REPORTS OF CASES

DECIDED BETWEEN

JULY 10, 1979 and DECEMBER 10, 1979

IN THE

Supreme Court of Nebraska

JANUARY TERM 1979 and SEPTEMBER TERM 1979

VOLUME CCIV

MARVIN L. GREEN

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1980

By Marvin L. Green, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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PAUL R. SKOG
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TABLE OF CASES REPORTED

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1979

KENNETH H. MUIRHEAD, APPELLEE, V. MINNIE L. GUNST, APPELLANT.

281 N. W. 2d 207

Filed July 10, 1979. No. 42105.

1. **Motor Vehicles.** The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is the right to proceed in a lawful manner in preference to the vehicle on the left.
2. **Motor Vehicles: Negligence.** When the negligence of the party seeking to invoke the last clear chance doctrine is active and continuous as a contributing factor up to the time of the injury, the doctrine has no application.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

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

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

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

HENDRIX, District Judge.

This action arises out of a motor vehicle collision which occurred at the intersection of 8th Avenue and 21st Street in the city of Kearney, Buffalo County, Nebraska, at about 9:15 a.m., on February 12, 1976. Kenneth H. Muirhead, plaintiff and appellee, hereinafter referred to as the plaintiff, alleged the collision

was caused by Minnie L. Gunst, defendant and appellant, hereinafter referred to as the defendant. The defendant alleged the collision was caused by the negligence of the plaintiff.

The case was tried to the county court of Buffalo County, Nebraska, which found in favor of the plaintiff and against the defendant, awarding judgment in the sum of $1,068.47 plus interest and costs. On appeal to the District Court for Buffalo County, Nebraska, the judgment of the county court was affirmed. The defendant appealed to this court contending that negligence by the plaintiff and the last clear chance doctrine should defeat plaintiff's recovery. We affirm the judgment of the District Court.

The evidence reveals the significant facts are not in dispute. The weather was clear and the intersection was hard-surfaced and not controlled by traffic signs or lights. The view of both parties was unobstructed. The plaintiff was driving his 1974 Chevrolet pickup north on 8th Avenue. The defendant was driving her 1974 Buick east on 21st Street. The defendant testified she was traveling approximately 20-25 miles per hour as she approached the intersection. She did not see the plaintiff until the impact. The plaintiff testified he was traveling approximately 20 miles per hour as he approached the intersection. He saw the defendant's vehicle approach the intersection, observed it enter the intersection after he entered it, and then perceived that the defendant was not slowing down nor yielding the right-of-way. He accelerated slightly and turned to the right, but the defendant's vehicle struck the plaintiff's vehicle just behind the left cab door. Damages resulted which were not in dispute.

Since this is a law action, the finding of the trial court is equivalent to the verdict of a jury and will not be set aside on appeal unless clearly wrong.

The finding of negligence by the defendant is amply supported by the evidence. This includes testi-

mony that plaintiff entered the intersection first and conclusive evidence of the plaintiff's vehicle being on the right. The defendant failed to yield the right-of way. § 39-635, R. R. S. 1943. When two vehicles approach an intersection at approximately the same time, the vehicle on the right has the right to proceed in a lawful manner in preference to the vehicle on the left. In other words, the vehicle on the right has the right to the immediate use of the intersection, and it is this use of the roadway that the vehicle on the left is required to yield to the vehicle on the right. Reese v. Mayer, 198 Neb. 499, 253 N. W. 2d 317. The evidence also reveals that defendant did not keep a proper lookout by virtue of her failing to see plaintiff's vehicle until the impact.

The trial court was also correct in determining that recovery was not barred by contributory negligence. At an unobstructed intersection, the plaintiff, having the right-of-way, had the right to assume that his right-of-way would be respected unless it would have appeared to an ordinarily careful and prudent person that to proceed would probably result in a collision. Sanderson v. Westphalen, 178 Neb. 298, 133 N. W. 2d 16. When it became apparent the defendant was not going to honor the plaintiff's right-of-way, the plaintiff increased his speed and turned to the right in an attempt to avoid the collision. The trial court correctly found that contributory negligence was not present to defeat recovery.

The defendant attempts to invoke the last clear chance doctrine, but it has no application where, as here, the trial court could properly have found that the negligence of the defendant was active and continuing, the plaintiff had no timely opportunity or ability to avoid the collision, and the plaintiff was not guilty of negligence. When the negligence of the party seeking to invoke the last clear chance doctrine is active and continuous as a contributing factor up to the time of the injury, the doctrine has no

application. Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385; and Restatement, Torts 2d, § 479, p. 530, and Nebraska Annotations, p. 130. It is not necessary to consider whether the law of this state permits the use of the doctrine to benefit a party not claiming damages.

AFFIRMED.

FRED C. KING, APPELLANT, V. SKY HARBOR AIR SERVICE, INC., A NEBRASKA CORPORATION, APPELLEE.
281 N. W. 2d 209

Filed July 10, 1979. No. 42223.

Contracts: Damages: Interest. In an action for a liquidated sum which represents a downpayment on a contract voided or terminated by mutual agreement, the amount claimed does not become an unliquidated claim merely because of the assertion of a counterclaim, and if the trier of fact finds against the defendant on the counterclaim, prejudgment interest should be awarded on the plaintiff's claim.

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

Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

Nelson & Harding, Peter E. Marchetti and Richard S. Reiser, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and COADY and NORTON, District Judges.

COADY, District Judge.

The plaintiff, Fred C. King, buyer, and the defendant, Sky Harbor Air Service, Inc., seller, contracted in writing for the sale of an airplane. The plaintiff paid $10,000 down. A few days later, the parties agreed to terminate or void the contract.

Subsequently, the plaintiff sued for the return of the downpayment with interest. The defendant counterclaimed alleging the $10,000 was left with the defendant as a downpayment on a second and subsequent unwritten purchase agreement; the defendant had incurred expenses for commissions, rent, premiums, and interest; and the defendant should be awarded damages because of plaintiff's breach of the second contract.

The case was tried in the District Court by jury which found against the defendant on the defendant's counterclaim and for the plaintiff in the sum of $10,000. Plaintiff, by motion, then asked for prejudgment interest. After a hearing thereon, the court denied the motion.

The sole issue in this appeal is whether plaintiff was entitled to prejudgment interest. This court's holding in Wiebe Constr. Co. v. School Dist. of Millard, 198 Neb. 730, 255 N. W. 2d 413 (1977), is controlling. We now hold that in an action for a liquidated sum which represents a downpayment on a contract voided or terminated by mutual agreement, the amount claimed does not become an unliquidated claim merely because of the assertion of a counterclaim, and if the trier of fact finds against the defendant on the counterclaim, prejudgment interest should be awarded on the plaintiff's claim.

We reverse the trial court's judgment and remand the cause to the District Court for the allowance of prejudgment interest.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLEE, V. BETTE BONN LEDWITH, APPELLANT.

281 N. W. 2d 729

Filed July 10, 1979. No. 42226.

1. **Supreme Court.** It is not within the province of the Supreme Court to determine moot questions.
2. **Injunctions: Judgments.** Where there is a final judgment against the party enjoined, the temporary injunction merges into the final decree and any questions concerning the propriety of the issuance of the temporary injunction become moot.
3. **Statutes: Words and Phrases.** Section 87-303.05 (1), R. R. S. 1943, authorizes the Attorney General to institute proceedings to prevent deceptive trade practices as defined in section 87-302 or 87-303.01, R. R. S. 1943.
4. **Statutes: Words and Phrases: Restitution.** Placing a party found to have been engaging in deceptive trade practices under the supervision of the Attorney General for a fixed period of time and retaining jurisdiction to order restitution should future violations occur is within the power granted to the court by section 87-303.05 (1), R. R. S. 1943.
5. **Statutes.** Proceedings brought by the Attorney General under section 87-303.05 (1), R. R. S. 1943, are civil in nature.
6. **Statutes: Words and Phrases: Proof.** The requirement in section 87-303.05 (1), R. R. S. 1943, that the Attorney General must have cause to believe that deceptive trade practices exist or have existed before instituting an action is not an essential element of the action which must be proved at trial.
7. **Equity: Appeal and Error.** Equity cases are heard de novo in this court with consideration given to the fact that the trial court observed the witnesses and their manner of testifying.
8. **Injunctions: Time.** An injunction is a remedy designed to control future behavior, and whether that behavior is occurring at the time of the decree granting the injunction is generally irrelevant to the propriety of its issuance.
9. **Appeal and Error: Records.** Where any fact issue is presented on appeal, in the absence of a bill of exceptions it is presumed the trial court's finding is correct.
10. **Pleadings: Counterclaim.** A counterclaim must allege facts sufficient to support an independent cause of action in favor of the defendant and against the plaintiff and must be more than a mere defense to the plaintiff's cause of action or in reduction of plaintiff's damages.
11. **Appeal and Error.** A party does not waive his rights of appeal by complying with a decree against him.

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

Bette Bonn Ledwith, 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.

CLINTON, J.

This appeal arises from the granting of an order permanently enjoining the defendant, Bette Bonn Ledwith, hereinafter referred to by her trade name of Bette Bonn, from engaging in certain trade practices in the course of recruiting students for and operating a school to train fashion models and requiring her to file quarterly reports with the Attorney General for 4 years. The proceedings were initiated by the Attorney General, acting pursuant to authority granted by section 87-303.05 (1), R. R. S. 1943, which is a part of the Nebraska codification of the Uniform Deceptive Trade Practices Act. §§ 87-301 through 87-306, R. R. S. 1943. In his petition, the Attorney General described several trade practices allegedly engaged in by Bette Bonn, stated the practices were deceptive, and requested temporary and permanent injunctive relief and restitution to the victims of such deceptive practices.

After a hearing, the court granted a temporary injunction in July 1976, restraining Bette Bonn from advertising for students in the "Help Wanted" section of certain newspapers and from advertising in a manner which would lead individuals reading the advertisements to believe that paid employment as a model was being offered.

Following an extensive trial on the merits, the court made findings of fact and issued its permanent order in May 1978. Details of the findings and the order will be discussed later in this opinion. Bette

Bonn appealed, making numerous assignments of error. We affirm.

The Attorney General's evidence consisted primarily of the testimony of many former students and some instructors at the Bette Bonn schools. In addition, Bette Bonn was called as a witness and examined at some length. The evidence established a virtually unvarying pattern of behavior which may be generally summarized without specific reference to the testimony of individuals.

For a number of years, Bette Bonn ran the Bette Bonn Schools of Modeling and Charm in Nebraska and elsewhere. There were two schools in Nebraska, one of which was in Lincoln and the other in Omaha. The business was almost entirely confined to instruction; Bette Bonn did not make a practice of finding employment for professional models who were not enrolled in her schools.

Bette Bonn regularly ran advertisements in the "Help Wanted" section of the classified advertisements of Omaha and Lincoln newspapers which varied from the following only in minor details:

> "MODELS — BETTE BONN
> STATE DIRECTOR
> World Modeling Association
> OUR 28TH YEAR
> OMAHA-LINCOLN
> All ages, sizes. *No training fee for professionals.* See our models 'Lincoln Home Show,' 'ETV Auction, Channels 12 and 13,' beginning soon. 342-7560 New Paxton 346-3330" (Emphasis supplied.)

Most students' initial contact with Bette Bonn came about because they were reading the "Help Wanted" section of the classified advertisements. Some students responded to the advertisement because they wanted to become professional models on a full or part-time basis while others believed the advertisement was offering paid employment.

Those calling for information were given an appointment for an interview with Bette Bonn. The interviews, which Bette Bonn always conducted personally, generally lasted from ½ hour to 1 hour. During the interview, Bette Bonn described the courses and fees and made a number of representations concerning the nature and value of the courses.

Three courses of instruction were available, but most or all of the students chose to enroll in the professional modeling course. This course was to consist of 92 lessons. Its price during the time period at issue was $345 initially and $445 later in the period if paid in full before starting the course. There was a $45 surcharge if the price was to be paid in installments. Students were given the option of paying half the installment price and working off half through modeling jobs which they were assured they would obtain while they were students.

Prospective students were led to believe they would earn back all of the tuition money on modeling assignments and probably make a profit while they were still students. They were told there was a great demand for models in Lincoln and Omaha, and they would have no trouble obtaining full or part-time employment upon completion of the course. They also believed Bette Bonn would obtain jobs for them after they completed their training.

Students were promised a "model's card" upon completion of the course which they were told they could show at any modeling agency in the country. It is clear the students believed the card would be at least the equivalent of a diploma in that it would provide nationally recognized certification of completion of an approved course of study.

All of these representations were false in various respects. Most students were given the opportunity to do a few modeling jobs while in school, although many of the jobs involved work such as passing out sample cigarettes on a street corner or acting as a

hostess at a trade show. Such jobs were systematically assigned first to students who had signed up to pay half the tuition and work off half. Where students who had paid the tuition in full or who had completed working off their tuition were assigned such jobs, they generally found it impossible to get paid for doing them, although many had specifically inquired as to whether there would be payment for doing the work and had been assured there would be. No student testified she "earned" enough, even considering hours worked for which no payment was forthcoming, to recover the cost of the tuition.

The classes had little if any content, were haphazardly scheduled, and were frequently canceled without notice. Some students quit the course in disgust after arriving at the school several times, finding no one there, and being unable to have their calls returned.

Most students who completed the course were unable to obtain the modeling card. It would have done them no good to obtain it, because the card was worthless for obtaining employment in Nebraska or anywhere else. One of Bette Bonn's own exhibits, a letter from the World Modeling Association, stated: "An association is not capable of accrediting its members. . . . If any association in the modeling field is claiming to give accreditation, this is not true." Thus, the card had no value even as a diploma.

Nancy Bounds Scounce, the owner of the Nancy Bounds School of Modeling in Omaha, was called by the plaintiff and qualified as an expert. She testified that Omaha and Lincoln simply could not support full-time professional models. Instructors from the Bette Bonn schools who testified could not recall that any student who completed the professional modeling course had become a full-time professional model. Bette Bonn, when called as a witness for the plaintiff, could name only two or three people who

had obtained full-time employment as a model after completing her course.

It is inferable from the record that most students never saw Bette Bonn again after they paid their tuition. Bette Bonn's first strategy for dealing with student complaints was to ignore all telephone messages. If students were undeterred by being ignored, they would be abruptly expelled. One student who was expelled was accused of being a spy for the rival model agency and the excuses could be vaguer than that. No tuition was ever refunded under any circumstances.

In his pleadings, the Attorney General alleged Bette Bonn's method of advertising was deceptive in that it led readers to believe paid employment was being offered when Bette Bonn was actually soliciting students. In addition, Bette Bonn was alleged to be representing to those who responded to the advertisements that paying modeling jobs were immediately available to those enrolled in the school and Bette Bonn would obtain modeling jobs for students when they completed the modeling course; that a "model's card" or some other document was required to model in Lincoln and Omaha; and that the modeling course involved a specific number of lessons in regularly scheduled classes. All of these representations were alleged to be deceptive in that there were few paid jobs available to students, either when enrolled in the course or upon completion of it; no card or certification is required to obtain a modeling job in Nebraska and Bette Bonn was not, in any event, associated with an organization granting certification to models; and classes were not delivered as promised, and few students were able to complete the course.

The Attorney General further alleged that numerous Nebraska residents had incurred actual damages as a result of such practices, and requested injunctive relief, restitution, and retention of contin-

uing jurisdiction by the court for the purpose of ordering further equitable relief.

The trial court made extensive and detailed findings of fact which essentially found the Attorney General's allegations to be true and expanded upon them. The court then ordered that Bette Bonn be permanently enjoined from: (1) Advertising for prospective students in the "Help Wanted" column of newspapers printed in Nebraska or delivered to Nebraska residents; (2) advertising for students in any manner which would lead individuals to believe the advertisements were for paid employment; (3) representing that students would receive paid employment during training unless the student is supplied with a current list of jobs and a list of students who received paying jobs while in training; (4) representing that employment as a model would be available on completion of training unless it is true and students are supplied with written information of positions available and names of graduates of Bette Bonn's school who have obtained employment; (5) representing that a "model's card" is necessary to model in Nebraska or that Bette Bonn is authorized by any official organization to issue such a card; and (6) expelling any student without just cause set forth in writing and without refunding tuition on a pro rata basis.

To aid in enforcement of the court's order, Bette Bonn was ordered to make quarterly reports to the Attorney General for 4 years. The reports were to contain all current business addresses, the names and addresses of all students enrolled in the school during the preceding 3 months, and copies of all advertising utilized in the preceding 3 months.

The court held that restitution was not warranted but retained jurisdiction to hold a hearing on the matter should there be a showing of any active practice violating the Uniform Deceptive Trade Prac-

tices Act or the court order in future business transactions.

Six of the assignments of error relate to various aspects of the proceedings wherein the temporary injunction was granted. As it is not within the province of this court to determine moot questions, we must first determine whether these assignments raise anything other than abstract legal issues. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles, 190 Neb. 795, 212 N. W. 2d 633. Obviously, the granting of a temporary injunction could have no effect on the final outcome of the case. Thus, the only actual issue which might be affected by our consideration of these questions is the right to damages of the party enjoined.

Generally, no tort liability arises for bringing an action in civil courts unless malicious prosecution can be proved. This rule applies where a party has wrongfully obtained an injunction and there can be no recovery in the absence of some statutory liability unless the prosecution was malicious. At common law there is no liability in tort for wrongful issuance of an injunction absent the elements necessary to prove malicious prosecution. United States Steel Corp. v. United Mine Wkrs. of Amer., 456 F. 2d 483 (3rd Cir., 1972); Camp v. Atlantic Refining Co., 179 S. W. 2d 326 (Tex. Civ. App., 1944); 43A C. J. S., Injunctions, § 314, p. 693.

Nebraska has a statute requiring the posting of bond before most temporary injunctions may be effective. § 25-1067, R. R. S. 1943. As in the case in all jurisdictions which we have examined, the party enjoined may recover damages on the bond only "if it be finally decided that the injunction ought not to have been granted." *Id.* See, United States Steel Corp. v. United Mine Wkrs. of Amer., *supra;* House of Vision, Inc. v. Hiyane, 42 Ill. 2d 45, 245 N. E. 2d 468; Electric Co-op., Inc. v. Ferguson, 124 Mont. 543, 227 P. 2d 597. Where, as in this case, trial on the

merits results in a final judgment against the party enjoined, there can be no liability on the bond.

Thus, at least one court has held that where there is a final judgment against the party enjoined, the temporary injunction merges into the final decree and any questions concerning the propriety of the issuance of the temporary injunction become moot. Valentine v. Valentine, 31 Wash. 2d 650, 198 P. 2d 494; State ex rel. Carroll v. Simmons, 61 Wash. 2d 146, 377 P. 2d 421. We hold that in this case all questions concerning the issuance of the temporary injunction are moot.

Several of the assignments of error may be dealt with simply by reference to the act under which this action was brought. Bette Bonn argues the Attorney General is not authorized to bring an action of this nature. Section 87-303.05 (1), R. R. S. 1943, grants such authorization in unmistakable terms: "Whenever the Attorney General has cause to believe that a person has engaged in or is engaging in any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01, he may apply for and obtain, in an action in any district court of this state, a temporary restraining order, or injunction, or both, pursuant to the rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof." The section continues: "The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice, or which may be necessary to restore to any other person any money or real or personal property which may have been acquired by means of any such practice." The court was clearly acting within its powers under this section in retaining jurisdiction to order restitution and in requiring the quarterly reports to the Attorney General, and the assignments of error on these points are without merit. As there was no final or-

der requiring restitution, the question of the sufficiency of the pleadings to support such an order need not be considered at this time. § 25-1911, R. R. S. 1943.

Next, Bette Bonn insists these proceedings are criminal rather than civil in nature and argues she was denied the rights granted to defendants in criminal proceedings. It is true that sections 87-303.08 and 87-303.09, R. R. S. 1943, provide for criminal sanctions for engaging in deceptive trade practices. However, those sections are not pertinent here as no attempt has been made to institute proceedings under them.

