Jones and the theft of property from Johnson's Jewelry. Second, that in any event, there is no showing that Johnson's Jewelry is an entity capable of owning property. As to the first point, the facts and information relied on by all parties to the action suggest that the stolen rings were owned by or were in the possession of (as bailee) Chester Johnson, doing business as Johnson's Jewelry. The addition of Jack Jones' name to the information as the owner who had surrendered possession of a dinner ring for repair to Johnson's Jewelry as bailee was superfluous but not prejudicial since, in any event, an information which charges theft from the person in the actual possession of personal property is sufficient. See, State v. Nelson, 182 Neb. 31, 152 N. W. 2d 10; Lovejoy v. State, 130 Neb. 154, 264 N. W. 417.

As to the second point, it is admitted the evidence does not disclose that Johnson's Jewelry is either a partnership, corporation, or anything else other than a name under which Chester Johnson did business. Although not directly on point, the case of State v. Siers, 197 Neb. 51, 248 N. W. 2d 1, is instructive. In that case, the information under which the defendant was charged read that the defendant did "unlawfully convert to his own use and embezzle said money, without the consent of said Pathfinder II Ltd., a limited partnership, his principal, * * *." There was no evidence that Pathfinder II, Ltd., had ever achieved any legal existence or that it was an entity capable of owning property. In quoting from Straub v. People, 145 Colo. 275, 358 P. 2d 615, this court said: " 'The name of the owner of property stolen is material only to the extent it serves a descriptive purpose. Another is to show that it is not the property of the accused, and that the accused

may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. And, where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results.' " The evidence, if believed, establishes that the property stolen was in the possession of Chester Johnson, doing business as Johnson's Jewelry, although one of the rings was owned by John Jones who had entrusted it to the care of Chester Johnson for repair. The defendant is unable to point out how she was misled or deceived as to whose property she was charged with stealing. Indeed, the defense other than a denial was that someone other than the defendant, and presumably Jeanette Hansen, was responsible. The defendant's second contention is without merit. No information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits. See Balis v. State, 137 Neb. 835, 291 N. W. 477.

The next assignment of error is so frivolous that it warrants little discussion. There was evidence, consisting of the expert testimony of Chester Johnson, that the aggregate value of the rings, in the condition in which they were recovered, was $1,595. The defendant somehow suggests that, because one of the rings belonged to John Jones, there was not sufficient evidence for a jury to find that the defendant took property of a value in excess of $300. Section 28-506, R. R. S. 1943, permits aggregating the value of money or property stolen by a series of acts from the same owner. Defendant cites no good reason nor any cases which suggest that the State cannot aggregate, for the purpose of determining value, the value of property entrusted to the victim, as bailee, by another and of property in which the victim has complete ownership. Defendant's assignment is without merit.

Defendant finally asserts that she was denied the effective assistance of trial counsel. Counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and should conscientiously protect the interests of his client. State v. Leadinghorse, 192 Neb. 485, 222 N. W. 2d 573. Essentially the claims of ineffective assistance of counsel relate to the failure of trial counsel to move to quash the information or to require the information to be amended to specify the time and place of the theft, precise descriptions of the items stolen, and who owned these items. As we have discussed before, the information was not defective. Defendant and counsel were fully apprised of the property alleged to have been stolen, from whom it was alleged to have been stolen, and its description. Those contentions are without merit. As to the time of the alleged crime, this court has held it is sufficient if a felonious act is laid on any date within the period of limitations. See Rema v. State, 52 Neb. 375, 72 N. W. 474. Assuming the defense counsel could have successfully acquired an amendment of the information, his failure to do so has not been shown by the defendant to have prejudiced her rights in any way. We have examined the record and found that counsel vigorously represented his client, attempted to and did assert the defendant's innocence, and built a defense on the proposition that someone else, not the defendant, committed the crime. The jury simply did not believe that version of the facts.