Section 87-303.05 (1), R. R. S. 1943, clearly contemplates a civil proceeding and provides only for civil remedies and not for criminal sanctions. See 1 Wharton's Criminal Law (14th Ed., 1978), § 6, p. 19. The statute has none of the earmarks of criminal proceedings which led to our holding in State v. Knoles, 199 Neb. 211, 256 N. W. 2d 873. We hold that proceedings brought under this section are civil in nature.

The last assignment of error relating directly to the language of the statute is the assertion that whether the Attorney General has "cause to believe" is an essential element of the cause of action which was not proven. A demurrer by Bette Bonn was apparently sustained because the allegation of "cause to believe" was omitted from the pleadings, and the Attorney General was given leave to amend the petition by interlineation.

There are two types of action which we have been able to discover in which proof of "cause to believe" is an essential element of the cause of action. In actions for malicious prosecution, plaintiff must plead and prove lack of probable cause. Rose v. Reinhart, 194 Neb. 478, 233 N. W. 2d 302. In an action against a police officer for false imprisonment, probable cause to believe that plaintiff had committed a

crime is a defense. Diers v. Mallon, 46 Neb. 121, 64 N.W. 722. In both of these actions, the element of probable cause is intertwined with and materially related to the facts creating the cause of action.

In this action, whether the Attorney General has "cause to believe" is irrelevant to whether deceptive trade practices actually exist. The only reasonable basis for its existence in the statutes is to prevent random investigations by the Attorney General's office. This conclusion is reinforced by the fact that "cause to believe" must also exist before the Attorney General's investigative powers under the act come into play. § 87-303.02, R. R. S. 1943.

We hold the requirement in section 87-303.05 (1), R. R. S. 1943, that the Attorney General have cause to believe deceptive trade practices exist or have existed before instituting an action is not an essential element of the action which must be proved at trial. Rather, the requirement is akin to the probable cause which must exist before a search warrant may be issued, and the Attorney General may be required to show he has some evidence leading him to believe a deceptive trade practice exists or has existed if the institution of the action is challenged early in the proceedings.

Two of the remaining assignments of error concern the sufficiency of the evidence to support the findings of the trial court. Equity actions are heard de novo in this court with consideration given to the fact the trial court observed the witnesses and their manner of testifying. Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866.

Applying this standard, we find the evidence strongly supports the trial court's finding that Bette Bonn was acting as a sole proprietor during the times pertinent to this action and that Evelyn Parker, an instructor at the Lincoln school, was only an agent or employee of Bette Bonn's. Evelyn Parker had no control over the operation of the school, did

not decide whether to accept students, did not participate in the selection of advertising or contribute to the rent, and seems to have received a salary of $50 per week although the compensation was termed a commission.

The evidence also supports the granting of the permanent injunction. Bette Bonn argues the injunction should not have been issued because she was not doing business at the time of trial. An injunction is a remedy designed to control future behavior, and whether that behavior is occurring at the time of the decree granting the injunction is generally irrelevant to the propriety of its issuance. Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513; Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc., 182 Neb. 791, 157 N. W. 2d 384.

The record as a whole supports the conclusion that Bette Bonn was absolutely convinced she had a right to conduct business in the manner described in this opinion and that she would never change her methods of operation voluntarily. In addition, in a letter written to Evelyn Parker in connection with similar proceedings in Iowa, Bette Bonn stated: "[I]t is my intention to appeal [the] . . . decision to the Iowa Supreme Court. *If that appeal should succeed, it is my intention to resume business operations in Iowa.*" (Emphasis supplied.) There is every reason to believe Bette Bonn had similar intentions regarding the proceedings in this state, and the issuance of the permanent injunction was entirely justified.

Next, it is urged the court erred in granting the Attorney General's motion for an order requiring the production of certain business records belonging to Bette Bonn in that the Attorney General failed to show good cause upon which such an order must be based. § 25-1267.39, R. R. S. 1943. The challenged order recites that a hearing was held and contains specific findings of fact stating that good cause was shown for the production of each category

of documents requested by the State. No bill of exceptions from that hearing has been included in the record submitted to this court. Where any fact issue is presented on appeal, in the absence of a bill of exceptions it is presumed the trial court's finding is correct. Hubbell v. Farmers Ins. Group, 200 Neb. 472, 263 N. W. 2d 863; Schreiner v. Irby Constr. Co., 184 Neb. 222, 166 N. W. 2d 121.

Perhaps the most unusual assignment of error in this case is the one urging that the Uniform Deceptive Trade Practices Act should have been declared unconstitutional by a default judgment. The background to this assignment is that a "counterclaim" alleging the Uniform Deceptive Trade Practices Act violates the Constitutions of the United States and the State of Nebraska was filed early in these proceedings. The State did not reply, and Bette Bonn then moved for a judgment by default. This motion was overruled. Subsequently, the court found in its conclusions of law that the allegations in the "counterclaim" constituted affirmative defenses and that the State had no duty to file a pleading in response thereto. We find the court's conclusion to be entirely correct.

Even assuming a default judgment may be granted on a counterclaim, a counterclaim "must be more than a mere defense to plaintiff's cause of action, or in reduction of his damages; 'it must be an existing, valid, and enforceable cause of action in favor of the defendant against the plaintiff.' " McGerr v. Marsh, 148 Neb. 50, 26 N. W. 2d 374. Thus, a counterclaim must allege facts sufficient to support an independent cause of action. Reserve Loan Life Ins. Co. v. Benson, 167 S. W. 266 (Tex. Civ. App., 1914). Mere allegations that a statute is unconstitutional do not meet this standard.

Finally, we note that Bette Bonn's fear she will be held to have waived her rights of appeal by complying with the court order and making quarterly re-

ports to the Attorney General during the pendency of the appeal is groundless. That rule applies only where a party accepts the benefits of a decree in his favor and not where compliance with the decree is involuntary or compelled. See, Larabee v. Larabee, 128 Neb. 560, 259 N. W. 520; Reynek v. Reynek, 193 Neb. 404, 227 N. W. 2d 578.

All other assignments of error have been considered and found to be without merit.

AFFIRMED.

DEAN AND GLEN JESSEN, DOING BUSINESS AS JESSEN BROTHERS, APPELLANTS, V. ASHLAND RECREATION ASSOCIATION, APPELLEE.

281 N. W. 2d 210

Filed July 10, 1979. No. 42242.

1. **Uniform Commercial Code: Sales.** The sale of growing sod is a sale of goods under section 2-107, U. C. C.
2. **Uniform Commercial Code: Sales: Contracts.** Except as otherwise provided in section 2-201, U. C. C., a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under section 2-201 (1), U. C. C., beyond the quantity of goods shown in such writing.
3. **Uniform Commercial Code: Contracts.** Under section 2-201, U. C. C., the only term which must appear in the required writing is the quantity term, which need not be accurately stated, but recovery is limited to the amount stated.
4. ____: ____. Under section 2-201, U. C. C., "partial performance" as a substitute for the required writing can validate the oral contract only for the goods which have been accepted or for which payment has been made and accepted.

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

Eskey & Gless, for appellants.

Marvin V. Miller and Claude D. Lutton, for appellee.

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

MCCOWN, J.

This is an action on an oral contract for the purchase of sod. The defense was the statute of frauds. The District Court granted defendant's motion for summary judgment and plaintiffs have appealed.

In March 1976 plaintiffs and defendant entered into an oral contract for the purchase and sale of sod located on land owned by defendant. Plaintiffs alleged that they agreed to purchase, and defendant agreed to sell, 30 acres of sod at $400 per acre; that $2,000 was to be paid in advance for the first 5 acres of sod; and thereafter plaintiffs were to pay $400 per acre for each additional acre as it was cut. Plaintiffs were also to pay fertilizer costs for the entire acreage. Plaintiffs alleged the sod was to be taken by plaintiffs as it became ready for cutting and that the contract was for an indefinite time. The plaintiffs paid the fertilizer costs and the $2,000 advance, and during the summer of 1976, cut 4½ to 6 acres of sod as it became ready. Plaintiffs allege that because of the dry weather no further sod became ready in 1976, and they made no further payments and cut no more sod. In the spring of 1977 plaintiffs were advised they would have to pay a higher price for sod in 1977. Plaintiffs demanded the balance of the sod at the contract price and defendant refused and advised plaintiffs the contract was terminated. Plaintiffs alleged that because of the refusal plaintiffs were required to purchase sod on the open market and prayed for damages for the excess costs incurred.

Defendant denied the existence of an oral contract

on the terms alleged by the plaintiffs, or of any contract for the total sale of 30 acres of sod, or any contract permitting an unlimited time for removal of sod. Defendant also alleged that the oral contract was in violation of the statute of frauds and void and unenforceable under section 36-202, R. R. S. 1943, and section 2-201, U. C. C.

Plaintiffs' reply alleged that the oral contract was not within the statute of frauds because there was a written memorandum of the agreement contained in a letter written to plaintiffs' counsel, signed by the vice president of the defendant, in 1977. In relevant part the letter states: "Each year we accept bids from a number of sod people in this area to purchase sod from us. We have always sold to just one company each year and each were to cut as much sod as possible, but to have permission to cut for only one year. If they would cut one acre or up to thirty was their decision.

"In our oral agreement with the Jessens in early 1976, we offered the area for $400 per acre, requiring $2000 in advance, until five acres were cut and then $400 per acre on each additional acre in advance of cutting. They were to pay for all fertilizing of this area. They did comply with the above by paying the $2000 plus the fertilizer cost. Now, whether they took 4½ or 6 acres or not, we cannot substantiate. However, it appeared they cut approximately 5 acres. We felt as if we had fulfilled our obligation and they theirs.

"In the past we have left it up to the buyers as to the amount of sod they would cut, but always stressed that we were hopeful they could take 20 to 25 acres. When these buyers purchase from us, they are well aware of the fact that summer heat and drought are normal and may prevent them from cutting. It is to their advantage to take as much sod as early as possible. The Jessens either did not have the demand or were cutting sod elsewhere. We

were disappointed that they did not take more."

An affidavit and admissions and answers to interrogatories established that for several years prior to 1976 the defendant had annually sold the sod located on approximately 20 to 25 acres of its unused land to the highest bidder. The defendant and plaintiffs had had a written agreement for the purchase and sale of sod for the year 1972 and a written agreement for the year 1973 before entering into the oral agreement involved here in 1976. The purchase price of $400 per acre had been the same under the agreements for 1972, 1973, and 1976. Plaintiffs had removed a total of 8 to 25 acres of sod in the 2-year period of the 1972 and 1973 contracts, and had paid a total amount of $8,000 for the 2 years, although they have no records of how much sod was removed in each year.

The District Court determined that the oral contract here was unenforceable under section 2-201, U. C. C., and sustained the defendant's motion for summary judgment, and dismissed plaintiffs' petition.

The sale of growing sod is a sale of goods under the Uniform Commercial Code. See § 2-107, U. C. C.

The relevant portions of section 2-201, U. C. C., provide: "(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing. * * *

"(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable * * *

"(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

"(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2-606)."

The comment to section 2-201, U. C. C., states with regard to the required writing: "Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be 'signed', a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity."

The comment also states: "The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated."

Partial performance of an oral contract will not remove the entire contract from the bar of the statute. The comments to section 2-201, U. C. C., state that " 'Partial performance' as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted."

The defendant's letter did not specify any definite quantity of sod except for the 5 acres of sod paid for in advance. Thereafter plaintiffs were to take as little or as much sod as they wanted. The quantity over the minimum was completely indefinite. The defendant did not admit in its pleadings, testimony, or otherwise that the oral contract involved required delivery of more than 5 acres of sod.

The oral contract here was for the sale of goods for the price of $500 or more and was unenforceable under section 2-201, U. C. C., except to the extent of 5 acres of sod which had been sold and delivered and

for which payment had been received and accepted. There is therefore no genuine issue as to any material fact remaining and the defendant was entitled to a summary judgment as a matter of law. See Farmland Service Coop., Inc. v. Klein, 196 Neb. 538, 244 N.W. 2d 86.

The motion for summary judgment was properly sustained. The judgment is affirmed.

AFFIRMED.

TESAR, District Judge, not participating.

JOANN GASPER ET AL., APPELLANTS, V. HOWARD U. MOSS, APPELLEE.

281 N. W. 2d 213

Filed July 10, 1979. No. 42243.

1. **Joint Tenancy: Intent.** Sums remaining on deposit at time of death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account was created.
2. **Joint Tenancy: Wills: Statutes.** A right of survivorship in a joint account arising from the express terms of the account or under section 30-2704, R. R. S. 1943, cannot be changed by will.
3. **Equity: Evidence: Supreme Court.** On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.

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

H. Jerome Kinney, for appellants.

Collins & Gleason, for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and HASTINGS, JJ., and FAHRNBRUCH, District Judge.

McCOWN, J.

This action in equity was brought by three stepdaughters of a decedent to establish an oral trust on behalf of the plaintiffs in one-half of the funds formerly held in a joint bank account between the decedent and his son, the defendant. Following trial the District Court dismissed plaintiffs' petition, and plaintiffs have appealed.

Howard F. Moss died August 8, 1976. Under the terms of his will dated April 16, 1974, plaintiffs were beneficiaries of one-half of his estate and his son, Howard U. Moss, was the beneficiary of the other half and was also the executor. At the time of his death Howard F. Moss had a joint bank account with his son, Howard U. Moss, in the sum of $15,996.86. On or about August 11, 1976, the defendant, Howard U. Moss, withdrew all the funds in the joint bank account.

Other than the bank account the decedent apparently owned no property of any substantial value at the time of his death. An insurance policy he owned was cashed and applied toward the expense of burial. The furnishings in his apartment were distributed between the plaintiffs, the defendant, and other friends. Apparently the estate was not probated. The record shows that on February 4, 1977, the defendant, Howard U. Moss, paid from his personal checking account the decedent's hospital bill of $1,000 and two doctor bills totaling $312.04.

On October 18, 1977, plaintiffs filed this action alleging that the defendant was named a joint owner of the bank account pursuant to a trust agreement between the decedent and the defendant by the terms of which, upon the death of the decedent, Howard F. Moss, the funds in the account were to be distributed to the beneficiaries under the will of Howard F. Moss; that defendant had withdrawn all the funds in the bank account after the death of the decedent in violation of the trust agreement; and that half of

such funds are held in trust by the defendant for the plaintiffs.

Howard F. Moss and Anna Moss were married December 18, 1971. It was a second marriage for each. Plaintiffs are the daughters of Anna Moss and the defendant is the son of Howard F. Moss. Prior to the death of Anna Moss, she and Howard F. Moss had gone to the same attorney to have their wills prepared. The will of Howard F. Moss was executed April 16, 1974. Anna Moss died August 6, 1974. The will of Anna Moss, according to the testimony, specified that her property was to be divided among her three daughters. Her daughter, JoAnn Gasper, was named executrix. At the time of Anna Moss' death, she had a joint bank account with her daughter, JoAnn Gasper. When Anna Moss died JoAnn combined the money from insurance policies, bonds, and the joint savings account, paid the bills, and divided the remainder among the three sisters and their brother, although the brother was specifically excluded by the will. The record does not show whether the will was ever offered for probate.

Plaintiffs' evidence was that Howard F. Moss said he wanted his estate to be handled in the same fashion as that of Anna Moss. After the death of Anna Moss he told the plaintiffs and some of their spouses that he had a savings account in his name and that the three plaintiffs were to get one-half of the savings. Plaintiffs' evidence was that he referred to his will and his savings interchangeably and said on one occasion: "[M]y savings is my Will." Plaintiffs' evidence also indicated there was a warm relationship between Howard F. Moss and the three stepdaughters which continued after the death of Anna Moss. Plaintiffs testified that at the funeral of Howard F. Moss, and on later occasions, the defendant told them that he was handling all the bills and that after everything was settled he would divide the

remainder of the savings with the plaintiffs according to the will.

The defendant's testimony was that Howard F. Moss did not explain why he made defendant a joint tenant of the bank account. The defendant denied that Howard F. Moss ever created any trust or gave him any instructions about the account except that he was to take care of any bills with the money in the account and any balance was to go to him. The defendant also denied telling plaintiffs that after the bills were paid he would settle up with them. He testified that he merely told plaintiffs he would take care of everything.

At the conclusion of the trial the court took the matter under advisement and after the submission of briefs sustained defendant's motion to dismiss, and dismissed plaintiffs' petition. The plaintiffs contend that the evidence was insufficient to support the judgment of dismissal.

Section 30-2703 (a), R. R. S. 1943, provides: "(a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."

Section 30-2704 (a) and (e), R. R. S. 1943, provide: "(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. * * *.

"(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P. O. D. payee designation, cannot be changed by will."

Those statutes were adopted in 1974 as a part of the Nebraska Probate Code which became operative January 1, 1977. In essence they codify previous

decisions of this court that evidence to establish an oral trust in a joint bank account or savings account must be clear, satisfactory, and convincing in character. See Eden v. Eden, 182 Neb. 768, 157 N. W. 2d 543.

In this case there is no direct evidence to establish the existence of an oral trust. Neither is the indirect or circumstantial evidence clear and convincing. Although the decedent may have had many different reasons for establishing the joint bank account with his son, the evidence is not clear and convincing that he created or established an oral trust for the plaintiffs at the time the joint account with defendant was established. The circumstantial evidence was also in conflict, and the evidence as a whole supports the trial court's conclusion.

On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Wasserburger v. Coffee, 201 Neb. 416, 267 N. W. 2d 760.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REGINALD C. BENNETT, APPELLANT.

281 N. W. 2d 216

Filed July 10, 1979. No. 42256.

1. **Criminal Law: Evidence: Verdicts: Proof.** A motion for directed verdict will be denied unless there is a total failure of competent proof in a criminal case to support a material allegation in the information or where the testimony adduced is of so weak or doubtful character that a conviction based thereon could not be sustained.
2. **Criminal Law: Confessions: Evidence.** Where the evidence as to

what occurred immediately prior to and at the time of making a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducement or threats, the confession is voluntary and may be received in evidence.

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

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

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

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

WHITE, J.

The defendant was charged in the District Court for Douglas County with first degree murder in the commission of a robbery of James G. Sloan on February 25, 1978. The jury found the defendant guilty and he was sentenced to a term of life imprisonment in the Nebraska Penal and Correctional Complex. Defendant appeals. We affirm.

We will discuss defendant-appellant's two assignments of error in the order presented. The first is that the District Court committed reversible error in denying the defense motions for a directed verdict made at the conclusion of the State's case, and again at the conclusion of the defense evidence, because the evidence was insufficient as a matter of law to prove corpus delicti and defendant's guilt beyond a reasonable doubt.

At approximately 7:30 p.m., on February 25, 1978, the Omaha city rescue squad was summoned to 701 South 22nd Street, Omaha, Nebraska, near the Drake Court Apartments, where a man, later identified as the defendant, ran up to the squad and informed them that an injured party was at the east end of the complex. There the victim was found lying face down on the sidewalk. He had obvious head

injuries and a considerable amount of blood was present under his head on a concrete sidewalk. The victim was not breathing and had no pulse. He was transported to the Lutheran Medical Center where, after failing to respond to treatment, he was pronounced dead.

An autopsy was performed by Dr. Richard B. Wilson, a pathologist. Dr. Wilson testified that, when he examined the victim, he found a deep cut on the forehead, obviously not made by a knife, as the edges were bruised and a little torn. There were other wounds on the side and near the top of the head. Upon removal of the brain by Dr. Wilson, the victim was found to have suffered a fractured skull and consequent release of blood into the ear canal. Examination of the body other than the head revealed by Dr. Wilson a greatly enlarged heart: "Looking at the heart valves, I found that the outlet valve, the one from the left chamber of the heart that carries blood down through the body cavity, was almost completely blocked. I could not get a finger through it. Normally one could put a thumb through this valve. It's very large. And so it was very firm also. And the term we use for this is calcification, * * *." The victim was also found to have seventeen-hundredths of one percent of alcohol in the blood as shown by the toxicology report.

Dr. Wilson testified that the "Proximate, * * * cause * * * [of death] is multiple head injuries, one of which may have been due to a direct blow * * * while the others appear to most likely result from a fall." Dr. Wilson explained that by the term proximate cause he meant "without the head injuries, * * * the man would still be walking around, * * *." There was sufficient evidence to prove that, while the victim's preexisting heart condition and consumption of alcohol may have contributed, the direct cause of death was the blows to the head.

A brick or cobblestone found near the victim's

body was sent to the State Crime Laboratory in Lincoln. Examination of the stone by Karen Schmidt, a forensic serologist, revealed a small amount of blood. The size of the sample precluded further tests to determine whether it was of human origin.

The defendant was identified at trial as the person at the scene when the rescue squad arrived. He directed the crew to the victim and attempted to assist them in placing the victim in the ambulance. About 1½ hours after the victim's body was taken to Lutheran Hospital, the defendant, identifying himself as David Brown, telephoned the hospital and inquired about Mr. Sloan's condition. Soon thereafter, the defendant appeared at Lutheran Hospital, again identified himself as David Brown, and again inquired about the condition of the victim. He later explained the use of this alias by saying that he felt there might be a warrant for his arrest due to a traffic ticket which had recently become past due.

He was directed by hospital personnel to Omaha police officers who, after contacting a Sergeant Olson, arranged to have the defendant taken to Omaha police headquarters for questioning.

It is clear the defendant was not then in custody, voluntarily accompanied the officers, and was considered as a material witness in a possible homicide. Officer Lanny Lenker was ordered from off-duty status to headquarters to question the defendant. He began questioning the defendant after 9:30 p.m., on February 25 at the police station. He asked the defendant to accompany him to the death scene which the defendant agreed to do. The defendant had stated he left his vehicle at Lutheran Hospital. Following examination of the death scene, Officer Lenker drove him there but his car was not to be found. The defendant claimed it must have been stolen. Officer Lenker checked with the hospital security guard who recalled having seen the defendant at the hospital but not with any vehicle. Officer Lenker then asked

the defendant to empty his pockets to see his car keys. When he dumped out his pockets, no keys could be found but the officer then observed a rent receipt bearing the name of Reginald Archie. The defendant had also been unable to produce any identification. At this time Officer Lenker concluded the defendant was a prime suspect in the homicide and returned him to the police station just after midnight. They began a series of police interrogations culminating in a tape-recorded confession given to Officer Subby Salerno at about 6 a.m.

The first interview, conducted by Officer Jack O'Donnell, began at midnight, at which time the defendant was orally given the Miranda warnings and agreed to talk to the officer. The interview lasted until 2:20 a.m. During that time, according to Officer O'Donnell's testimony, the defendant first stated that he had wanted to go out with his wife at about 6 in the evening but his wife did not wish to go with him. He had about $3 when he left his house. He got into his automobile and drove to the South Omaha area. He then drove to a Colonial Hills apartment located at South 13th Street, Omaha, where he intended to talk to a man but could not find him. He said he talked to the man's girl friend for awhile, left there, got into his automobile, and about this time a friend of his that he knew by the name of Reginald Spears came up to him and got into his automobile where they talked for awhile. Reginald Spears wished to borrow $10 from the defendant because he had rented an apartment at the Drake Court earlier that day for $20, later decided he did not want the apartment, and needed some money. The defendant had no money so Reginald Spears left and the defendant returned to his residence. He said that he was nearing his home, apparently having parked his car, and was walking when he saw a man lying on the ground. He yelled for somebody as the man needed help. He ran up the street to call the police and then

waited for the rescue squad. He offered to help them put the man in the rescue car and eventually went back to his apartment where he told his wife that he was going out to look for a job. He went down to the corner where he called the hospital to determine the condition of the man, eventually went to the hospital, and was then brought down to the police station.

At about 1 a.m., during the O'Donnell interview, the defendant admitted his name was not David Brown, first claiming his real name was Reginald Spears, then Reginald Bennett. At 1:30 a.m., the defendant signed a written consent for a search of his apartment. Earlier in the interview the defendant had denied he had seen or taken any of the personal property of the deceased; however, after the search of his apartment began, he directed the officers to a set of keys which were later found to open the victim's apartment. The police at the same time found a slip of paper, a form of receipt with the victim's name on it.

On return to the central police station, the defendant recounted the events of the prior evening, this time giving a different version then he had given earlier. He stated that he left his apartment by himself to walk up to 22nd and Jones Streets to get some candy for his wife. When he was walking up the stairs by the Drake Court, he ran into Mr. Sloan who held an object in his hand and threatened to spray him with what he thought was mace. A little later the defendant stated that Mr. Sloan could have possibly thought he was going to rob him and, after defendant was pushed to the ground, he threw a rock at Mr. Sloan or hit him with a rock. Later, in the same interview, he retracted this story, admitted he had made it up, and stated the correct story was the version he told Officer Lenker, namely, of simply finding the body. The interview was concluded and defendant was placed in a cell at approximately 2:20

a.m. At approximately 3:45 a.m., the defendant was brought from his cell to an interrogation room where he was interviewed by Officer Subby Salerno. That interview concluded at 6 a.m., with a taped statement in which the defendant admitted striking the victim in the head with a large rock. He said he did this after Mr. Sloan reached into his pocket. After Mr. Sloan fell to the ground, the defendant picked up some change, keys, and a wallet containing $3. After the interview, the defendant led the officers to a trash can into which he had thrown the victim's wallet and they retrieved it.

At trial, the defendant retracted his confession and again stated that he and his wife found the body after it was already on the ground. The jury obviously chose not to believe that version of the facts. The evidence of the defendant's statement, together with the physical facts, are obviously sufficient to sustain both the overruling of the motion for a directed verdict and the conviction of first degree murder. A motion for directed verdict will be denied unless there is a total failure of competent proof in a criminal case to support a material allegation in the information or where the testimony adduced is of so weak or doubtful character that a conviction based thereon could not be sustained. State v. Webb, 197 Neb. 662, 250 N. W. 2d 625 (1977).

The judgment will be affirmed unless, as contended by the defendant in his second assignment of error, the confession was given involuntarily or without a knowing waiver of his right to remain silent and right to counsel.

A defendant's confession is admissible in evidence against him only if it was voluntarily given. The totality of the circumstances must show that the confession was the product of a rational intellect and free will. See, Blackburn v. Alabama, 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960); State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66 (1965). A further

prerequisite to admissibility of any statement given during custodial interrogation is that the defendant was informed, prior to making the statement, of his constitutional privilege against self-incrimination and right to counsel. See Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

There is first the assertion of the defendant that the interrogation by Officer Lenker, after defendant identified himself as David Brown to the Omaha police officers at the Lutheran Hospital, was, in fact, custodial and, since he was not advised of his rights, all further statements given thereafter were tainted. This contention is without merit.

The Miranda procedures apply equally to exculpatory as well as inculpatory statements, but they were not meant to preclude law enforcement personnel from performing their traditional investigatory functions such as general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process. See, United States v. Akin, 435 F. 2d 1011 (5th Cir., 1970); Miranda v. Arizona, *supra*. As related previously, the police officers testified that the defendant was not in custody and was being interviewed as a material witness, a fact with which the District Court hearing the evidence agreed. Defendant was, in fact, returned to the Lutheran Hospital for the purpose of picking up his automobile which he had voluntarily told the officers he had driven to Lutheran Hospital. He then informed the officers that the car was stolen. The officers, after finding the defendant possessed no keys for the vehicle spoken of, and after receiving a statement of the security guard that he saw the defendant but without an automobile, concluded the defendant was probably lying. It was only at this point that the police seriously began to consider the defendant as a prime suspect.

He was arrested and no further statements were taken until Officer O'Donnell informed him of his

rights at the interrogation which began at midnight. Officer O'Donnell did so orally and from memory rather than using the standard rights advisory form. When asked to repeat those rights at trial, he inadvertently omitted the required warning: "Anything you may say can be and will be used against you in court." He had not, however, omitted the warning when asked the same question at the earlier suppression hearing, and the evidence was properly admitted.

"[W]here the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence." State v. Keesecker, 198 Neb. 426, 253 N. W. 2d 169 (1977).

Each of the officers who testified at the suppression hearing testified that the defendant was alert, that the statements were voluntary, and that the defendant voluntarily spoke with the officers. Officer Salerno, who obtained the tape-recorded confession, testified that the defendant was alert; the defendant said he felt well; and he was willing to speak with Officer Salerno. The tape itself makes it clear the defendant was fully informed of his rights and there was no duress, coercion, threats, or promises of reward or immunity.

Defendant would have us reverse on his bald assertion unsupported by any corroboration that he felt threatened, was, in fact, tired and weary, and was denied his rights. The defendant had a fair hearing on the subject of the Miranda rights and the evidence fully supports the trial court's judgment. The judgment and sentence are, therefore, affirmed.

AFFIRMED.

MARIA GLIONNA, APPELLEE, V. GERALD E. CHIZEK, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT, IMPLEADED WITH STUART'S, INC., APPELLEE.

281 N. W. 2d 220

Filed July 10, 1979. No. 42324.

1. **Labor and Labor Relations: Statutes.** An appeal from proceedings under section 48-601 et seq., R. R. S. 1943, the Employment Security Law, must be considered by this court de novo.
2. **Labor and Labor Relations: Words and Phrases: Statutes.** If an employee accepts employment in good faith and through no fault or deficiency on his or her part the workload becomes an increasingly unreasonable burden so as to affect the health or sense of well-being of the employee, voluntary termination does have some justifiably reasonable connection with or relation to conditions of employment and may be deemed for "good cause" under section 48-628 (a), R. S. Supp., 1976.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

James R. Jones and John W. Wynkoop, for appellant.

Warren J. Nash, for appellee Glionna.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

HASTINGS, J.

This is an appeal by Gerald E. Chizek, Commissioner of Labor, hereinafter called Chizek, from an order of the District Court for Douglas County which reversed the determination of the Appeal Tribunal of the Department of Labor which found that plaintiff had voluntarily left her employment with Stuart's, Inc., without good cause and therefore was not entitled to unemployment compensation benefits. The initial claim had been heard by a claims deputy of the Nebraska Department of Labor who found that plaintiff had left her employment because she was dissatisfied with her job and her reasons

were not of the necessitous and compelling reasons indicated in section 48-628 (a), R. S. Supp., 1976. Testimony was given by both plaintiff and Don Dandy, owner of Stuart's, Inc., before the Nebraska Appeal Tribunal and additional testimony by plaintiff in the District Court.

According to plaintiff she began working for Stuart's, Inc., on April 1, 1976, and worked until September 29, 1977, when by her own action she terminated her employment. She was hired to work from 10 a.m., until 5:30 p.m., 3 days a week, and from 10 a.m., to 6 p.m., 2 days a week. Her pay was $3.50 per hour straight time and then was raised to $4 in about 3 months. At first she was employed as a seamstress, working with one other lady who was more or less in charge. However, the lady in charge quit and other people were hired periodically for a few days at a time, but for the most part plaintiff ran the entire tailor shop by herself. During that period of time she did the fittings, marking, ripping, sewing, and pressing. She said the volume of work increased to the point where she started going to work at 9:30 a.m., skipping lunch and one coffee break, and working as many as 9, 10, and up to 11 hours a day. According to plaintiff, there was "more than one evening" she was ready to leave work for the day when Mr. Dandy asked her to finish the job and she would stay until 6 or 7 p.m. At one point she testified that almost every day Mr. Dandy asked her to work overtime, from 8½ to 11 hours per day. Apparently Mr. Dandy never told plaintiff she would be fired if she did not work overtime, but she knew there was the work to be done, she needed the job, and she would stay late each day until she was finished. At another point in her testimony she said she felt there was a danger of losing her job if she left at the normal quitting time.

Finally, the next to the last day she worked, which was 2 days before she was to take a week's vacation,

there was so much work to do she told Mr. Dandy she could not work 11 hours a day and she could not possibly get the work done before taking her vacation. He replied they would see tomorrow. The next day there was more work on the bench than when she had left. She told him it was more work than humanly possible to do, and Mr. Dandy started to scream, jump up and down, and call her names she had never heard before. She began to shake so much she ran a needle through her finger. Following that last day she claimed she was sick and upset for 2 days.

Mr. Dandy gave a somewhat different version of the events leading up to plaintiff's quitting. He did agree that she oftentimes worked overtime, but claimed she was manager of the tailor shop and could leave at 5:30 p.m., each day, but that she wanted to work longer hours. He did not deny there was that much work to do and that plaintiff did work hard and would get upset. However, he knew she was doing extra work after hours for Aksarben. He testified she was an excellent seamstress and he had tried to hire her back. He also said he sent work to other tailor shops, which plaintiff admitted, but she denied it made any appreciable difference in her workload.

An appeal under the Employment Security Law, sections 48-601 to 48-669, R. R. S. 1943, must be heard by the District Court de novo on the record, although either party may offer additional evidence after proper notice. This court on appeal *must also consider the cause de novo on the record,* meaning that it is our duty to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. § 48-639, R. R. S. 1943; A. Borchman Sons v. Carpenter, 166 Neb. 322, 89 N. W. 2d 123 (1958).

Section 48-628, R. S. Supp., 1976, provided in part: "An individual shall be disqualified for benefits:

(a) For the week in which he left work voluntarily *without good cause* * * *." (Emphasis supplied.) The key phrase, of course, is "without good cause." It is obvious that the Employment Security Law does not purport to grant benefits to employees who leave their work purely voluntarily. Woodmen of the World Life Ins. Society v. Olsen, 141 Neb. 776, 4 N.W. 2d 923 (1942). However, if the reason for leaving, voluntarily though it may appear, has some justifiably reasonable connection with or relation to the conditions of employment, it cannot be said that the leaving is "voluntarily without good cause." In Fannon v. Federal Cartridge Corp., 219 Minn. 306, 18 N. W. 2d 249 (1945), where an employee was transferred from one department to another because of allergies and then quit because the environment in the second position made her ill, the court said: "* * * where factors or circumstances directly connected with employment result in illness or disease to an employee and make it impossible for him to continue therein because of serious danger to his health, termination of employment for this reason may correctly be said to be involuntary and for 'good cause attributable to the employer,' even though the employer be free from all negligence or wrongdoing in connection therewith."

The Nebraska Appeal Tribunal, in a decision handed down on November 29, 1943, said that where, because of a lack of help, an employee found the work to be too much for her and quit, "claimant quit with good cause." Appeal Tribunal Decision, No. 136, Vol. VI, 11-29-43. Also found at CCH Unemployment Insurance Reporter, Vol. IB, par. 1975, p. 30,164.

The authorities cited and otherwise referred to above demonstrate that each situation depends upon the particular facts and circumstances therein existing and our decisions in this area must be on a case-by-case basis.

The trial judge in his memorandum and order found that plaintiff's "workload proved too much for her and she became concerned about her physical and mental well being." As he so aptly put it, "The facts of this case parallel the Greek fable concerning the countryman who killed the goose that laid the golden eggs." He concluded plaintiff had sustained her burden of proving that she left her employment with good cause, within the meaning of section 48-628, R. S. Supp., 1976, and was eligible for the benefits provided by law.

We do not say that any time an employee decides he or she does not like the job or that it is burdensome or requires more skill than is possessed by the employee, voluntary termination can be for "good cause." However, we do state that when an *employee* accepts employment in good faith and through no fault or deficiency on his or her part the workload becomes an increasingly unreasonable burden so as to affect the health or sense of well-being of the employee, voluntary termination does have some justifiably reasonable connection with or relation to conditions of employment and may be deemed for *"good cause."* The evidence supports such a finding here, and the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH L. CLIFFORD, JR., APPELLANT.

281 N. W. 2d 223

Filed July 10, 1979. No. 42415.

1. **Criminal Law: Mistrial: New Trial.** A mistrial may be declared and a new trial granted in a criminal case where there is a manifest necessity to do so in order to serve the ends of public justice.
2. **Criminal Law: Mistrial: New Trial: Double Jeopardy.** Where

the trial court discovers, after trial has commenced, that a juror is disqualified by reason of bias, and that fact was not disclosed on voir dire examination, the court may declare a mistrial without prejudice, and the subsequent retrial of the defendant does not constitute double jeopardy.

3. **Criminal Law: Statutes: Arrest: Proof.** Under section 60-430.07, R. S. Supp., 1978, an attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required.

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

Jerry Matthews of the Oglala Sioux Tribal Legal Services, for appellant.

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

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

MCCOWN, J.

The defendant was convicted by a jury in the county court on a charge of operating a motor vehicle to avoid arrest and sentenced to 60 days in the county jail. On appeal the District Court affirmed the conviction and sentence.

About midnight of September 1, 1977, a deputy sheriff was following an automobile on the highway near Rushville, Nebraska, and observed it weaving from the centerline to the shoulder of the highway. The deputy turned on his red lights and stopped the vehicle. The defendant was the driver. The deputy asked the defendant to take a field sobriety test because the defendant's eyes were bloodshot and the deputy could smell alcohol. The defendant failed the sobriety tests and the deputy informed him that he was under arrest for driving while intoxicated. The deputy returned to his patrol car to report the arrest and the defendant drove away. A high speed chase ensued in which defendant eluded a roadblock

and was finally stopped and rearrested by the deputy and another officer.

Complaints were filed in the county court of Sheridan County charging the defendant on one count of driving while intoxicated, and on a second count of operating a motor vehicle to avoid arrest. Defendant filed a demand for jury trial. After a jury had been selected and trial commenced, one of the jurors was found to be disqualified and a mistrial without prejudice was declared. Some 3 weeks later a different jury was selected and trial was held. The jury acquitted the defendant of the charge of driving while intoxicated and found him guilty of the charge of operating a motor vehicle to avoid arrest. The county court sentenced him to 60 days in the county jail. On appeal the District Court affirmed the conviction and sentence and this appeal followed.

The defendant first contends that the county court erred in granting a mistrial without prejudice and that defendant's later trial and conviction violated his constitutional right not to be twice put in jeopardy for the same offense.

The record establishes that on March 8, 1978, the jury panel was assembled and voir dire conducted. The prosecutor passed the jurors for cause. The court inquired whether two of the jurors were acquainted with the defendant and they responded: "No." The defendant's attorney inquired whether any of the jurors knew the defendant or had ever met him, and no one responded. Thereafter the panel was passed for cause, and the jury selected.

Trial commenced and continued through the morning. At the noon recess one of the jurors contacted the judge about his ability to fairly and impartially carry out his duties as a juror. The court conducted a hearing and ascertained that the juror had not associated the defendant's name with his face at the time of the voir dire examination, but after sitting through a portion of the trial the juror

realized that he and his wife were well acquainted with some of the defendant's family and knew some facts about the defendant that he did not realize at the time of the voir dire examination. The juror stated that he did not think he could be a fair and impartial juror.

The prosecutor offered to stipulate to a trial by the remaining jurors but defendant's counsel refused. The prosecutor moved for a mistrial without prejudice and the defendant moved for a mistrial with prejudice. The court declared a mistrial without prejudice. The defendant preserved his position prior to the retrial contending that he had been twice put in jeopardy for the same offense in violation of both the Nebraska and United States Constitutions.

The early common law rule was that the discharge of an impaneled jury in a criminal case for any cause before the verdict would sustain a plea of former jeopardy and operate practically as a discharge of the prisoner. The modern rule permits a court to discharge a jury without having the effect of acquitting the defendant in any case where the ends of justice would be otherwise defeated. A mistrial may be declared and a new trial granted where there is a manifest necessity to do so in order to serve the ends of public justice. See Arizona v. Washington, 434 U. S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717.

Long ago the Supreme Court recognized that the discovery of the possible bias of a juror after the commencement of trial constituted manifest necessity for a mistrial, and that a subsequent retrial of a defendant did not constitute double jeopardy. In Simmons v. United States, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968, one juror swore during voir dire that he did not know the defendant. After the jury was impaneled and evidence was taken it became known that the juror knew the defendant personally. The trial court discharged the jury without prejudice and ordered retrial. The issue on appeal was whether

the subsequent retrial of the defendant constituted double jeopardy. The court held it did not and said: "There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused."