We have considered other errors, including the alleged excessiveness of the sentence, and find them without merit. Judgment and sentence are affirmed.

AFFIRMED.

SCOTT-HOURIGAN CO., A CORPORATION, APPELLEE, V. HAROLD DEPREZ, APPELLANT.

279 N. W. 2d 150

Filed May 22, 1979. No. 42152.

Judgments: Evidence: Appeal and Error. In a jury-waived action the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

John R. Brogan of Brogan, McCluskey & Wolstenholm, for appellant.

R. P. Cathcart of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

Heard before BOSLAUGH, WHITE, and HASTINGS, JJ., and GRANT and SPRAGUE, District Judges.

SPRAGUE, District Judge.

This is an appeal from a money judgment in a jury-waived action tried to the District Court for York County, Nebraska. The defendant, Harold Deprez, purchased two grain bins and related accessories from the plaintiff, Scott-Hourigan Co., a corporation. The bins were to be erected and ready for use by the 1974 harvest season. On September 23, 1974, there was a questioned acceptance of the erected bins by the defendant. The defendant did not use the bins for storage during the year 1974.

Shortly after the erection of the bins a white rust condition was observed on some of the bin panels. Treatment of these white rust areas, with a vinegar solution, was accomplished by the plaintiff in the spring of 1975. In January of 1976, 13 of the panels were replaced by the plaintiff. Plaintiff refused to replace any other panels.

A balance of $3,927.80 was due on the bins, and the plaintiff instituted a suit to recover this amount.

The defendant claimed there was a breach of implied warranty because of the white rust condition on the bin panels, and counterclaimed for the replacement cost of the defective material.

The District Court found generally in favor of the plaintiff and against the defendant on his counterclaim, and entered a judgment in the amount of $3,777.80. The court did find three panels with rust spots to be defective, and deducted the replacement cost of the panels in the amount of $150 from the contract price.

Defendant contends the court erred in finding only three of the panels provided by the plaintiff were defective. Defendant further contends the court erred in finding that the appearance of the two grain bins was immaterial to any implied warranty.

Both plaintiff and defendant offered expert testimony on the white rust condition. The nature and the extent of this condition, along with its impact upon the durability and the future utilization of the bins, was exhaustively covered by the testimony at trial.

The central question presented to the trial court was whether the rust condition was extensive or severe enough to affect the life and use of the bins. The court found that the rust condition was not of consequence. The findings of the court also incorporate by implication a determination that any cosmetic deterioration occasioned by the rust was not of serious import.

A lengthy review of the testimony would serve no illustrative purpose. It is sufficient to observe that there was competent evidence for the court to find: (1) That the rust condition was not extensive, and (2) that the rust condition had no detrimental effect on the life and use of the bins. These were the questions of fact decided by the trial court in a jury-waived matter. The findings are sufficiently supported by the evidence.

This court has consistently held that in a jury-waived action the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Burhoop v. Pegram, 194 Neb. 606, 234 N. W. 2d 828 (1975); First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N. W. 2d 115 (1973).

The briefs of both parties discuss at length the proper measure of damages, had an implied breach of warranty been established. Because of the affirmance of the trial court's finding, no discussion of this question is necessary.

Defendant further contends he was deprived of a fair trial because the court commenced the trial in the absence of defendant and his counsel. No specific showing was made by the defendant that would in any way indicate he was prejudiced by his absence at the start of the trial. The only evidence submitted by the plaintiff prior to the arrival of the defendant and his counsel concerned matters previously admitted by the pleadings. A recess was then taken to await the arrival of all parties. In searching the record, this court can find no evidence that the defendant was denied a fair trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. KINCAID, APPELLANT.

279 N. W. 2d 152

Filed May 22, 1979. No. 42184.

1. **Right to Counsel: Attorney and Client.** As a general rule a defendant is entitled to retain counsel of his own choice and may not be denied the right to change retained counsel unless the result is to interfere with the orderly procedure in the courts without a showing of good cause for the desired change.
2. **Right to Counsel: Criminal Law.** The right of counsel accorded

defendants in criminal trials cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.