This court has held that where, during trial, a juror is found disqualified because of his partiality toward the defendant and his failure to disclose that fact on voir dire examination, the declaration of a mistrial without prejudice and a subsequent retrial did not constitute double jeopardy. See Quinton v. State, 112 Neb. 684, 200 N. W. 881. In that case we said: "The right, in the absence of statute, to exclude a juror and discharge the jury in a proper case, without prejudice to a future trial of the case on its merits, is and of necessity must be inherent in the court, within its sound discretion. This is necessary to the protection of the state, as well as for the protection of defendant. To deny it to either would be a flagrant abuse of the discretion imposed. * * *

"Thus, we conclude that the court, in considering the juror disqualified, in discharging the jury, and in sustaining the demurrer to the plea in bar, was clearly within the law, and that its acts and doings, as shown by the record, did not place defendant twice in jeopardy."

The disqualification of the juror in the present case and the declaration of a mistrial due to the juror's bias were manifestly necessary to serve the ends of justice and the retrial of the defendant under

such circumstances did not constitute double jeopardy.

Defendant also contends the court erred in refusing to instruct the jury that the State had the burden to prove defendant had actually violated a law of the State of Nebraska for which officers were attempting to arrest him in order to establish all the essential elements of the crime of operating a motor vehicle to avoid arrest.

The court instructed the jury that the State must prove beyond a reasonable doubt that the defendant was operating a motor vehicle upon a public highway or road; that he knew a law enforcement officer was attempting to arrest him for violating a law of the State of Nebraska; that he fled in a motor vehicle to avoid such arrest; and that the acts were done at the times and places alleged.

Section 60-430.07, R. S. Supp., 1978, provides: "It shall be unlawful for any person operating any motor vehicle to flee in such vehicle in an effort to avoid arrest for violating any law of this state. * * *."

The offense of fleeing in a motor vehicle to avoid arrest is separate and distinct from any offense for which law enforcement officers were attempting to make the arrest. The two offenses are not interdependent, nor is proof of the commission of one offense an essential element of proof of the other offense. Under section 60-430.07, R. S. Supp., 1978, an attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required. To the extent the dicta in State v. Goodloe, 197 Neb. 632, 250 N. W. 2d 606, may be in conflict, it is disapproved.

The instructions given to the jury in the present case properly set out the essential elements of the offense, and the court did not err in refusing defend-

ant's requested instruction. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND O. KING, APPELLANT.

281 N. W. 2d 226

Filed July 10, 1979. No. 42419.

Criminal Law: Motor Vehicles: Theft. Whether, at the time of taking an automobile, the defendant had the intent of permanently depriving the owner of its use or whether he intended to return it is a question of fact.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Dennis G. Carlson, for appellant.

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

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

WHITE, J.

The defendant was tried in the District Court on a charge of automobile theft in violation of section 28-522, R. R. S. 1943. The defendant waived a jury and at trial he contended he was guilty only of the lesser-included offense of wrongful taking of an automobile, also known as joy riding. § 28-521, R. R. S. 1943. The trial court found the defendant guilty of automobile theft and sentenced him to a term of 1 year in the Nebraska Penal and Correctional Complex with credit for time spent in the county jail awaiting trial. The defendant appeals. We affirm.

Defendant assigns three errors here but they are interrelated and may be stated as follows: That the

evidence is not sufficient to sustain a conviction for automobile theft and the trial court should have found the defendant guilty of the lesser-included charge of automobile joy riding. The principal distinction between the offenses is the intent to keep or permanently deprive the owner of use of the automobile, which is an element of automobile theft.

In reviewing criminal cases, this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. State v. Olson, 200 Neb. 341, 263 N. W. 2d 485. It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. State v. Partee, 199 Neb. 305, 258 N. W. 2d 634.

The following facts are undisputed. On the afternoon of March 17, 1978, at approximately 3 p.m., the defendant went to the Vanice Pontiac-Cadillac, Inc., used car lot located at 70th and O Streets, Lincoln, Nebraska. He drove a 1968 Pontiac GTO. While there, he removed the key from the turn signal of a 1967 Pontiac and took it with him upon leaving. At approximately 3 a.m., the morning of March 18, 1978, the defendant returned to the Vanice parking lot and, by his own admission, took the 1967 Pontiac without permission and without consent of the owner. At 8:30 a.m., on March 18, 1978, a Lincoln policeman at 22nd and A Streets observed the defendant driving a 1967 Pontiac without license plates or in transit tags. The policeman pursued him and, after an extended chase, apprehended the defendant at 27th and C Streets, approximately 5 miles from where the automobile had been taken.

Upon being arrested, the defendant was advised of his Miranda rights and taken to the Lincoln police station where he was questioned.

In support of his contention that he is guilty only of

the lesser offense of joy riding, the defendant testified at trial that he had never intended to keep the automobile. He testified he never left the city of Lincoln after taking the automobile on March 18, 1978, and that, at the time he was apprehended, he had just delivered a friend to her home and was on his way back to the Vanice automobile dealership where he intended to leave the automobile in the near vicinity of that lot. The defendant asserts that he had been released 2 days previously from the county jail and had not yet found a place to stay. He thought he would sleep in the automobile if he needed to and, other than that, he only took it to ride around.

In opposition to defendant's testimony on intent, the State presented testimony from two Lincoln police officers. The police officers testified that at the police station the defendant told them he was stealing cars for an unidentified party in Denver, that he stole the cars to get money and drugs, and that he would not steal a car just for joy riding. He further told the police officers that had he had time to tune up the car, he would not have been caught.

The defendant asserts he was under the influence of amphetamines and marijuana at the time of the taking and at the time of his apprehension. There is no assertion that he was not *capable* of forming the necessary intent for automobile theft. Nor is there any contention on appeal that the statements of the defendant were not, in fact, voluntary and given after warnings required in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Essentially, the defendant's response to the incriminating statements testified to by the police was to deny having made them.

"Any person who steals or attempts to steal an automobile or motorcycle, of any value, * * * with intent thereby to defraud the owner; * * * shall be deemed guilty of a felony, * * *. The possession of

such property without the consent of the owner and without a certificate of registration issued to the possessor as required by law, shall be prima facie evidence of guilt * * *." § 28-522, R. R. S. 1943. The State does not dispute that the absence of an intent to permanently deprive the owner is a defense to a charge of automobile theft. The State simply asserts that the evidence is sufficient for the trial court to have found the defendant guilty. We agree. The possession of the stolen automobile without the permission of the owner and without a certificate of registration is in itself prima facie evidence. Whether such evidence is overcome so as to place a further burden on the State, or the fact that the defendant was apprehended within a reasonable time of the taking and within the same community as the taking, need not be decided here since the trial court could and did properly consider the defendant's own statements to the officers concerning his intent. "It must be borne in mind that the intent with which an act is done is purely a mental process and hard to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of all the surrounding circumstances." Buckley v. State, 131 Neb. 752, 269 N. W. 892.

The evidence in this case was clearly sufficient to justify the trial court's determination. The judgment and sentence are affirmed.

AFFIRMED.

LEE S. RAGAINS, APPELLEE, V. NANCY M. RAGAINS, APPELLANT.

281 N. W. 2d 516

Filed July 17, 1979. No. 41998.

1. **Divorce: Alimony: Property.** The general rule is that the fixing

of alimony and distribution of property rest in the sound discretion of the District Court and in the absence of abuse of discretion will not be disturbed on appeal.

2. _____: _____: _____. The rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances of the particular case.

3. _____: _____: _____. The division of property and the issue of alimony may be considered together and they are to be determined upon the consideration of all the facts and circumstances.

4. **Divorce: Property.** Although this court would generally prefer that there be a complete division of the property in dissolution actions, when the proper situation presents itself the trial court does not abuse its discretion in having the parties own an undivided one-half interest in the property.

5. **Divorce: Alimony: Property.** The award of alimony and the division of property are determined by the circumstances of the parties at the time of the dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children. No case has said that the granting, denial, or reduction of alimony nor the division of property are to be considered punitive, and no such provision should be engrafted on the law of this state.

6. **Divorce: Attorney's Fees.** The award of an attorney's fee is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of the property, the alimony awarded, the earning capacity of the parties, and the general equities of the situation.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Tye, Worlock, Tye, Jacobsen & Orr and Larry E. Butler, for appellant.

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

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

WHITEHEAD, District Judge.

This is an action for dissolution of marriage. The District Court found that the marriage was irre-

trievably broken and entered a decree of dissolution. The court granted custody of the one remaining minor, dependent child of the parties to the wife and awarded child support. The court also made a property division, awarded alimony to the wife, and awarded the wife an attorney's fee. The wife has appealed.

The parties were married October 26, 1952. The wife was 18 years old and the husband was 20 years old at the time of the marriage. Both had completed high school. At the time of the dissolution, the wife was 43 years old and the husband was 45 years old. At the time of the marriage the husband owned 25 Hereford stock cows, a saddle horse, and an automobile that was 1 year old. The wife brought basically no property into the marriage. Immediately following the marriage the parties moved to a ranch owned by the husband's grandfather where the husband was employed, receiving compensation of $150 per month and free feed for his livestock.

In 1953 the oldest of the three children of the parties was born. Only one child is now a minor. In 1954 the husband entered the military service and upon discharge entered college as a preveterinary student. He was graduated as a veterinarian in 1963. During the entire 7 years in which the husband attended college, both parties worked to support the family, the wife working as a babysitter and in a day care center, the husband on a construction crew and in cutting hay.

For the first 3 years of school, the husband received benefits under the G. I. Bill. After his eligibility had been used up, the husband's parents sent him $160 per month until he graduated 4 years later. Further, the husband's parents paid for all of his tuition and books throughout his schooling.

Upon the husband's graduation in 1963, the parties moved to Kearney, Nebraska, where the husband

commenced the practice of veterinary medicine. At the time of the dissolution the parties had acquired a variety of personal property including household furnishings, automobiles, machinery, livestock, and land, including a residence and an interest in the real estate of the veterinary clinic of which the husband is a partner, an interest in the veterinary clinic partnership, and a livestock partnership.

The wife worked on the farm during the marriage and also cared for the family home and the children. In 1976, the wife had open heart surgery at the Mayo Clinic and a prosthetic valve was placed in the heart. Evidence was contradictory as to her present health. In the last several years, as a result of the increasing number of veterinarians practicing in the area and an influx of cutrate drug houses, the husband's income has declined substantially. He also suffers from diabetes, which curtails his ability to work. The husband's average monthly income for 1977 was $1,100. The husband has no source of income aside from his veterinarian practice.

The District Court, on January 17, 1978, entered its decree dissolving the marriage and awarding custody of the remaining minor child to the wife, subject to the reasonable visitation rights of the husband, and ordered the husband to pay child support for the minor child in the sum of $150 per month. The court, in making a property division, credited the husband with $5,000 in assets owned by him at the time of the marriage, 56 percent of the fair market value of a tract of agricultural real estate of which 56 percent of the purchase price was paid as a result of a $15,000 gift from the husband's mother, and 22.7 percent of the fair market value of another parcel of agricultural real estate of which 22.7 percent of the purchase price was paid from the sale proceeds of land inherited from the husband's grandmother. Also, the husband was given credit for $7,500 of monetary gifts from his mother to make

annual payments on land contracts. The court did not give the husband credit for $9,500 in gifts received from his mother which were used to pay various household expenses.

In the property division the court awarded each of the parties a portion of the parties' real estate outright, awarded each an undivided one-half interest in certain real estate, divided the personal property, and assigned the major portion of indebtedness to the husband. The court further ordered alimony to the wife in the sum of $300 per month until the death or remarriage of the wife, but not to exceed a total of 120 months, and ordered the husband to pay the costs, including a $500 attorney's fee. The wife has appealed.

No issues as to custody or child support are raised by the wife. She assigns a number of alleged errors which could be summarized by stating: (1) That the court erred in the property division by crediting the husband with the assets owned by him at the time of the marriage, with a portion of the gifts received from his mother, and with the portion of the value of the real estate purchased with money received as gifts or inheritance; (2) that the division of the property was unfair; (3) that the award of alimony was inadequate, unfair, and unreasonable; (4) that the award of an attorney's fee was unreasonable; (5) that the court erred in dividing the property to require the parties to remain as coowners of certain parcels of real estate; and (6) that the court erred in not considering evidence as to the responsibility for the breakdown of the marriage.

The property involved in this case had a total value of $465,931.46 less liabilities of $125,276, producing net assets of $340,655.46. In the division of the property, the District Court made an allowance to the husband of $75,460 for an inheritance, gifts he received from his mother, and property owned prior to the marriage. The balance of the net assets were

divided as follows: $138,481.75 to the husband and $126,713.71 to the wife. The wife also received an award of alimony of $36,000.

The issues raised on appeal concerning the property division and alimony can be discussed together.

The general rule is that the fixing of alimony and distribution of property rest in the sound discretion of the District Court and in the absence of abuse of discretion will not be disturbed on appeal. Schmer v. Schmer, 197 Neb. 800, 251 N. W. 2d 167 (1977); Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618 (1975); Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108 (1975).

The wife argues strongly that the award of property is patently unfair under the decree. Considering all the property awarded to the husband by the District Court, he receives 62.8 percent of the property and the wife receives 37.2 percent. When, however, you consider the amount of alimony received by the wife plus her property award, the husband receives approximately 52 percent of the property and the wife 48 percent. This court has said that the rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances of the particular case. Junker v. Junker, 188 Neb. 555, 198 N. W. 2d 189 (1972).

The division of property and the issue of alimony may be considered together and they are to be determined upon the consideration of all the facts and circumstances. Sullivan v. Sullivan, 192 Neb. 841, 224 N. W. 2d 542 (1975); Boroff v. Boroff, 197 Neb. 641, 250 N. W. 2d 613 (1977).

We find no error in the division of property and award of alimony in this case. Although this court would generally prefer that there be a complete division of the property in dissolution actions, when the

proper situation presents itself the trial court does not abuse its discretion in having the parties own an undivided one-half interest in the property. In this situation it is in the best interest of the parties that they are left as owners of an undivided one-half interest in several parcels of property to be able to share equally in the appreciation and development potential of the property.

The wife raises the issue that the trial court was in error in refusing to hear testimony as to the alleged responsibility for the breakdown of the marriage. The clearest expression of the rule of law is set forth in the concurring opinion in Theye v. Theye, 200 Neb. 206, 263 N. W. 2d 92 (1978), which states as follows: "The award of alimony and the division of property are determined by the circumstances of the parties at the time of dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children. See § 42-365, R. S. Supp., 1976. No case has said that the granting, denial, or reduction of alimony nor the division of property are to be considered punitive. I would not engraft any such provision on the law of this state." Nor do we.

As to the issue of attorney's fees, in an action for dissolution of marriage, the award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property, the alimony awarded, the earning capacity of the parties, and the general equities of the situation. Campbell v. Campbell, 202 Neb. 575, 276 N. W. 2d 220 (1979). We see no error in the award of attorney's fees. The wife is allowed $1,000 for the services of her attorney in this court.

AFFIRMED.

BILL B. SVOBODA, APPELLEE AND CROSS-APPELLANT, V. THOMAS D. JOHNSON AND RUTH M. JOHNSON, APPELLANTS AND CROSS-APPELLEES.

281 N. W. 2d 892

Filed July 17, 1979. No. 42031.

1. **Easements.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
2. **Easements: Time.** The use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and continuous for the full prescriptive period.
3. **Easements: Evidence.** To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence.
4. **Easements: Time: Burden of Proof.** Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive.
5. **Easements.** The term "exclusive use" does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others.
6. **Easements: Intent.** The term "claim of right" means nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. This "claim of right" means no more than "hostile" and if possession is hostile it is "under a claim of right."
7. **Adverse Possession: Intent: Time.** Under the law of adverse possession, the intent with which the claimant first took possession of a disputed tract is not ordinarily of too much significance. When the possession of the land of another, no matter what the intention may have been in making the first entry, amounts to that which the law deems as adverse to the true owner and such possession continues for the statutory period of limitations of 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary.
8. **Adverse Possession: Intent.** Intent may be either actual or implied, or inferred from the circumstances. In most cases it is in-

ferred from the circumstances. Actual assertion of claim of ownership is not necessary.

9. **Easements: Adverse Possession.** Although land may be unenclosed, where there is a well-defined roadway or path thereon, the rule as to a prescription of adverse use applies, and places the burden on the landowner to establish that the use by the claimant of the prescriptive right was permissive.
10. **Easements: Words and Phrases.** "Acquiescence" means passive assent or submission, quiescence, or consent by silence.
11. **Easements: Time: Notice.** If the use of an easement has been for the requisite time, notorious, adverse, visible, and under a claim of right, the owner of the servient tenement is charged with knowledge of such use and his acquiescence in it is implied.
12. **Appeal and Error: Equity: Evidence.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the District Court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict thereon on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

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

David E. Cording, for appellants.

Leonard J. Germer and Lance J. Johnson, for appellee.

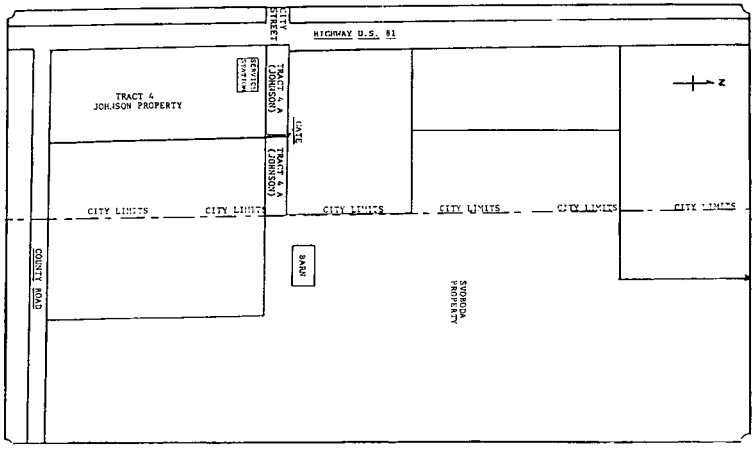
Heard before KRIVOSHA, C. J., MCCOWN, BRODKEY, and HASTINGS, JJ., and WHITEHEAD, District Judge.

BRODKEY, J.

Plaintiff, Bill Svoboda, instituted this action in the District Court for Thayer County, seeking an order granting to himself, other adjoining landowners, and the general public, an easement by prescription for the use of a roadway across defendants, Thomas and Ruth Johnson's property; and also for an order establishing an easement for a waterline under and across the same property. He also sought an order for the removal of a gate built by defendants across the same property, and a permanent injunction to prevent the defendants from interferring with the easements sought.

After the trial to the court without a jury, the District Court entered its findings and orders on February 21, 1978. The trial judge found that by prescription the plaintiff had a waterline easement and a private roadway easement for his own and his invitees' use over defendants' property. He also ordered that the defendant remove the gate across the roadway and that the defendant should be enjoined from interferring in any way with the plaintiff's use of the easements. The court also found that the plaintiff failed to prove that a public easement existed over defendants' property. Defendants then perfected this appeal, and the plaintiff cross-appealed from the District Court's finding that the plaintiff failed to prove an easement for the use of the general public.

For the purpose of visualizing the various tracts of land involved in this case, and for a better understanding of the issues involved, we have prepared a plat reflecting the evidence introduced during the trial with reference to these matters.



Plaintiff and defendants are the owners of neighboring tracts of land located in and near Hebron,

Nebraska. Plaintiff Svoboda owns the property as shown on the plat referred to. Defendants, Thomas and Ruth Johnson, are the owners of tracts 4 and 4 A. Tract 4 A is the property upon which the plaintiff seeks to establish the prescriptive easements. Both the plaintiff and defendants trace the ownership of their respective properties to one J. E. Shearer, who in 1910 purchased an 80-acre tract of land containing all of the property east of U. S. Highway No. 81, except for the lot on the northwest corner of the plat. J. E. Shearer operated a gravel pit on this property until sometime in the early 1940's. Access to the gravel pit was obtained by a roadway which entirely occupied tract 4 A. Before J. E. Shearer died in 1950, he sold tract 4 to one Herb Braasch who built a service station on the tract, the building being located approximately 10 feet from the boundary line between tracts 4 and 4 A. Traffic entering or leaving from the service station crossed over tract 4 A, although there is no evidence in the record that express permission was ever obtained from J. E. Shearer or his heirs. In October of 1974, the defendants became the owners by purchase of tract 4, including the service station upon the land.

J. E. Shearer died in 1950. His estate (or his heirs) sold separate tracts of land located in the gravel pit area to various purchasers. In 1962, plaintiff's father bought the property shown on the plat. He used the land for raising horses. In November of 1976, the senior Svoboda made a gift of that property to his son, Bill B. Svoboda, the plaintiff herein. Tract 4 A served as the only road for the senior Svoboda and the plaintiff to gain access to their property. Also, plaintiff's father, in 1962, installed a waterline under tract 4 A to service his property. Other adjoining landowners were also using tract 4 A for access to their properties.

It appears that defendant, Thomas Johnson, built a carwash operation behind his service station, but

experienced difficulty with water draining off of tract 4 A, the roadway. In contacting the city of Hebron for assistance in improving the drainage off of tract 4 A, he discovered that J. E. Shearer's estate, or decedent's heirs, still owned tract 4 A. In November of 1975, Johnson purchased tract 4 A and received a warranty deed for the land signed by decedent's heirs, his three sons, and their wives. Thereafter, in March of 1977, Johnson built a fence across tract 4 A with a 14-foot gate in it. The gate was never locked and the plaintiff has been able to open the gate to drive back to his property without interference by the defendants.

Shortly after the gate was erected, plaintiff Svoboda contacted the defendant, Thomas Johnson, to obtain a permanent easement across tract 4 A. Johnson refused to give plaintiff a permanent easement, offering instead a year's lease. At that time Svoboda stated that he claimed a permanent easement over tract 4 A.

Tract 4 A ends near the barn located on plaintiff's property, to the east of defendants' property. Plaintiff's property is bounded on the south by a county road as shown on the plat. There is evidence in the record that the soil is sandy, that the surface has gullies, and that in bad weather it would be impossible to drive onto the Svoboda property without prior preparation of the land for a road, although a road from the county road was never considered because plaintiff had been using the road on tract 4 A and a new road was not needed. Svoboda testified that it would be impractical and would necessitate the expenditure of money to build a road across his property from the county road to the barn.

The defendants have advanced four arguments in an attempt to defeat the plaintiff's claim of an easement by prescription. Defendants contend the plaintiff failed to prove: (1) That his use of tract 4 A was "exclusive;" (2) that his use was exercised

under a "claim of right;" (3) that the plaintiff's use was by "permission;" and (4) that the plaintiff did not perform any acts which would bring his claim of right to the defendants' attention or knowledge.

We conclude the evidence in the record establishes that an easement was created in favor of plaintiff's father because of his use of the road for over 10 years, and that easement was by law transferred to the plaintiff when his father subsequently gave him the property. Further, the defendants, as purchasers of tract 4 A, took tract 4 A subject to that easement, and should be restrained from doing any acts which would interfere with the plaintiff's full use of the easement as it existed at the time the defendants bought tract 4 A. Polyzois v. Resnick, 123 Neb. 663, 243 N. W. 864 (1932).

The general rules applicable to prescriptive easements are well settled in Nebraska, and are set out in Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196 (1952), as follows: "The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period. * * *

"To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. * * *

"The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebut-

ting the prescription by showing the use to be permissive. * * *

"It is presumed, however, that every man knows the condition and status of his land; and if anyone enters into open and notorious possession of an easement therein under a claim of right, the owner is charged with knowledge thereof. * * *." [Citations omitted.] Thus there are six elements which must be established by clear and convincing evidence before an easement by prescription will be found to exist.

First, the claimant's use must be *continuous* and *uninterrupted* for the required period of time. Connot v. Bowden, 189 Neb. 97, 200 N. W. 2d 126 (1972). The claimed easement must have been exercised whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed against him. The plaintiff testified that his father consistently used tract 4 A on a day-to-day basis from the date they bought their property in 1962, and that fact was obvious and known to the Shearers. Under section 25-202, R. R. S. 1943, an action for the recovery of title or possession of lands can only be brought within the 10 years after the cause of action shall have accrued. Even disregarding the possibility that when the plaintiff's father bought his property from the Shearers, tract 4 A was already subjected to an easement by necessity, the right to bring an action for ejectment would have commenced in 1962 and would have been barred in 1972.

The second element required to be established by the claimant is that the use was *open and notorious* so that the owner will learn of the use, assuming that he keeps himself informed about the condition of his property. Again the plaintiff's undisputed testimony, that both he and his father used tract 4 A on a day-to-day basis from the date the senior Svoboda

bought his property in 1962, establishes such an open and notorious use.

The third element to be proved is that claimant's use was *exclusive*. In Jurgensen v. Ainscow, *supra*, we stated that: "The term 'exclusive use,' however, does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others. See, 17 Am. Jur., Easements, § 64, p. 976; Thompson v. Bowes, 115 Me. 6, 97 A. 1, 1 A. L. R. 1365; Annotation, 111 A. L. R. pp. 223, 224." See, also, Hopkins v. Hill, 160 Neb. 29, 68 N. W. 2d 678 (1955).

Although the plaintiff claims the public in general has also acquired an easement in tract 4 A, he still maintains that his use was for the purpose of obtaining ingress and egress to his property, and was not dependent upon the use made of tract 4 A by the public. The evidence shows that the public's use was primarily confined to the portion of tract 4 A adjacent to the service station on tract 4. The public has used tract 4 principally for obtaining passage into the service station or the carwash at the rear of the station, although neighboring property owners, to a limited extent, used the road for access to their properties.

The fourth element required to prove a prescriptive easement is that the claimant's use was under a *claim of right*, such that there is no recognition of the right of the owner of the servient tenement to stop the use. In Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976), we quoted from 3 Am. Jur. 2d, Adverse Possession, § 96, p. 177, with reference to the meaning of "claim of right," as follows: " 'Terms such as "claim of right," "claim of title," and "claim of ownership," when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any

semblance or shadow of actual title or right. * * * Thus, "claim of right" means no more than "hostile" and if possession is hostile it is "under a claim of right." ' "

In Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331 (1957), we discussed what constitutes a claim of right as follows: "It can readily be seen that the intent with which the claimant first took possession of the disputed tract is not ordinarily of too much significance. The title of the true owner is lost by his inaction. It would seem, therefore, that when the possession of the land of another, no matter what the intention may have been in making the first entry, amounts to that which the law deems as adverse to the true owner and such possession continues for the statutory period of limitation of 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary such as occupancy under a lease, an easement, or a permissive use. City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A. L. R. 1. See Annotation, 97 A. L. R. 14." In Barnes v. Milligan, 200 Neb. 450, at 456-457, 264 N. W. 2d 186, at 190-191 (1978), we stated, in pertinent part, as follows: "The intent may be either actual or presumed, or inferred from the circumstances. In most cases it is inferred from the circumstances. * * * As the cases make clear, actual assertion of claim of ownership is not necessary."

Although there is no evidence the plaintiff or his father ever asserted a claim to an easement over tract 4 A, *in haec verba*, Dail Shearer, the son of J. E. Shearer who owned tract 4 A before his death, testified that he knew the plaintiff and his father had used tract 4 A as a road since buying their property in 1962; and also that plaintiff's father placed a waterline under tract 4 A in 1962, extending to his property. We conclude that plaintiff's claim was under a "claim of right."

The fifth element which must be established in order to create an easement by prescription is that the claimant's use was *adverse*. In Fischer v. Grinsbergs, 198 Neb. 329, 252 N. W. 2d 619 (1977), we stated: "As long ago as 1912, this court stated in Marjerus v. Barton, 92 Neb. 685, 139 N. W. 208 (1912), that if a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is *adverse and under claim of right*, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a *preponderance* of the evidence. Butts v. Hale, 157 Neb. 334, 59 N. W. 2d 583 (1953); Jurgensen v. Ainscow, *supra*." (Emphasis supplied.)

Dail Shearer testified that he had never required anyone to obtain permission to use tract 4 A, nor had he tried to keep anyone off the tract. Defendants argue that a presumption of adverse use by the plaintiff cannot arise because the evidence shows the use by all persons who used the tract was open and visible. Defendants also argue that if no presumption of adverse use has arisen, then, relying upon Scoville v. Fisher, 181 Neb. 496, 149 N. W. 2d 339 (1967), the implied permission of the Shearer family must be found, because the plaintiff never informed the defendants or their predecessors in title of their adverse claim.

We believe that the defendants' reliance on Scoville v. Fisher, *supra*, is misplaced. The plaintiff in Scoville sought to establish an easement over the defendant-owner's lot. The lot was used by the public generally for parking and turning their vehicles around. This court found the use of the lot was permissive and not adverse, and stated the rule to be that a way may be acquired by one person over unenclosed land of another by user or prescription, but

it generally requires some circumstances or act in addition to, or in connection with, the use of the way to indicate the use has been claimed as a right and has not been regarded by the parties merely as a privilege revocable at the pleasure of the owner of the soil. In that case we stated: "We are not unmindful of the general rule stated in Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196, to the effect that a presumption of adversity arises when there has been open, visible, continuous, and unmolested use for the prescriptive period of 10 years. The same contention was made in Stubblefield v. Osborn, *supra. The general rule must be interpreted in the light of the facts of each case.* * * * *Here we have unenclosed land with no defined pathway across it.* * * *." (Emphasis supplied.) Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547 (1948), involved an easement over certain unplatted islands in the Platte River, used for hunting purposes. In that case this court recognized the relevancy of evidence of a well-defined road or trail over unenclosed land, stating: "One of the defendants testified that the road down to the river * * * was just a trail through the pasture, angling through the brush with several turns, terminating at the river, and was not a well-defined road; and that he saw no signs of a road leading from the premises to that point. This testimony was rebutted to the effect that the tracks to the river from the Bolton premises were eight to ten inches deep, or from four to six inches deep; that there was not more than one path, and that the plaintiffs always used the same path in going down to the river." For other reasons, however, the court found in Stubblefield that the original entry and use by the claimants was permissive, and affirmed the trial court in denying an injunction. We conclude that even though land may be unenclosed, where there is a well-defined path or roadway thereon, the rule as to a presumption of adverse use applies, and

places the burden on the landowner to establish that the use by the claimant of the prescriptive right was permissive. See, also, 25 Am. Jur. 2d, Easements and Licenses, § 46, p. 457.

In the instant case, there is conflicting testimony as to whether or not tract 4 A was enclosed or at least partially enclosed. There is overwhelming evidence that tract 4 A was a well-defined roadway used by the plaintiff to enter onto his property, using the entire length of tract 4 A for that purpose. It is also clear that the public used only the first 25 to 30 feet for entering or exiting from the service station located on tract 4.

We find that the plaintiff's use was not permissive by defendants or their predecessors in title, and that there exists in this case a presumption of adverse use by the plaintiff. Because of such presumption of adverse use, there was no need for the plaintiff to make any specific, overt statements to the defendants, claiming the right to travel over their property. Defendants have failed to rebut this presumption.

Finally, in Hopkins v. Hill, 160 Neb. 29, 68 N. W. 2d 678 (1955), we held that *acquiescence* on the part of the owner is necessary in order to acquire a prescriptive easement, and that acquiescence means, "passive assent or submission, quiescence, consent by silence. See, Dartnell v. Bidwell, 115 Me. 227, 98 A. 743, 5 A. L. R. 1320; Davis v. Wilkinson, 140 Va. 672, 125 S. E. 700; Jurgensen v. Ainscow, *supra*.

"If such user has been for the requisite time open, notorious, visible, uninterrupted, and undisputed under claim of right adverse to such owner, he is charged with knowledge of such user and his acquiescence in it is implied. See, 2 Thompson Real Property (Perm. Ed.), § 512, p. 94, cases under note 18, also § 510, p. 89; Hester v. Sawyers, 41 N. M. 497, 71 P. 2d 646, 112 A. L. R. 536." The evidence in the record clearly established "acquiescence" by the

defendants or their predecessor in title to the use by the plaintiff of the roadway and waterline.

Plaintiff also argues that he is entitled to an "easement by necessity" under the evidence in this case. However, he has introduced no evidence in the record as to the cost of establishing a road over his own property, or outlet to the county road, nor the comparison of that cost to the value of his property, which would undoubtedly be necessary to determine the necessity for an easement over tract 4 A. See Badura v. Lyons, 147 Neb. 442, 23 N. W. 2d 678 (1946). However, since we have found that plaintiff has established his right to a prescriptive easement for his and his invitees' benefit, we need not further discuss that issue.

The trial court found that no easement had been created over tract 4 A for the benefit of the public. Plaintiff has cross-appealed with reference to this issue claiming that the District Court erred in its finding, and argues that a public highway may be established either by prescription or by implied dedication. We have no quarrel with the general rule, but our examination of the record convinces us that the evidence upon this issue is not so clear and convincing as to warrant the finding of a public easement and that the decision of the trial court, based upon conflicting evidence, was correct.

In Pierce v. Rabe, 177 Neb. 745, 131 N. W. 2d 183 (1964), which was an action brought to procure an injunction enjoining the defendants from erecting and padlocking gates or interferring with plaintiff's right to use a road extending east and west through defendant's land, we stated: " 'While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue,

consider the fact that the trial court observed the witnesses and their manner of testifying.' "

An independent review of the evidence in the record convinces us that the trial court was correct in granting plaintiff a prescriptive right over and across tract 4 A, and also in establishing a waterline easement under tract 4 A, and in its issuing a permanent injunction prohibiting interference with those rights. No errors otherwise appearing in the record, we conclude that the judgment of the trial court must be affirmed.

AFFIRMED.

CRAIG KIRSHENBAUM, APPELLANT, V. LUCINDA DETTMAN FIGUEROA, APPELLEE.

281 N. W. 2d 408

Filed July 17, 1979. No. 42070.

1. **Negligence: Juries.** Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the degree thereof, the issues must be submitted to the jury.
2. **Verdicts: Evidence.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom.
3. **Pleadings: Evidence: Juries.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence.
4. **Instructions: Juries.** Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one.

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

Norman Denenberg, for appellant.

Knowles & Edmunds, for appellee.

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

VAN PELT, District Judge.

This is an action for personal injuries brought by the plaintiff, the operator of a motorcycle which collided with an automobile operated by the defendant. The case was tried to a jury which returned a verdict in favor of the defendant. Following the overruling of a motion for new trial, plaintiff appealed, assigning as error that the District Court erred in: (1) Failing to sustain plaintiff's motion for a directed verdict respecting defendant's negligence; (2) submitting to the jury the issue of plaintiff's failure to keep a proper lookout; and (3) failing to instruct the jury on the law applicable to left turns.

Plaintiff contends the trial court should have found the defendant guilty of negligence as a matter of law, since she failed to see another driver who was favored over her under section 39-636, R. R. S. 1943, and whom she had a duty to see. Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652. Defendant contends she had no duty to see the plaintiff since she was unable to do so by virtue of a dip or blindspot which obscured the motorcycle from her vision.

The accident occurred in Omaha, Douglas County, Nebraska, at the intersection of 117th and Dodge Streets on August 7, 1976. Plaintiff was traveling east on Dodge Street on a motorcycle in the right or curb lane of two lanes. Defendant was traveling west on Dodge Street in the left or center lane. At the intersection, defendant turned left to proceed south on 117th Street. Plaintiff's motorcycle collided with the right rear door of the defendant's automobile at the point on Dodge Street where the eastbound curb lane intersects 117th Street.

The defendant testified that approximately 50 feet east of the intersection she looked to the west to see

if any traffic was coming and she saw only the lights of an automobile at the 120th Street intersection. After she was into her turn, she said she saw the plaintiff's motorcycle for the first time approximately 50 feet west of the intersection. She further testified that there is a dip or blindspot on Dodge Street approximately 50 feet west of the 117th Street intersection out of which the motorcycle emerged.

Officer Lynch of the Omaha police department testified as to the existence of the dip or blindspot and its effect on vision from points both 50 and 60 feet east of the intersection. The plaintiff produced another witness who testified there was only a minimal dip in Dodge Street, insufficient to hide the plaintiff's motorcycle from the defendant's vision, and the plaintiff offered a number of photographs which are particularly persuasive on this point. Other than the evidence relating to the blindspot, there is no other evidence in the record as to why the defendant could not and should not have seen the plaintiff's motorcycle.

There is sufficient evidence in the record from which the jury could have found that there was a dip and blindspot in which the plaintiff's motorcycle went out of the defendant's vision as she approached the intersection. For reasons known only to the jury, they accepted the defendant's evidence and rejected the plaintiff's witnesses and photographs on this fact issue.

Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the degree thereof, the issues must be submitted to the jury. Oberhelman v. Blount, 196 Neb. 42, 241 N. W. 2d 355; Treffer v. Seevers, 195 Neb. 114, 237 N. W. 2d 114.

In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is

entitled to the benefit of every reasonable inference which may be drawn therefrom. Clark Bilt, Inc. v. Wells Dairy Co., 200 Neb. 20, 261 N. W. 2d 772. Thus, the trial court was correct in not directing a verdict on the issue of the defendant's negligence, and was correct in submitting that issue to the jury under proper instruction.

Plaintiff's second assignment of error is that the trial court erred in submitting to the jury the issue of the plaintiff's failure to keep a proper lookout, when there was no credible evidence respecting the same. Contrary to the plaintiff's contention, there is evidence in the record from which one could find that the defendant's left-turn signal was flashing as she entered the intersection and executed her turn, and that the plaintiff had an opportunity to view the same as he traveled for a distance of at least 600 feet west of the intersection, except for the blindspot previously discussed. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786. Thus, the issue of plaintiff's negligence in failing to maintain a proper lookout was properly submitted.

Plaintiff's third assignment of error is that the trial court erred in failing to instruct the jury on the law applicable to left turns. Specifically, plaintiff complains the court did not instruct on section 39-652, R. R. S. 1943, which sets forth when and how turn signals should be made. The court in instruction No. 2 set forth as one of the plaintiff's allegations of negligence that the defendant was negligent in "making a left turn without giving a proper left turn signal." In instruction No. 6 the court correctly referred to the above left-turn negligence allegation as one or more of the elements which plaintiff must prove in order to recover. Thus, the issue of whether the defendant was negligent in making a left turn without giving a proper left-turn signal was

submitted to the jury. Plaintiff made no request for a more detailed instruction setting forth section 39-652, R. R. S. 1943. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Clark Bilt, Inc. v. Wells Dairy Co., *supra*.

For all of the above reasons, plaintiff's three assignments of error are without merit, and the judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

The majority holds that the presence of a "dip" some 50 to 60 feet from the intersection which defendant was traversing somehow excuses her from responsibility for striking, while executing a left turn across oncoming lanes of traffic, a motorcyclist who held a favored position under the rules of the road. Assuming that the existence of a blindspot would somehow call for application of a different standard of care in executing what heretofore has always been termed a hazardous movement, the question remains in this case whether a dip sufficient to conceal the plaintiff and his motorcycle existed at all. On this point, the photographs are absolutely conclusive. The testimony of the defendant and the police officer to the effect that the plaintiff was concealed by the dip is simply wrong. The photograph marked exhibit 27, for example, is a view of what the human eye would see at a distance of 150 feet east of the point from which the defendant intended to turn. The camera was positioned at a height of 3 feet from the surface of Dodge Street in the lane in which the defendant would have had to have been to make the turn. The headlights of an automobile are clearly visible at the lowest point in the dip. There is evidence that the headlights on the plaintiff's motorcycle were mounted 6 inches higher than those of an average automobile.

As a matter of law, the court should have found that the defendant at all times could have seen the plaintiff had she been keeping a proper lookout. This failure of a driver to see one who is favored over him under the rules of the road amounts to negligence as a matter of law. Bonnes v. Olson, 197 Neb. 309, 248 N. W. 2d 756. At a minimum in this case, the trial court should have instructed the jury that the defendant was guilty of negligence as a matter of law and submitted the question of the plaintiff's contributory negligence to the jury. Trial courts are under an obligation to submit to a jury only issues on which there is a conflict in evidence. They are not required and should not submit issues in which there is an apparent conflict in the evidence but the physical facts conclusively demonstrate that the conflicting testimony is erroneous, mistaken, or fabricated. Ritchie v. Davidson, 183 Neb. 94, 158 N. W. 2d 275. The judgment should be reversed and the cause remanded for a new trial.

KRIVOSHA, C. J., joins in this dissent.