3. **Right to Counsel: Attorney and Client.** If a defendant in a criminal case acquiesces in representation by an attorney whom he had previously rejected, he cannot afterwards complain that he was not represented by counsel.
4. **Criminal Law: Pleas.** An accused may voluntarily, knowingly, and understandingly plead guilty to a crime even though his plea contains a protestation of innocence, when he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt.
5. **Criminal Law: Sentences.** 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 Douglas County: JAMES J. MURPHY, Judge. Affirmed.

Robert L. Kincaid, pro se.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Defendant appeals his conviction, on a guilty plea, of a felony charge of issuing an insufficient fund check and ultimate sentence to a term of 2 to 5 years in the Nebraska Penal and Correctional Complex. His assignments of error may be condensed into three: (1) The trial court's refusal to appoint counsel for defendant prior to his guilty plea; (2) involuntariness of the guilty plea; and (3) excessive sentence.

An information was filed in the District Court on June 29, 1977, charging that defendant issued an insufficient fund check in the amount of $1,500 on May 3, 1977. Defendant was scheduled for arraignment on July 7, 1977, but at the request of his counsel, Bernard Walsh, Jr., the matter was continued to July 14, 1977, at which time he entered a plea of not

guilty. The case was set for trial to the next jury panel. On November 14, 1977, at the request of defendant and his attorney, the case was continued for trial on December 5, 1977, later continued to January 9, 1978, then February 6, 1978, and finally was scheduled to commence trial on March 15, 1978, at 2 p.m. This order was entered on March 13, 1978, after the court had denied the oral motion of attorney Walsh to withdraw as defendant's counsel.

The only reported hearing prior to the one of March 13, 1978, was one held on December 1, 1977, when defendant and his attorney requested a continuance until after January 1, 1978, "to give Mr. Kincaid an effort — or a time to clean up his unpaid checks. And if the matters have not be [sic] resolved by that time, Mr. Kincaid will plead guilty. Now, this is my understanding with Mr. Pane, [the prosecutor] and this is Mr. Kincaid's understanding; is that right?" To this statement by Mr. Walsh the defendant answered, "That's right." Following this hearing the various continuances set out above were granted, presumably for the same reason.

On March 13, 1978, around 9:30 a.m., defendant appeared with his counsel and the county prosecutor, obviously at the request of the court, to determine whether or not there was to be a jury trial which had previously been set for March 15, 1978. The trial judge detailed the past history of the case and told the defendant that "the sands of time have just about run out on your hourglass." and "There won't be any more continuances, and the moment of decision has arrived for Mr. Kincaid." The defendant reported he had been in the hospital in February following an automobile accident and "Another thing: I've been continuing this so I could pay these checks off. I had about $6,000 worth, * * * I've paid over half of them off now. * * * but I'm just trying to explain to you, Judge, why I've — I've been stalling this so long. I haven't had all the money, and I still

don't have it. * * * I realize Mr. Pane has given me every chance in the world. He's been a gentleman; he's helped me in every way." The court informed the defendant that its patience was exhausted and there would be no more continuances, and set the case for trial to commence 2 days later, at 2:30 in the afternoon.