HASTINGS, J., concurring.

I do not agree with that portion of the majority opinion which may imply, as suggested by the dissent, that the presence of a "dip," in and of itself, affords a legal excuse for failing to see an oncoming vehicle. However, I do concur in the result reached by the majority.

Bonnes v. Olson, 197 Neb. 309, 248 N. W. 2d 756 (1976), does stand for the proposition that the failure of one driver to see another favored over him under the rules of the road amounts to negligence as a matter of law. However, Kremlacek v. Sedlacek, 190 Neb. 460, 209 N. W. 2d 149 (1973), provides that the driver claiming to be in the favored position must be "*undisputedly* located in a favored position. * * * Consequently the applicable rule is that where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed

and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury."

Although we very well may have reached a different result had we been hearing this case de novo, that is not the scope of our review. The case was properly submitted to the jury with appropriate instructions and should be affirmed.

FLAME BAR, INC., DOING BUSINESS AS FLAME BAR, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

281 N. W. 2d 390

Filed July 17, 1979. No. 42109.

Intoxicating Liquors: Licenses and Permits. The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for licenses for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion.

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

J. Joseph McQuillan of McQuillan & Swartz, for appellant.

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

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and REIMER and HIPPE, District Judges.

REIMER, District Judge.

The appellant, Flame Bar, Inc., doing business as Flame Bar, is a closely-held family corporation in which Harry W. Whitney, president, and his wife, Nancy K. Whitney, treasurer, are the sole stockholders. The Whitneys bought the existing corpora-

tion from the predecessor licensee, Gladys A. Gibreal, in 1974, and operated under renewals in 1975, 1976, and 1977. Application was made by the appellant for renewal of the Class C license for the year beginning November 1, 1977, and by a four to three vote of the city council of the city of Omaha, under date of October 4, 1977, the application was approved. By letter to the Nebraska Liquor Control Commission under date of October 18, 1977, Larry L. Jones, an agent for the Commission, filed protest of the issuance of a liquor license to Flame Bar, Inc. The Nebraska Liquor Control Commission notified the licensee of the time and place of hearing and that such hearing was necessary by reason of a protest having been filed. This notice was supplemented by a letter to the licensee from the Commission which informed the licensee that the issues to be considered on the hearing were: "1. Whether or not this licensee has operated this premises in such a manner so as to become a nuisance to the City of Omaha. 2. Whether or not the licensee's character and reputation is such so as to cause him to become unfit to have his license renewed. 3. Whether or not the licensee is attempting to become a partner in another business applying for a liquor license without disclosing that fact to the Commission."

At the Commission hearing on November 2, 1977, evidence was received, on behalf of the applicant and the Commission, which resulted in an order denying the license and setting out specific findings. From an appeal to the District Court for Douglas County, Nebraska, in which the action of the Commission was affirmed, the applicant has appealed to this court. We affirm.

The Nebraska Liquor Control Act, as it related to the issues here presented, reads in part as follows: "No license of any kind shall be issued to * * * (2) a person who is not of good character and reputation in the community in which he resides, * * * (10) a

corporation, if any officer, manager or director thereof, or any stockholder, owning in the aggregate more than twenty-five percent of the stock of such corporation would be ineligible to receive a license hereunder for any reason other than citizenship and residence within the governmental subdivision;" § 53-125, R. R. S. 1943.

The Commission has found from the evidence presented before it that the principal stockholder and manager of the Flame Bar, Harry W. Whitney, was "not of good character and reputation" within the meaning of the act and has refused the license.

"The purpose of the appeal is to review the action of the commission. The power to regulate is vested in the commission, not the courts. If the commission has not abused its discretion, the courts should not interfere." T & N P Co., Inc. v. Nebraska Liquor Control Commission, 189 Neb. 708, 204 N. W. 2d 809. "The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for licenses for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion." City of Lincoln v. Nebraska Liquor Control Commission, 181 Neb. 277, 147 N. W. 2d 803; Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413.

The testimony of Harry W. Whitney indicates he was well aware of the fact that his bar was used by known prostitutes: "Q. And why didn't you ask them to leave? A. Why didn't I ask them to leave? Q. Yes. A. They weren't doing anything wrong and they were sitting there having a drink. They hung around all over the neighborhood — the Hamilton Hotel, they lived there. You know, I didn't know if they were in there having a drink or if they were in there working. * * * Q. But you just admitted to me a moment ago that you didn't in the case of others that they really weren't causing any trouble,

they were just sitting around. A. The ones that didn't cause — if they were loud or if — I've had this happen. Somebody would go out with the girls in there and they'd come back and say, 'I gave this girl some money inside the bar and went outside and she ran up the street.' If they'd come back I'd say, 'I never want you in here again.' "

It is obvious Mr. Whitney saw nothing wrong with quiet, business-like prostitution and it was also, indirectly, good for his business. He cooperated with vice squad officers only when it appeared that he might lose his license. He was also convicted of violating city of Omaha municipal code section 98-149, "Providing Gambling Facilities," for an offense occurring in the Flame Bar. Notwithstanding the generous personal recommendations of longtime personal friends of Mr. Whitney, the Commission had the obligation to closely examine the character of business Mr. Whitney operated in the Flame Bar, and on this record it is not an abuse of discretion by the Commission to find that Harry W. Whitney was a person "not of good character" for purposes of operating a licensed liquor store. The denial by the Commission was neither arbitrary nor unreasonable. C & L Co. v. Nebraska Liquor Control Commission, 190 Neb. 91, 206 N. W. 2d 49.

The order of the Nebraska Liquor Control Commission denying this license, which order was affirmed by the District Court, is affirmed.

AFFIRMED.

KRIVOSHA, C. J., dissents.

LOUISE T. HAMMOND, APPELLEE, V. THE NEBRASKA NATURAL GAS COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH E. I. DUPONT DE NEMOURS & COMPANY, INC., ET AL., APPELLEES.

281 N. W. 2d 520

Filed July 17, 1979. No. 42113.

1. **Negligence: Public Utilities.** Natural gas is a dangerous commodity and a distributor of natural gas is required to exercise a high degree of care and diligence to prevent injury and damage to the public from the escape of gas from its lines. A distributor of natural gas is required to exercise a degree of care commensurate to the danger involved in the transaction of its business.
2. **Public Utilities.** A distributor of natural gas is required to have employees efficient in their line of work and to install pipes and fittings of good material and workmanship and maintain them in a reasonably safe condition.
3. **Negligence: Public Utilities.** The duty to use due care which a distributor of natural gas owes to the public is a continuing one and one which can not be delegated to another.
4. **Negligence.** The opportunity to acquire knowledge by the use of reasonable diligence is equivalent to knowledge, and where the duty to use due care requires knowledge, voluntary ignorance is not a defense.
5. **Public Utilities.** A gas pipeline must be designed and installed so that each joint will sustain the longitudinal pull-out or thrust forces caused by contraction or expansion of the piping or by anticipated external or internal loading. In plastic pipe each joint must be at least as strong as the pipe being joined.
6. **Negligence: Evidence.** Post accident changes in warnings and instructions generally are not admissible as implied admissions of negligence if their prejudicial nature outweighs their relevance.

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

Terry J. Grennan and Stephen A. Davis of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Richard E. O'Toole and Thomas J. Walsh of Walsh, Walentine & Miles, for appellee Hammond.

Kennedy, Holland, DeLacy & Svoboda, for appellee E. I. duPont de Nemours & Company, Inc.

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

BOSLAUGH, J.

The Pathfinder Hotel, located at the corner of Sixth and Broad Streets in Fremont, Nebraska, was destroyed by an explosion and fire on January 10, 1976. Subsequent investigation disclosed that the explosion and resulting fire were caused by natural gas escaping from a main at Sixth and Broad Streets which had entered the basement of the hotel.

This action was commenced by the owner of the hotel against The Nebraska Natural Gas Company (Gas Co.) and E. I. duPont de Nemours and Company, Inc., (duPont) to recover the damages resulting from the destruction of the hotel and its contents. The jury returned a verdict against the Gas Co. in the amount of $427,500. The Gas Co. appeals from the judgment entered against it in that amount. The plaintiff does not appeal from the judgment in favor of duPont.

The principal assignments of error relate to the trial court's instructions to the jury. Other assignments relate to the sufficiency of the evidence, the ruling of the trial court on a motion in limine, and the refusal to admit certain testimony.

The Gas Co. owns and operates the gas distribution system in Fremont, Nebraska. In June 1974, the Gas Co. installed 348 feet of 2-inch plastic polyethylene pipe, manufactured by duPont and known as Aldyl A pipe, in Sixth Street between the main in Broad Street and the main in Park Street. The plastic pipe was inserted in an existing 4-inch steel main and connected at each end to existing steel mains by use of compression couplings manufactured by the Norton McMurray Manufacturing Company. Due to thermal contraction the plastic pipe pulled out of the coupling at Sixth and Broad Streets which allowed gas to escape and enter the basement of the hotel.

The plaintiff alleged that the Gas Co. was negligent in failing to install the plastic pipe in a safe and proper manner. There were other specifications of negligence but they are not important to a determination of this case.

The plaintiff alleged that duPont was negligent in failing to adequately warn and advise the Gas Co. of the dangers inherent in the use of the plastic pipe and the necessity for anchoring plastic pipe when used with compression fittings.

The Gas Co. and duPont both alleged that the plaintiff was contributorily negligent in failing to take adequate precautions after the odor of gas had been detected in the hotel building some 4 hours before the explosion and in failing to have certain fire resistant features incorporated into the building.

The defendants also filed cross-claims against each other for contribution and indemnity. The cross-claims were severed by the trial court on its own motion, and were reserved for trial at a later date.

The case was submitted to the jury upon the allegations of negligence and contributory negligence together with three forms of verdict. The verdict forms permitted the jury to find against the Gas Co., against both defendants, or against the plaintiff. The jury found against only the Gas Co.

The defendant Gas Co., as a distributor of natural gas, a dangerous commodity, was required to exercise a high degree of care and diligence to prevent injury and damage to the public from the escape of gas from its lines. It was required to exercise a degree of care commensurate to the danger involved in the transaction of its business. Whittington v. Nebraska Nat. Gas Co., 177 Neb. 264, 128 N. W. 2d 795; Fonda v. Northwestern Public Service Co., 134 Neb. 430, 278 N. W. 836.

The Gas Co. was required to have employees efficient in their line of work and to install pipes and fit-

tings of good material and workmanship and maintain them in a reasonably safe condition. Mattson v. Central Electric & Gas Co., 174 F. 2d 215 (8th Cir., 1949); Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712.

The duty which the Gas Co. owed to the public was a continuing one and one which could not be delegated to another. Mattson v. Central Electric & Gas Co., *supra*; Daugherty v. Nebraska Nat. Gas Co., 173 Neb. 30, 112 N. W. 2d 790.

The opportunity to acquire knowledge by the use of reasonable diligence is equivalent to knowledge. To the extent that the duty of the Gas Co. to use due care required knowledge, voluntary ignorance was not a defense. Mattson v. Central Electric & Gas Co., *supra*; Daugherty v. Nebraska Nat. Gas Co., *supra*.

In addition to the common law duties imposed upon the Gas Co., it was subject also to the standards and requirements imposed by federal and state statutes. Since at least 1971, federal law imposed the following safety standards which also had been adopted by the State of Nebraska in 1975: "192.273 (a) The pipeline must be designed and installed so that each joint will sustain the longitudinal pull-out or thrust forces caused by contraction or expansion of the piping or by anticipated external or internal loading. * * * 192.281 (a) Each plastic pipe joint must be made in accordance with written procedures that have been proven by destructive burst test to produce joints at least as strong as the pipe being joined."

The evidence indicates that the plastic pipe pulled out of the compression coupling at Sixth and Broad Streets because of a combination of factors. Plastic pipe has a coefficient of thermal expansion and contraction approximately 15 times that of steel. As a result, a decrease in temperature will cause significant contraction in the pipe, particularly where it

has been inserted in a steel main and there is no restraint other than service connections made along its length.

A compression coupling is a device that has been used in the gas industry for many years. It consists of a sleeve or barrel into which the ends of the pipes which are to be joined are inserted. When the compression nuts on each end of the coupling are tightened, gaskets are forced against the pipe, resulting in a gas tight joint. A compression coupling has very little resistance to longitudinal stress and additional precautions must be taken to avoid pull-out when such a coupling is used to join plastic pipe.

The evidence shows that these facts were well-known in the industry prior to January 10, 1976. Literature in the possession of the Gas Co. discussed the problem and warned of the hazard involved in the use of compression couplings to join plastic pipe. The Norton McMurray Company and the Dresser Company, which manufactured compression couplings, had developed special fittings to be used for joining plastic pipe. DuPont itself manufactured a special "transition coupling." A newsletter published by the duPont representative, Jack Wielar, in September 1975, and supplied to the Gas Co., described a system for anchoring plastic pipe to avoid a pull-out from a compression fitting. The Gas Co.'s own operations manual warned that plastic pipe had a high rate of expansion and contraction in comparison to metal pipe and stated that "Compression type couplings shall be strapped where there is any possibility that the coupling can move due to external or internal thrusts."

On November 29, 1974, the Gas Co. had experienced a pull-out of 2-inch Aldyl A pipe from a standard compression coupling. In January 1975, Wielar and the president of the Gas Co. discussed a pull-out at a neighboring utility. On January 9, 1976, the day before the explosion, a pull-out caused by thermal

contraction occurred in downtown Fremont.

The evidence was clearly sufficient to support a finding that the coupling installed by the Gas Co. on its main at Sixth and Broad Streets had not been installed in a safe and proper manner. There was a dispute in the evidence as to what advice and instruction the Gas Co. had received from duPont in regard to the use of compression couplings with plastic pipe. Since the duty of the Gas Co. could not be delegated, any negligence on the part of duPont was not a defense as between the plaintiff and the Gas Co.

The allegations of contributory negligence at most presented a question for the jury. There is no evidence as to how the absence of certain fire resistant features in the building contributed to the loss. The evidence shows that the plaintiff's employees attempted to contact the Gas Co. when it became apparent that a serious gas problem existed. Any delay in taking necessary precautions was attributable in a large part to the failure of the Gas Co. to have adequate emergency procedures and a failure to respond promptly to the calls from the plaintiff's employees.

The Gas Co.'s theory of the case was that it had relied solely upon warnings and instructions which it had received from duPont concerning the use of Aldyl A pipe with standard compression couplings. The Gas Co.'s principal objection to the instructions to the jury was that the trial court failed to adequately present this theory of the case to the jury.

As stated previously, the Gas Co.'s duty to the public was nondelegable and any negligence on the part of duPont with respect to warnings or instructions to the Gas Co. concerning the use of standard compression couplings with Aldyl A pipe would not be a defense as between the Gas Co. and the plaintiff. The facts concerning the danger of pull-out if standard compression couplings were used to join

plastic pipe were well known throughout the industry. The Gas Co. could not avoid its responsibility to the public by relying upon information alleged to be erroneous and supplied by duPont.

There was no defect in the pipe supplied by duPont or the coupling supplied by Norton McMurray Company. The difficulty lay in the fact that the standard compression coupling by itself would not withstand the longitudinal stress caused by thermal contraction of the pipe, and some type of anchoring was required to prevent a pull-out.

By instruction No. 20 the jury was advised that its verdict should be for duPont if the Gas Co. had actual knowledge that additional precautions should have been taken in designing and installing the joint in the main at Sixth and Broad Streets. This was a correct statement of the law. Any negligence on the part of duPont in failing to adequately instruct and warn the Gas Co. could not have been a proximate cause of the accident if the Gas Co. had actual knowledge of the matter.

We have examined the other instructions and requested instructions and find no merit in any of the assignments of error relating to them.

The Gas Co. complains that a form of verdict should have been submitted which would have permitted the jury to find in favor of the Gas Co. and against duPont. Under the facts and circumstances of this case, there could be no finding for the plaintiff and against duPont alone because the duty of the Gas Co. was nondelegable. Unless the leak was caused by the installation of the compression coupling without adequate additional precautions to avoid pull-out from thermal contraction, any failure of duPont to warn and instruct the Gas Co. in that regard could not be a proximate cause of the accident. The verdict in favor of the plaintiff and against only the Gas Co., under the circumstances in this case, was equivalent to a finding for duPont.

The entry of judgment for duPont on the verdict returned was at most error without prejudice.

After the accident, on April 30, 1976, duPont published a bulletin, entitled *Pull-Out Forces on Joints in Polyethylene Pipe Systems*, which contained a detailed explanation of thermal contraction in Aldyl A pipe and measures which could be taken to prevent pull-out. DuPont's motion in limine to prevent the Gas Co. from referring to the bulletin or using it in the examination of witnesses was sustained. The Gas Co. assigns this ruling as error.

Post accident changes in warnings and instructions generally are not admissible as implied admissions of negligence if their prejudicial nature outweighs their relevance. Haysom v. Coleman Lantern, 89 Wash. 2d 474, 573 P. 2d 785.

The admissibility of such evidence generally is within the discretion of the trial court. The bulletin related primarily to the issue of duPont's alleged negligence in failing to give adequate instructions and warnings to the Gas Co. which was not a defense to the Gas Co. as against the plaintiff. The trial court could determine that the prejudicial nature of the bulletin outweighed its utility of evidence in this proceeding. See § 27-403, R. R. S. 1943.

The Gas Co. offered testimony by two deputy state fire marshals that if the joint in the main at Sixth and Broad Streets had been inspected by them before the accident, they would have approved it as being in compliance with the federal and state safety regulations as they understood them at that time. The Gas Co. contends the exclusion of this evidence was error.

The deputy fire marshals did not inspect the main and they admit that the joint in fact did not comply with the safety regulations at the time of the explosion. The fact that the deputy fire marshals would have erroneously approved the joint in the main would not excuse the negligence of the Gas Co. in

failing to comply with the safety regulations. The evidence was not relevant to any issue in the trial and was properly excluded.

We have considered the other assignments of error and find they are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

MARY JUNE SMALLEY COCKLE, APPELLEE AND CROSS-APPELLANT, V. GEORGE ROBERT COCKLE, APPELLANT AND CROSS-APPELLEE.

281 N. W. 2d 392

Filed July 17, 1979. No. 42143.

1. **Statutes: Appeal and Error.** Under section 25-1919, R. R. S. 1943, and Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1977, consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned.
2. **Judgments.** To support a suit thereon, a foreign judgment must be a valid, final, personal adjudication; it must create a definite and absolute indebtedness.

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

Larry A. Duff, for appellant.

Gary B. Randall of Byrne & Randall, P.C., for appellee.

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

STUART, District Judge.

Plaintiff petitioned the District Court for Douglas County, Nebraska, to register a foreign judgment previously rendered in the Superior Court of Monterey County, California. Defendant filed a counter-

claim and set-off. The trial court entered a summary judgment dismissing the counterclaim and set-off and allowed the registration of the foreign judgment. Defendant appeals.

It appears that the trial judge correctly decided the issues presented before him. However, there appears a plain error which this court must consider. The rule is: Under section 25-1919, R. R. S. 1943, and Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1977, consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. Zych v. Zych, 165 Neb. 586, 86 N. W. 2d 611; Pueppka v. Iowa Mutual Ins. Co., 166 Neb. 203, 88 N. W. 2d 657.

The parties were husband and wife, with residence in various places during the period of defendant's military service. Their place of residence at the time of separation was in the State of California, where plaintiff has continued to reside. Defendant secured a decree of divorce in Nevada in 1969, became a resident of Nebraska in 1970, and has maintained his residence in this state since that time. In 1974, plaintiff brought action in the Superior Court of Monterey County, California, for an accounting of the community assets of the marriage and an award to her of one-half thereof. Defendant, although denying the jurisdiction of the court in a special appearance, subsequently answered and appeared at a trial on April 28, 1976. On May 3, 1976, the court signed an order which concludes as follows:

"THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiff is hereby awarded, assigned and conveyed 78.3% of ½, which is 39.14% of the total military retirement pay (her share presently amounts to $400.00 per month) together with any increases, including cost of living increases; and plaintiff is awarded, assigned and conveyed, and defendant shall pay and assign to plaintiff said

portion of the military retirement pay. Defendant shall execute, deliver and do all things necessary to accomplish said assignment. This assignment is effective as of June 1, 1976, and shall continue until defendant's death.