Mr. Walsh then moved to withdraw from the case because defendant had assured him "that he would plead guilty if he was not able to pay these checks off. * * * Mr. Kincaid is aware of that. I told him this morning in my office that I felt that he's been given every opportunity. He feels he isn't guilty. I feel that the law is contrary." The court replied, "I don't see how I can permit you to withdraw now, Mr. Walsh. There's no way that I'm going to continue this case past this panel. If you want to talk to the Public Defender's Office, fine. But I — Mr. Kincaid, I don't think, even qualifies for the services of the Public Defender's Office." The defendant said he had only paid Mr. Walsh $100, he didn't have the money to hire an attorney, and would like "to ask the Court to appoint me an attorney." The defendant went on to say, "Mr. Walsh * * * *Since I told him that I was going to pay these off and it was going to be dismissed,* * * * he hasn't looked into the case. * * * We don't have any witnesses." (Emphasis supplied.) The court stated that he had had plenty of time to get all the witnesses he wanted, to which the defendant agreed, and the court denied the application to withdraw. In response to a question by the defendant, he was told he could represent himself if that is what he chose to do. The defendant denied the statement made by the court that what he had in mind was to get his attorney to withdraw so he could have more time, and insisted that he would appear for trial as scheduled, but he wanted to talk to the public defender's office. The court answered: "You can talk to the Public Defender's Office * * *."

Defendant again stated he didn't want to represent himself, that his present attorney advised him to plead guilty, and that if he didn't do so his attorney felt there would be more charges filed. He admitted there were more than $6,000 in outstanding bad checks, but that he didn't feel he was guilty on this particular charge. The court assured defendant he didn't need to accept his attorney's advice, and, if he chose to reject it, Mr. Walsh would still do the best he could to see that he got a fair trial, as would the court.

The following morning, the day before the trial was to begin, defendant appeared in court with attorney Walsh and entered a plea of guilty. Defendant told the court he knew what he was doing; he was told the penalties and said he understood them; and his understanding of the plea agreement was that sentence would be deferred for approximately 60 days to give him a chance to make restitution, but that other than that no threats, coercion, or promises had been made or used. The court further explained the various pleas defendant could make; that if he plead not guilty he would be entitled to a jury trial, the right of confrontation and cross-examination, the right against self-incrimination, the right to subpoena witnesses, the presumption of innocence, the burden of proof, and the requirement of a unanimous verdict; and that all of those rights were waived by a plea of guilty. Defendant acknowledged these rights and advised the court the plea he was about to make was completely voluntary and thereupon entered a plea of guilty. In establishing a factual basis for the plea, the defendant admitted he wrote the check and that at the time he did not have funds in the bank to cover the check. He also agreed that he gave the check for the purchase of an automobile from an individual, and that he then sold the automobile and kept the proceeds. About the only thing the court neglected to ask the

defendant was whether or not he was satisfied with the representation of his attorney, Mr. Walsh. However, Mr. Walsh was present with defendant and participated in the arraignment to a limited extent. The court accepted the plea, found defendant guilty, and set sentencing for May 22, 1978.

Defendant appeared with Mr. Walsh for sentencing as scheduled, and advised the court he knew of no reason why sentence should not then be imposed. Mr. Walsh made a rather lengthy and impassioned plea for probation, setting forth defendant's family background and his desire to still make restitution. The defendant himself also promised restitution if given a chance.

Following the sentencing, Mr. Walsh perfected defendant's appeal to this court except for the brief, which was filed pro se. By motion filed by defendant on January 31, 1979, and unopposed by the State, defendant asked that argument and submission of his case be continued to the April 1979 call for the reason that he would then have sufficient funds to hire a lawyer. This was granted and he was represented by counsel before this court.

The foregoing rather long and detailed recitation of the facts is necessary in order to answer two of the claimed errors: Lack of voluntariness of the guilty plea and denial of appointed counsel, which are closely interwoven and in every case are peculiarly related to the surrounding circumstances.

With the exception of the listing of the assignments of error, defendant's entire brief is devoted to the claim of excessiveness of the sentence. However, all three assignments of error will be discussed in this opinion.

It is beyond question that as a general rule a defendant is entitled to retain counsel of his own choice and may not be denied the right to change retained counsel unless the result is to interfere with the orderly procedure in the courts without a showing of

good cause for the desired change. As stated in State v. Addison, 197 Neb. 482, 249 N. W. 2d 746 (1977), a reverse situation wherein the defendant wanted to discharge appointed counsel and retain counsel of his choice, "Defendant made no showing as to any reason for his dissatisfaction with appointed counsel. What we said in State v. Coleman, *supra*, is particularly apt herein and is controlling: 'This case directly raises the issue of the right of a criminal defendant to seek substitute counsel on the very eve of trial without demonstrating a good cause therefor, when the record shows that he has been represented throughout by court-appointed counsel in a diligent and competent manner. We hold that the right of counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay.'" Defendant admitted he had been requesting continuances to intentionally stall his trial, and that he had agreed on several occasions he would plead guilty if he could not make the checks good. His only complaint about his retained counsel's competency was that counsel had believed the defendant when told that he, the defendant, was going to have the checks paid off and the case was going to be dismissed, as a result of which counsel hadn't looked into the case or investigated for favorable witnesses. This is hardly a legitimate complaint and certainly is not a showing of good cause under the circumstances.

Be that as it may, the trial court gave defendant two additional options: One, he was told he could represent himself, and two, even though the court doubted Kincaid's eligibility for appointment of counsel, he could take his papers and consult with the public defender. The defendant appeared in

court the day ahead of his scheduled trial with his same retained counsel and appeared again under the same circumstances at the sentencing without further complaint or conversation about counsel. Particularly appropriate are these words from State v. Kirby, 198 Neb. 646, 254 N. W. 2d 424 (1977): "In Faretta, *supra*, the Supreme Court, explaining its holding that a defendant in a criminal trial has a constitutional right to proceed without counsel, stated: 'An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. *Unless the accused has acquiesced in such representation*, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.' " Kincaid's acquiescence is self evident. Defendant was represented by counsel at all stages of the proceedings in District Court.

As to the voluntariness of the guilty plea, the trial judge thoroughly and painstakingly explained all of defendant's rights. From the rather lengthy recitation of the facts in this opinion, it is apparent that the plea was voluntarily, knowingly, and understandingly made. Defendant's protestation of innocence falls on deaf ears in light of the facts admitted by him during the arraignment and sentencing. He apparently extracted the last drop of advantage when he finally plead guilty in exchange for a 60-day delay in sentencing. In any event, an accused may voluntarily, knowingly, and understandingly plead guilty to a crime even though his plea contains a protestation of innocence, when he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. State v. Rubek, 189 Neb. 141, 201 N. W. 2d 255 (1972).

Defendant's presentence investigation report contains three pages of arrests or convictions from 1946 to 1977, including 19 check charges, with penalties ranging from dismissal upon making restitution to 1

to 5 years *suspended* sentence in Colorado; 12 charges of grand larceny, larceny by bailee, and obtaining money by false pretenses with one sentence of 1 to 10 years in Minnesota; and 6 Dyer Act charges, one of which resulted in a sentence to a federal corrections institution for a term of from 4 months to 4 years. There is no merit to defendant's claim of excessive sentence in light of his record and the maximum sentence of 10 years provided for by section 28-1213, R. R. S. 1943. "A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion." State v. Robinson, 202 Neb. 210, 274 N. W. 2d 553 (1979).

The judgment is affirmed.

AFFIRMED.

POLYXENY M. NIMMER, APPELLEE, V. GEORGE R. NIMMER, APPELLANT.

279 N. W. 2d 156

Filed May 22, 1979. No. 42187.

Divorce: Custody: Minors: Attorney's Fees. An action seeking modification of custody or possession rights over minor children is a proceeding ancillary to the original divorce, and the District Court retains authority to exercise discretion in the granting of attorney's fees.

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

Seb Caporale, for appellant.

Sally Millett Rau of Walsh, Walentine & Miles, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and WINDRUM, District Judge.

WINDRUM, District Judge.

The marriage of Polyxeny M. Nimmer, appellee,

and George R. Nimmer, appellant, was dissolved on April 14, 1975. Custody of the minor children of the parties was retained by the District Court, with the physical possession awarded to petitioner, the appellee, subject to visitation rights of respondent, the appellant.