2. Defendant shall pay to and assign to plaintiff, as received, 78.3% of ½, which amounts to 39.15% of all increases including any cost of living increases, in said military retirement pay. Said payments shall commence when received and shall continue until defendant's death.

3. The Court confirms to each of the parties the personal property and household furniture now in their possession as previously divided by oral agreement of the parties.

4. Each party shall bear their own costs incurred in this action."

This is the order which plaintiff presented for registration under section 25-1587 et seq., R. R. S. 1943.

The general law for the enforcement of a foreign money judgment is set forth in 1 Restatement of Conflict of Laws 2d, Judgments, § 100, p. 304, as follows: "A valid judgment for the payment of money rendered in a State of the United States will be enforced in a sister State, except as stated in §§ 103-121." Section 108, following, further provides: "A judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition."

Regarding the enforcement of a foreign judgment, the rule has been stated as follows: "To support a suit thereon, a foreign judgment must be a valid, final, personal adjudication * * *; it must create a definite and absolute indebtedness and must be rendered by a court having jurisdiction of the parties and the subject matter." 50 C. J. S., Judgments, § 868, p. 442.

We are required to rule that there is no dollar

judgment set forth in the California judgment offered for registration that is certain in amount. The only construction which can be placed upon either of the first two paragraphs of this judgment is that they purport to require both the payment and assignment of future receipts. There is a recital of the value of plaintiff's share at the time of the order but defendant's liability is specifically imposed as to a given percentage of any amounts which he might later receive. An officer of the Nebraska court cannot ascertain the amount due upon the judgment without resorting to facts outside the record of the California court. By the terms of the order, the only direction to the defendant is that he shall make assignments and shall pay 39.14 percent of his military retirement pay. If he fails to carry out these commands, it is highly possible that the California court might enter a general judgment that is certain in amount, but this action cannot be taken by the courts of this state.

The trial court should have entered a judgment denying registration of the California judgment.

The trial court denied plaintiff's request for allowance of an attorney's fee. Plaintiff cross-appeals that denial. The awarding of an attorney's fee under section 42-367, R. R. S. 1943, is discretionary. Sullivan v. Sullivan, 192 Neb. 841, 224 N. W. 2d 542. In the absence of any evidence of abuse of that discretion, we find there is no merit in plaintiff's cross-appeal.

The judgment of the trial court is reversed and judgment is hereby entered denying registration to the judgment of the Superior Court of Monterey County, California.

REVERSED.

SCRIBNER GRAIN & LUMBER CO., A NEBRASKA CORPORATION, APPELLEE, V. GERALD D. WORTMAN, APPELLANT.

281 N. W. 2d 394

Filed July 17, 1979. No. 42156.

1. **Corporations.** A corporation will be looked upon as a separate legal entity until sufficient reason to the contrary appears. The corporate fiction may be disregarded when its retention would produce injustice and inequitable consequences.
2. _____. The corporate fiction of a legal entity may be removed when the notion of legal entity is used to justify wrong, protect fraud, or defend crime.

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

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary and Martin, P.C., for appellant.

Robert M. Hillis of Yost, Schafersman, Yost, Lamme & Hillis, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and REIMER and HIPPE, District Judges.

REIMER, District Judge.

This is an action in equity brought before the District Court for Cuming County, Nebraska, by Scribner Grain & Lumber Co., a Nebraska corporation, against Gerald D. Wortman, the principal stockholder and managing officer of a closed corporation, seeking to enforce the debt of the corporation against the individual stockholder and managing officer, Gerald D. Wortman. From a judgment in favor of the plaintiff, the defendant, Gerald D. Wortman, has appealed. We affirm.

The facts briefly stated are that Gerald D. Wortman had operated a commercial feedlot in Cuming County, Nebraska, for several years prior to 1974, known as Sandhill Feedlots. During 1973 the defendant, Gerald D. Wortman, formed a corporation under the name of Sandhill Feedlots, Inc., and there

appears to be no question that the same was duly incorporated as by law provided. Beginning on January 1, 1974, the property of the former feedlot, operated as a sole proprietorship, was transferred to the corporation and stock issued. The business of the corporation was financed by the Production Credit Association office at Tekamah, Nebraska, and a statement of these transactions are in the record. The plaintiff continued to do business with the new corporation in the same manner as it had before, periodically delivering feed to the feedlot and billing for the balance at the end of each month. During 1974 the plaintiff was paid in February, March, twice in April, again in May, July, August, and September, for the deliveries made during those months, by drafts drawn by the corporation, Sandhill Feedlots, Inc., upon the Production Credit Association. The payment by draft received by the plaintiff on August 17, 1974, was in the amount of $10,861.45 and was $2,500 in excess of the amount billed by plaintiff. The defendant, Gerald D. Wortman, requested a check from plaintiff repaying to him, individually, the amount of the excess and it was given him. Again in September a draft was delivered for $15,656.22, which was $4,000 in excess of the billing. And again, Wortman requested and was given a check on the plaintiff for the amount of the excess. The October 1974 billing was never paid and the plaintiff thereafter brought suit against Sandhill Feedlots, Inc., and recovered judgment in the sum of $13,022.89 on July 3, 1975, in the District Court for Cuming County, Nebraska. It is this judgment which is the subject of the present litigation. After execution had issued against the corporation and was returned unsatisfied, because all the assets of the corporation had been depleted, this action was brought against the principal shareholder and managing officer of the corporation, Gerald D. Wortman, alleging that said stockholder had appropri-

iated and used corporate funds and property for his personal purposes and thereby defrauded and caused damage to the plaintiff as a creditor of the corporation. The court was asked to render judgment against the defendant individually for the corporate debt.

The evidence shows that the defendant, Gerald D. Wortman, readily admits that the two items above referenced were used for his personal interest along with a check drawn on Sandhill Feedlots, Inc., for $2,000, dated June 7, 1974, payable to Ruth A. Shurter, and another check drawn on Sandhill Feedlots, Inc., for $2,250, dated February 14, 1974, payable to A. Gargiulo and Jannuzzi, and another check drawn on Sandhill Feedlots, Inc., for $1,780, dated January 22, 1974, payable to Pfizer Travel Headquarters. The total of these funds admittedly diverted from the corporation by defendant Wortman is in the amount of $12,530. Defendant Wortman argues that these are insignificant amounts when compared to the volume of business done by the corporation.

" 'If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.' " Massachusetts Bonding & Ins. Co. v. Master Laboratories, 143 Neb. 617, 10 N. W. 2d 501.

A closer look at the testimony of defendant Wortman reveals that through the corporation he was operating a commercial feedlot where the cattle of customers were fed to market weight, then sold to slaughter. He testified that the yard had a 5,000 head capacity and it usually sold about 1,000 head per month; that in 1974 the yard sold 10,000 to 11,000

head and of that number some 4,000 head were owned by the defendant individually; that he paid the same for the care of his cattle as other customers paid, six or seven cents a day.

A further analysis of this testimony is in order. This testimony would indicate that cattle were in the feeding process at the yards for a 5-month or approximately 150-day feeding. If the price paid by Mr. Wortman for feeding his cattle was seven cents per day for 150 days, he was getting his cattle fed to market weight for about $10.50 per head. From other records in the evidence it is apparent that some of the corn purchased by the feedlot corporation was at $2.50 per bushel and that some of the hay was bought at $38 per ton. It is beyond the belief of this court that an estimated 700-pound feeder animal can be fed 150 days to an estimated market weight of 1,100 pounds on 2 bushels of corn and 300 pounds of hay. A general review of the books and records of the corporation, volunteered into the record by the defendant Wortman, would indicate that the actual cost of feeding an animal would be in the area of 75 to 80 cents per day. It is therefore apparent, in addition to actually removing for his own use some $12,530 or more in cash, the defendant transferred substantial benefit to himself by charging only a token figure for the feeding of his personally owned cattle.

"While the general rule is that a corporation will be looked upon as a separate legal entity until sufficient reason to the contrary appears, there is sufficient evidence in the record here to pierce the corporate shell and dissipate the separate legal identities. In such cases the law has no compunction in holding a corporation liable for the acts of its owner or visa versa." Hayes v. Sanitary Improvement Dist. No. 194, 196 Neb. 653, 244 N. W. 2d 505.

The defendant Wortman alleged in his answer and later testified that Dennis Baumert, the managing

officer of the plaintiff, conspired with him to make the overpayment amounts of $2,500 and $4,000 available to him personally. Dennis Baumert testified and denied any guilty knowledge. The presiding judge of the District Court heard the testimony of both witnesses and accepted the version given by Baumert. This court will not interfere.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J. and WHITE, J., concur in the result.

FRITZ MEYER, LANCASTER COUNTY ASSESSOR, APPELLANT, V. ROBERT COLIN ET AL., APPELLEES.

281 N. W. 2d 737

Filed July 17, 1979. No. 42238.

1. **Moot Question: Appeal and Error: Public Policy.** As a general rule, appellate courts do not sit to give opinions in cases or controversies which have become moot. An appeal or error proceeding will be dismissed where no actual controversy still exists between the parties at the time of the hearing. This general rule, however, does not apply to appeals involving matters of public interest.
2. **Political Subdivisions: Public Officers and Employees: Counties: Statutes.** The determination by a county board that an "unforeseen emergency" exists within the meaning of the Nebraska Budget Act will not be disturbed in the absence of a showing of abuse of discretion by the board. § 23-928, R. R. S. 1943.
3. _____: _____: _____: _____. A county board, in exercising its power to approve the salaries or reduce budget requests, may not unreasonably interfere with the operation of the office of an elected official, but the exercise of those powers by the board shall not be disturbed in the absence of an abuse of discretion. § 23-1111, R. R. S. 1943; § 23-908, R. R. S. 1943.
4. **Injunctions.** Injunction will not be granted in the absence of proof of injury, or threatened injury.
5. **Counties: Political Subdivisions: Public Officers and Employees.** Authority of a county board to transfer funds from one budget account to another in case of "unforeseen emergencies" does not relieve the county board of duty to make accurate estimates of the anticipated expenditures of each department.

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

Bauer, Galter, Geier, Flowers & Thompson, for appellant.

Mattson, Ricketts, Davies, Stewart and Calkins and Richard M. Duxbury and Perry, Perry, Witthoff & Guthery, for appellees.

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

WHITE, J.

The appellant, Fritz Meyer, was, at the time this suit was filed, the County Assessor of Lancaster County. The defendants, appellees here, are the members of the Board of Commissioners of Lancaster County.

This suit for an injunction involves the budgetary practices of Lancaster County and, specifically, the budget year of July 1, 1977, to June 30, 1978.

In his petition, Meyer alleged that the Commissioners had created, in 1976, a budgetary account denominated "Contingent Salary Adjustment Fund." At the same time, they had encouraged officeholders and department heads, including Meyer, to exclude from the budget submitted by the officeholders all expected salary raises, including cost-of-living raises. When Meyer ignored that instruction and included in his budget an amount equal to estimated cost-of-living raises, the Board itself deleted the amount. All such proposed increases are included instead within the "contingent" fund and granted during the course of the year as the Commissioners may determine.

Meyer sought to enjoin this practice as violative of the County Budget Act, section 23-901 et seq., R. R. S. 1943, and the Nebraska Budget Act, section 23-921 et seq., R. R. S. 1943. The District Court found that

it is within the discretion of the County Board to establish a separate fund for payment of departmental employees' salaries; that appropriation from the fund, because of "emergencies," is within the discretion of the Commissioners; and that the record did not show an abuse of that discretion. The court further found that unexpended funds in the "contingent" fund can appropriately be carried over to the succeeding budget year without violating the county mill-levy limitation; and finally, that the plaintiff did not sustain his burden of proof in establishing that the Commissioners violated the budget law or interfered with Meyer's operation of his office. Meyer appeals. We affirm in part and reverse in part.

At the outset we note, as conceded in oral argument, that Meyer is no longer County Assessor and the obvious fact that the budget year has expired. As a general rule, appellate courts do not sit to give opinions in cases or controversies which have become moot. An appeal or error proceeding will be dismissed where no actual controversy still exists between the parties at the time of the hearing. This general rule, however, does not apply to appeals involving matters of public interest. State ex rel. Coulter v. McFarland, 166 Neb. 242, 88 N. W. 2d 892; Braesch v. DePasquale, 200 Neb. 726, 265 N. W. 2d 842; 5 C. J. S., Appeal & Error, § 1354 (1), p. 404.

As the questions presented involve the public's interest in the continuing budgetary process of the counties and the relationship of the officeholders with the various Commissioners and supervisors, we have agreed to decide the issues presented.

Section 23-923, R. R. S. 1943, requires the County Board, as the "governing body" for the county, to prepare each year a proposed budget statement containing prescribed information on funds on hand, estimated revenue, and estimated expenditures, plus necessary cash reserves. Forms are prescribed and

furnished for this purpose by the State Auditor of Public Accounts. In practice the County Board meets this obligation by requiring each department head to submit a budget for his department. Some of these department heads are, as in the case of the appellant, elected officials.

The record shows that no later than the 1976 fiscal year the Board began instructing the department heads to omit anticipated cost-of-living raises from their budget requests. A memorandum concerning preparation of the fiscal 1977-78 budget contained the following instruction to department heads: "Develop personnel expenditures based on current salary plus normal merit increases commencing at time of eligibility. *Do not include any anticipated increase in the salary schedules.*" (Emphasis supplied.) At the same time, the Board established a "Contingent Salary Adjustment Fund" for the purpose of replenishing, at some time during the year, department budgets which had been depleted by the omission of the amount for cost-of-living raises.

In her testimony, Commissioner Gauger gave two reasons for the Board's adoption of this practice. First, the cost-of-living raise percentage is bargained for on a countywide basis and the Board does not find it helpful to have each department make a request for that amount. Second, Commissioner Gauger testified that in fixing the budgets for salaries for the individual officeholders, the Board concluded that the allocated salary account would be sufficient, even allowing for percentage or cost-of-living wage increases, by reason of the fact that, in their experience, few officers obtained employment of the maximum number of allowable employees throughout the fiscal year. This was due to amounts not paid by reason of vacancies which occur during the fiscal year and delay until replacements are hired. This was referred to in testimony as "attrition." The "contingent" fund was set up, according

to Commissioner Gauger, as insurance against the eventuality that the projections on attrition were incorrect. In the event that the budget of any particular office did run dry due to salary increases, it would be supplemented by an "emergency" transfer of funds from the "Contingent Salary Adjustment Fund" under the procedure authorized by sections 23-928 and 23-929, R. R. S. 1943. That procedure allows the Board, after public notice and hearing, to transfer money from one fund to another whenever, during the fiscal year, it becomes clear that "due to unforeseen emergencies there is temporarily insufficient money in a particular fund to meet the requirements of the adopted budget of expenditures for that fund, * * *."

In 1976, $443,180 was appropriated to the fund. In 1977, the amount was increased to $500,000.

This amount was determined by applying a fixed percent, usually 6 percent, to the entire requested salary budgets of all county departments. In other words, the fund was budgeted for an amount equal to the county's "maximum exposure" for cost-of-living raises even though it was believed by the Board that this amount was excessive.

In practice, the "Contingent Salary Adjustment Fund" was little used. Generally, the officeholders appear to have operated within the salary budget originally set by the Commissioners. This was the case in both 1976 and 1977 fiscal years in appellant's office of the County Assessor. Substantial portions of the "contingent" fund were transferred at the end of both the 1976 and 1977 fiscal years to the general fund.

Meyer attacks this budgetary practice on several grounds. One is that by overfunding the "Contingent Salary Adjustment Fund" and carrying the excess over to the general fund, the County Board somehow exceeds the maximum mill levy for the fiscal year. This contention is without merit for it

appears to be addressed merely to the *size* of the allocation, an area where the governmental body is accorded great discretion. The county is authorized to levy, up to its mill-levy maximum, enough taxes to cover all expenditures, as estimated by the Board, plus a cash reserve of up to 50 percent of those expenditures. §§ 23-923 and 23-927, R. R. S. 1943. In determining the amount to be levied, unencumbered balances, in this case the amount left in the "Contingent Salary Adjustment Fund," are actually subtracted from the estimated expenditures. § 23-924, R. R. S. 1943. Meyer points to no violation of the law in this accumulation and successively higher appropriation. The remedy for excessive allocation lies largely with the electorate. Especially pertinent is the comment of the Wisconsin court in State v. Zimmerman (Wis., 1924), 197 N. W. 823: "Legislative bodies may appropriate money wisely or unwisely, too sparingly or too extravagantly; but so long as they keep within the limits of the organic law they are accountable not to the courts, but to their constituents alone."

Meyer also asserts that the appropriation from the "Contingent Salary Adjustment Fund" characterized as "emergency" transfers under section 23-928, R. R. S. 1943, was improper since no true emergency existed but was, instead, an anticipated or expected underappropriation of funds necessary to operate a department. Meyer's contention may have some validity, as will be discussed below, but it is sufficient to note at this point that we are not directed specifically to the terms and conditions of any specific appropriation from the fund. A determination of "emergency" under the Nebraska Budget Act is a question for the County Board and, like other determinations by a legislative body, will not be disturbed on appeal unless there has been an abuse of discretion. See Roberts v. Thompson, 82 Neb. 458, 118 N. W. 106. Except in very general

terms, the record is absolutely devoid of the description of any such emergency appropriation although presumably, and from the budget records, there have been such appropriations. The trial court correctly held that there was insufficient evidence to show an abuse of discretion.

Meyer next argues that the deletion from his budget, of the amount requested by him for cost-of-living raises for his employees, constitutes an unwarranted interference by the County Board with the operation of the office of the County Assessor. The question presented is actually distinct from mere budgeting procedures and relates, instead, to the independence and discretion which are to be afforded an elected officer. It is clear that section 23-1111, R. R. S. 1943, requiring the approval of salaries by the County Board, does not allow the Board to arbitrarily reduce the salaries recommended by the elected officer. See Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860. Similarly, the power of the Board to reduce requests submitted by the various offices, provided in section 23-908, R. R. S. 1943, does not give the Board the authority to budget a particular office out of existence or to unduly hinder the officer in the conduct of his duties. Mr. Meyer testified he was running his office shorthanded because of the cut in his requested budget. This condition was, however, essentially self-imposed. At no time did he request a supplemental appropriation. Without regard to the appropriateness of its doing so, it fully appears that the Board stood ready to make such appropriations. There is no evidence of any intent of the Board to interfere or of any actual interference by the Board in the operation of Mr. Meyer's office.

The evidence presented was thus insufficient to show any injury suffered or likely to be suffered by Mr. Meyer in his position as County Assessor. On that ground alone, the trial court was correct in de-

nying the requested injunction. See Steffen v. County of Cuming, 195 Neb. 442, 238 N. W. 2d 890. However, we think it appropriate to comment on the budgeting procedure which really lies at the heart of the complaint raised by Mr. Meyer in this action. We consider that procedure to run contrary to the intent of the budget act. As stated in section 23-921, R. R. S. 1943: "The purpose of this act is to require governing bodies of this state to which this act applies to follow prescribed budget practices and procedures and make available to the public pertinent information pertaining to the financial requirements and expectations of such governing bodies so that intelligent and informed support, opposition, criticism, suggestions, or observations can be made by those affected; * * *."

The budget forms provided by the State Auditor in furtherance and by direction of the act classify expenditures quite logically by department. While it would be impossible, without unduly hampering management of the county's affairs, to state every subordinate item with absolute specificity, the budget should, so far as practical, inform the public of the amounts to be spent in the conduct of each office. It would clearly be improper to budget for the salaries of all county employees in one lump account to be controlled by the County Board. That is what was done here, albeit to a lesser extent, with cost-of-living raises. The Board claims this was not their intent and that their initial estimates for department expenditures were accurate. Yet, the creation of the "Contingent Salary Adjustment Fund," the statement concerning its purpose, and certainly its size ($500,000 in 1977), betray a lack of confidence in the initial estimates. The Legislature granted the governmental bodies power to transfer funds from one account to another, but only in the case of "unforeseen emergencies." By that phrase, the Legislature may not have been referring to anything par-

ticularly calamitous. Some courts have found similar phrases to mean anything which was reasonably unforeseeable at the time the initial action was taken. See, for example, Fitts v. Gibbs, 40 Wash. 2d 444, 244 P. 2d 241. As stated before, the governing body is entitled to substantial discretion in this area. In any event, we need not draw lines in this case for, if the limitation has any meaning at all, it is at least a message to the governing body not to anticipate the free use of the transfer power to the detriment of making accurate and specific budget estimates in the first place.