On September 15, 1977, the appellant filed his application requesting a change in the possession, care, and control of the minor children. Appellee on October 17, 1977, filed her responsive pleading, the prayer of which is as follows: "Wherefore, petitioner having fully answered respondent's Application, petitioner prays that said Application be dismissed and that petitioner be awarded attorney's fees which were necessitated by respondent bringing this matter before the Court." On February 23, 1978, in response to a motion of the appellant filed February 22, 1978, appellant's application to modify the decree relative to custody was dismissed without prejudice. On March 2, 1978, appellee filed an application for attorney's fees together with a notice for a hearing on March 8, 1978. An objection to the application was filed March 6, 1978.

The record is silent as to what, if anything, occurred on March 8, 1978, at the appointed time for hearing the application for attorney's fees. There is no bill of exceptions for this portion of the case and no order of continuance contained in the transcript. An order was entered on April 13, 1978, reciting that both sides had presented briefs to the court concerning the appellee's application for attorney's fees, and the court found that appellant should pay for the use and benefit of appellee's attorney the sum of $500 for services rendered in behalf of the appellee, payable forthwith.

The appellant filed a motion for new trial. It was duly overruled, and he brought the appeal.

Appellant maintains the District Court had no jurisdiction to order attorney's fees after the cause of

action had been dismissed. He cites therefor Kiddle v. Kiddle, 90 Neb. 248, 133 N. W. 181. In that case, the wife brought the action for divorce. The parties reconciled before the hearing at which the court awarded temporary attorney's fees and suit money to the wife. Before it was paid, the court, on motion of the husband, dismissed the petition for divorce. The court held that the husband had to pay the attorney's fees. The court still had jurisdiction when the order was made. Appellant further cites Rhein v. Rhein, 244 Minn. 260, 69 N. W. 2d 657. In that case, the husband had brought an action for divorce. The wife asked for temporary suit money. Prior to ruling thereon, the husband dismissed the petition. The Minnesota Supreme Court held that they had no jurisdiction to award suit money.

In the instant case, once the original decree was entered the court had continuing jurisdiction until all the children were of legal age or emancipated. A final order, the decree, had been entered imposing obligations on appellant.

The application to change physical custody of the minor children and the response thereto constituted a continuation of the suit for dissolution of marriage and was one of its incidents. Thus, the holding of Rhein v. Rhein, *supra*, is not applicable even if the principle therein announced is to be followed in Nebraska, which we need not decide. The court may allow attorney's fees, both temporary and final. §§ 42-367 and 42-351, R. R. S. 1943, as amended. The authority of the court to allow attorney's fees continues until the subject matter of the divorce suit is finally settled and determined. Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232. The decree of a District Court in an action for the dissolution of a marriage, insofar as minor children are concerned, is never final in the sense it cannot be changed. Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847. Thus the court has continuing jurisdiction.

In response to appellant's application for modification of the decree, appellee requested an order be entered awarding her attorney's fees. After appellant dismissed his application, appellee filed an application for attorney's fees and caused notice of hearing to be served on appellant. Attached to appellee's application was an itemized list of services rendered, which totaled 15 hours. A $500 fee would not be unreasonable if the services as alleged had been performed.

Appellant maintains procedural due process requires an evidentiary hearing before a court can make a valid award for attorney's fees. The matter had been set for hearing. There is no bill of exceptions for this portion. However, the order dated April 13, 1978, states each side had presented briefs, so there must have been an understanding between all parties concerning the hearing.

Where there is no bill of exceptions, this court shall examine the pleadings and if the same will support the judgment of the court, this court shall not reverse. In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of pleadings to support judgment. Rhodes v. Johnstone, 191 Neb. 552, 216 N. W. 2d 168.

The judgment of the District Court is affirmed. The appellee is awarded the sum of $500 for the services of her attorney rendered in this court.

AFFIRMED.