We do not say that the use of a particular account violates the act merely because it is labeled "contingent." A contingency is something which is not yet certain and the governing body may undoubtedly budget for that event. But where the anticipated contingency is merely the failure to budget properly in the first place, it is time to try again. The problem was recognized in State v. Board Chosen Freeholders, 56 N. J. L. 459, 29 A. 331. There was a budget item of $73,000 "for the payment of debt" when it appeared only $33,000 was needed for that purpose. "Counsel for the board defends this discrepancy on the ground that the board had a right to name an excessive sum, because the surplus might be needed to make up deficiencies in other items which could not be accurately estimated, and by the act of 1878 the board was authorized to transfer sums from one account to another. Such a contention is, we think, plainly untenable. It ignores the duty, unquestionably imposed by the statute, of making honest estimates of the probable expenditure necessary for the several items designated. This obligation is not at all weakened by the permission given to eke out the deficiency of one appropriation from the surplus of another, when the honest estimates have proved to be erroneous."

In its second finding, the trial court held: "The

defendants acting in their capacity as the Lancaster County Board of Commissioners have authority to approve the budget for departmental employees' salaries. It is within the discretion of the County Board to establish a fund for payment of those salaries or any part thereof." To the extent that finding or the general finding for the Board would permit maintenance of a portion of departmental salary expenses in a separate, nondepartmental account, they are reversed. The order of the trial court is, in all other respects, affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

CLINTON, J., participating on briefs.

JODEEN MILES, THROUGH AND BY HER FATHER AND NEXT FRIEND, HARVEY MILES, APPELLANT, V. SCHOOL DISTRICT NO. 138 OF CHEYENNE COUNTY, NEBRASKA, APPELLEE.

281 N. W. 2d 396

Filed July 17, 1979. No. 42263.

1. **Torts: Political Subdivisions.** Under section 23-2406, R. R. S. 1943, of the Political Subdivisions Tort Claims Act, the findings of the District Court under the act will not be disturbed on appeal unless they are clearly wrong.
2. **Negligence.** Negligence must be measured against the particular set of facts and circumstances which are present in each case.
3. **Evidence: Trial.** In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

Marc J. Weinpel of Peetz, Peetz & Weinpel, for appellant.

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

Heard before KRIVOSHA, C. J., CLINTON, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This is an action brought under the Political Subdivisions Tort Claims Act for injuries sustained by a 17-year-old student alleging negligence on the part of School District No. 138 in the conduct of its shop-training class where plaintiff's injuries occurred. The case was tried to the court, and the District Judge entered judgment in favor of the defendant, from which judgment the plaintiff appeals.

On October 29, 1974, the date of her injury, Jodeen Miles was a 17-year-old senior student at Gurley High School, Gurley, Nebraska (School District No. 138 of Cheyenne County, Nebraska). Miss Miles had enrolled in a shop-training class in her junior and senior years, Shop I and Shop II. Her senior project was the construction of a large wooden candlestick holder which was to be cylindrical in shape and carved from a large block of wood. The first step in making the candlestick holder required her to use a jointer machine in order to plane off the corners of the rectangular block of wood in preparation for further carving on the lathe.

A jointer machine is a general woodworking tool used for planing and squaring. The machine consists of an infeed table on the right of the machine and an outfeed table on the left. Along the back of the machine, running the length of both tables, is an adjustable piece of metal called a fence. Bevel cuts can be made by adjusting the fence to an appropriate angle. Miss Miles was making a bevel cut at the time of the accident. The cutting blades rotate on a cylinder located between the infeed and outfeed tables. The blades are covered by a spring-loaded metal guard which moves away from the blades as a

board is pushed up to it along the infeed table. At the time of the accident, the board was still on the infeed table and had not yet passed through the blades. However, Miss Miles had pushed the board from right to left to a position where it had pushed the guard away from the rotating blades, thus exposing them. It was then that she decided to quit for the day. While the machine was still operating, she attempted to remove the piece of wood from the infeed table by placing her left hand on the left end of the board and her right hand on the right end. At this time the left end of the piece of wood was in contact with the spring-loaded metal guard and adjacent to the exposed rotating blades. Her left hand came into contact with the blades, severing two fingers.

In Miss Miles' junior year in the Shop I course, Ronald Shearer, the shop-training instructor in both the Shop I and Shop II courses, demonstrated the safe use of all power tools including the jointer machine. Students were required to do workbook exercises which covered the proper use of the jointer. Miss Miles' performance in the workbook exercises was satisfactory. A safety test was administered in the Shop I class, although the record is silent as to whether Miss Miles passed this test. In her junior year, Miss Miles worked with the jointer machine in constructing a curio cabinet. At her request, Mr. Shearer occasionally assisted her with jointer operations, and she used the jointer safely and correctly at all times and had no problem using the machine.

In her senior year, Miss Miles enrolled in the Shop II class again taught by Mr. Shearer. At the first of the year each student was issued a safety booklet, which Miss Miles read. Although the school district had no rules or guidelines on the conduct of the shop class, Mr. Shearer had a personal rule that the students could not use the power tools until they had

passed a safety examination. When the safety test was given, Miss Miles received a grade of 68 percent. A passing grade was 70 percent. There is nothing in the record as to whether or not the questions which Miss Miles failed to answer pertained to the operation of the jointer. Miss Miles and other students who failed the test were required to refer to the textbook and write the correct answers to the questions they had missed. Following this procedure, Miss Miles answered all questions correctly. This was done before Miss Miles was allowed to use any of the power tools.

On October 28, 1974, the day before the accident, Miss Miles commenced use of the jointer in planing the corners from the block of wood in order to make it cylindrical for the lathe. At Miss Miles' request, Mr. Shearer tilted the fence at an angle so that the corners of the rectangular piece of wood could pass over the blade in a planing action. Mr. Shearer then ran the piece of wood through the machine a few times as Miss Miles watched. Mr. Shearer then observed his student repeat the operation. Miss Miles operated the jointer machine safely and properly on this date, as she had on several occasions the previous year.

Again, on October 29, 1974, Mr. Shearer adjusted the fence at the proper angle and watched Miss Miles run the wood through at least once. She continued to work at least 5 or 10 minutes without mishap and ran the board through the machine 5 or 10 times during that period. It was at this time that she injured her left hand in attempting to remove the wood from the infeed table as previously described. Although Mr. Shearer was in the shop at the time, standing 6 to 8 feet away from his student, he was not directly supervising her at the time the injury was received.

The trial court found that the proximate cause of the plaintiff's injuries was the failure of the plaintiff

to use the ordinary care which an ordinary, prudent child, of the same capacity to appreciate and avoid danger as the plaintiff, would have used under like circumstances. The court further found that the defendant's negligence, if any, was not the proximate cause of the accident; that, in any event, plaintiff's negligence was more than slight and defendant's, if any, less than gross by comparison. Pursuant to the above findings, the court dismissed plaintiff's petition.

We affirm the judgment of the District Court. The findings of the District Court in an action under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless they are clearly wrong. Brahatcek v. Millard School District, 202 Neb. 86, 273 N. W. 2d 680 (1979); Daniels v. Andersen, 195 Neb. 95, 237 N. W. 2d 397 (1975); Buttner v. Omaha P. P. Dist., 193 Neb. 515, 227 N. W. 2d 862 (1975).

The plaintiff contends the trial court erred in not finding that Mr. Shearer's failure to conduct a second closed-book examination was negligence and the proximate cause of plaintiff's injury. Negligence must be measured against the particular set of facts and circumstances which are present in each case. Krehnke v. Farmers Union Co-op. Assn., 199 Neb. 632, 260 N. W. 2d 601 (1977). By reason of instruction, demonstration, and experience for over 1 year in the safe and proper operation of the jointer machine, Miss Miles was thoroughly familiar with its operation and the hazards attendant thereto. Mr. Shearer's requirement that students who failed the safety examination write the correct answers to the questions and submit them for his approval was reasonable under the facts and circumstances in the present case. In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every in-

ference that can reasonably be deduced from the evidence. Daniels v. Andersen, *supra*. A review of that evidence leads to the certain conclusion that the plaintiff's negligence in placing her left hand in the rotating blades was the sole proximate cause of the injuries she sustained in this unfortunate accident.

The defendant contends the plaintiff did not comply with the provisions of the Political Subdivisions Tort Claims Act in the filing of her claim, and that there was no final disposition of her claim within the meaning of that act. Having affirmed the judgment of the District Court on the merits, we need not and do not address that issue.

AFFIRMED.

CITY OF PAPILLION, A MUNICIPAL CORPORATION, APPELLANT, V. CLARA SCHRAM, DECEASED, BY BERNARD F. SCHRAM, HER PERSONAL REPRESENTATIVE, ET AL., APPELLEE.

281 N. W. 2d 528

Filed July 17, 1979. No. 42272.

1. **Easements.** An easement is in gross when it is not created to benefit or when it does not benefit the possessor of any tract of land in his use of it as such possessor.
2. _____. An easement in gross belongs to the owner of it independently of his ownership or possession of any specific land.
3. **Deeds: Intent.** Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. The doctrine of merger, however, applies only in situations where the parties to the deed and to the prior agreements are the same.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Michael N. Schirber, for appellant.

Steven W. Floersch of Collins & Gleason, for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and HASTINGS, JJ., and FAHRNBRUCH, District Judge.

FAHRNBRUCH, District Judge.

The City of Papillion, a municipal corporation, as plaintiff, brought this action against defendant to collect a water usage fee. The action was defended on the basis that plaintiff had agreed to supply water free of charge to defendant and her late husband as partial consideration for an easement. The trial court found for the defendant. Plaintiff appealed. While the appeal was pending, defendant died and the case was revived in the names of her heirs. We affirm the judgment of the trial court.

In trial to the court, the pleadings and stipulations conclusively demonstrated that in early 1946 defendant, Clara Schram, and her late husband, John H. Schram, were the owners of Tax Lot 23 in Section 26, Township 14 North, Range 12 East of the 6th P.M., Sarpy County, Nebraska.

On February 27, 1946, Clara and John H. Schram executed a perpetual easement to plaintiff's predecessor, village of Papillion, granting it the right to install two 16-inch tubular wells on the above-described property and to remove water for the village of Papillion as its water supply. The easement was filed of record March 21, 1946, in Sarpy County, Nebraska.

As part of the consideration for the easement, plaintiff agreed to annually supply the Schrams, through their private waterline, not to exceed 600,000 gallons of water free of charge "as long as said wells or any well placed upon the land of grantor is in operation." It is undisputed that at all times relevant herein the wells were operational and the flow

of water has been uninterrupted. The easement further provided that the plaintiff "further agree[s], in order to prevent future litigation, that if the wells dug under this contract shall fail or exhaust the water supply under said land of grantors, [defendant and her husband] that the grantee [plaintiff] shall continue to furnish water to grantors under this contract without expense * * *."

The easement provided that it was binding upon the heirs or assigns of grantors and the successors and assigns of grantee.

The easement granted was an easement in gross for commercial purposes. "An easement is in gross when it is not created to benefit *or* when it does not benefit the possessor of any tract of land in his use of it as such possessor." Restatement of the Law of Property, Easement in Gross, § 454, p. 2917. Under Comment "a" of that section, it is stated: "An easement in gross belongs to the owner of it independently of his ownership or possession of any specific land." Moreover, both the easement granted and the evidence fails to indicate a dominant tenement. The land upon which the wells are located is a servient tenement, but without a dominant tenement there can be no easement appurtenant. "An easement appurtenant * * * is a privilege which the owner of one tenement has the right to enjoy *in respect to that tenement*, in or over the tenement of another person." (Emphasis supplied.) 28 C. J. S., Easements, § 4, p. 633. Here, the purpose of the easement was to assure the citizens of the plaintiff and its predecessor a municipal water supply. It was not intended to benefit any specific property owned by plaintiff. The right of plaintiff to continue operation of the wells and to withdraw water is not at issue here.

On or about April 12, 1971, the Schrams granted an option to purchase a portion of their real estate to Charles G. Smith and Nellie M. Smith, husband and

wife. Thereafter, on June 13, 1972, Clara Schram, then a widow, conveyed the portion so optioned to the Smiths. The property conveyed to the Smiths encompassed the land upon which plaintiff's wells were located.

Plaintiff contends that when Clara Schram deeded a portion of the real estate she also deeded her right to receive the free water. Such contention cannot be sustained. Defendant's right to receive the free water was not by way of an easement appurtenant reserved unto the defendant, her husband, and their heirs in the grant of easement to plaintiff's predecessor. The free water was a part of the consideration flowing from the plaintiff and its predecessor to defendant and her husband, payable in annual installments of not to exceed 600,000 gallons of water per annum. The consideration was not contingent upon the wells' nor the land's continual production of water. The easement provided: "[I]n order to prevent future litigation, * * * if the wells dug under this contract shall fail or exhaust the water supply under said land of grantors, [defendant, her husband, and their heirs] that the grantee [plaintiff] shall continue to furnish water to grantors under this contract without expense * * *."

Defendant is entitled to the full consideration for the easement unless she has divested herself of that right.

The keystone question to the resolution of this litigation is whether Clara Schram divested herself and her heirs from the free water when she conveyed a portion of her land to the Smiths. The extent of the divestiture is controlled by the true intent of the parties to the conveyance. § 76-205, R. R. S. 1943.

Plaintiff contends that the trial court was in error in admitting extrinsic evidence, the "option agreement," as to the intent of the parties in regard to the Schram-Smith sale. The plaintiff claims the deed between the parties is unambiguous and that all of

the preceding negotiations and agreements merged in the deed. Plaintiff's position cannot be sustained.

The Schram-Smith deed itself contains inconsistencies. In the granting clause of the deed the Smiths were the grantees. Yet, in the habendum clause it is stated: "To have and to hold the premises above described, together with all the tenements, hereditaments and appurtenances thereunto belonging unto the said Clara M. Schram A/K/A Clara Schram and to her heirs and assigns forever." Under the habendum clause, it is warranted that the premises are free from encumbrance "except easements and covenants of record" while the granting clause makes no such exceptions.

Whether the Schram-Smith deed was unambiguous or ambiguous is not controlling as to the admissibility of the "option agreement" in this case.

" 'Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties.' * * * The doctrine of merger, however, was applied in those cases only in situations where the parties to the land contract and the parties to the deed were the same. *It does not apply in regard to persons who have no privity of contract.*" (Emphasis supplied.) Beren Corp. v. Spader, 198 Neb. 677, 255 N. W. 2d 247.

Since the plaintiff had no privity of contract to the Schram-Smith sale, the trial court properly admitted the option from the Schrams to the Smiths to determine the "true intent" of the parties. The option provided in part: "It is further agreed that all of the benefits accruing to the Sellers under and by vir-

tue of an easement dated March 21, 1946 and recorded in Miscellaneous Book 12, Pages 649 and 650 in the office of the Register of Deeds of Sarpy County, Nebraska, entered into by and between the Sellers herein and the City of Papillion shall continue and Sellers shall retain the private pipeline referred to in said Easement Agreement including the connecting pipeline laid by the City and including all of the benefits accruing to the Sellers, together with the continued use of water furnished by the City of Papillion to Sellers pursuant to the terms of said easement."

The evidence supports the trial court's finding that the easement granted to plaintiff was an easement in gross and that Clara Schram did not divest herself or her heirs of the right to receive free water under the terms of the easement.

The judgment of the trial court is affirmed.

AFFIRMED.

HILT TRUCK LINES, INC., A CORPORATION, APPELLANT, V. RAJEAN W. JONES ET AL., APPELLEES.

281 N. W. 2d 399

Filed July 17, 1979. No. 42310.

1. **Workmen's Compensation: Employer and Employee.** False statements made at the time employment was secured are ordinarily insufficient to terminate the relation of master and servant existing at the time of the injury, even though they may constitute grounds for rescinding the contract of employment, at least where there is no causal connection between the injury and the misrepresentation.
2. _____: _____. Three factors must be present before a false statement in an employment application will bar workmen's compensation benefits: (1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

3. **Workmen's Compensation: Negligence: Employer and Employee: Burden of Proof.** In a workmen's compensation case the burden of proof on the defense of intoxication or intentional willful negligence is on the employer.
4. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
5. **Workmen's Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

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

William E. Pfeiffer and Thomas Wm. Weingarten of Spielhagen, Pfeiffer & Miller and John R. Doyle of Doyle & Doyle, for appellees.

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

MCCOWN, J.

This is a workmen's compensation proceeding initiated by the plaintiff to determine the rights and liabilities of the parties in connection with the accidental death of a truckdriver in the course of his employment. The single judge of the Workmen's Compensation Court determined that the plaintiff, Hilt Truck Lines, Inc., was the employer and awarded death benefits to the decedent's widow and his three minor children. Upon rehearing, the full panel of the Workmen's Compensation Court affirmed the findings and award of the single-judge court, and the plaintiff has appealed.

The decedent, Kenneth Youan Jones, also known as Kenneth Troy Cook, was a truckdriver who began using the name Kenneth Youan Jones sometime in the summer of 1976, and obtained a Nebraska

driver's license in that name. In early October 1976, Jones applied to defendant, Robert A. Thurston, in Lincoln, Nebraska, for a truckdriver's job in response to a newspaper advertisement. Thurston owns several tractor units which he leases with drivers to the plaintiff, Hilt Truck Lines, Inc.

In his interview with the decedent, Thurston informed Jones that Jones could not be hired until he had been screened and approved by plaintiff, Hilt Truck Lines, Inc. Thurston inquired as to Jones' accident and driving records and was assured by Jones that he had extensive experience, no convictions for traffic violations, no accident record, and that his operator's license had never been suspended or revoked. With these assurances, Thurston sent Jones to the plaintiff Hilt to apply. At the Hilt offices the decedent filled out an application form, signing his name as Kenneth Youan Jones. At no time did he ever tell Thurston or Hilt that he had previously used the name Kenneth Troy Cook, nor that he had a driving record under any name other than Kenneth Youan Jones. He also completed a standardized Department of Transportation test and completed a driver's certification of violations form on which he certified that he had no traffic violations during the preceding 12 months. The certification was dated October 6, 1976. Jones was then approved as a driver by Hilt.

Upon clearance by Hilt, Thurston accompanied Jones on his first trip to make sure that Jones was capable and to check him out on all appropriate procedures. Jones' performance on the checkout run was satisfactory and thereafter Jones drove the truck by himself on trips for Hilt.

Under Thurston's lease of trucks with drivers to Hilt, Thurston had power to hire and fire drivers, but had no control over drivers when they were on the road. Hilt held all permits, provided cargo and cargo trailers, arranged for trips, and operated all

trucks under its own authority and its own permits. The lease also specifically provided that Hilt was to provide workmen's compensation coverage for the drivers.

On October 25, 1976, Jones left Nebraska to deliver a cargo in New Jersey. He was returning with a cargo of liquor westbound on Interstate Highway No. 80 in Pennsylvania on the night of October 30, 1976. The Pennsylvania state patrol received a report of a truck accident by C. B. radio at 10:40 p.m., on that date. A state trooper arrived at the scene at 11:15 p.m., and found a tractor-trailer with its cargo and parts of the vehicle scattered over a wide area. The truck had struck the guardrail on the right side of the highway, skimmed along the rail for approximately 300 feet, broken through the rail, and traveled another 246 feet. Only the rear doors of the trailer were left intact. The cab was twisted beyond recognition and Kenneth Youan Jones was lying near the cab apparently dead. He was pronounced dead upon arrival at the hospital.

At the point of the accident the highway was blacktop with a downhill curve to the right. There was no lighting and there was light rain and fog, although visibility was termed adequate. The highway was wet from the rain. The state trooper testified there had been a number of accidents involving trucks at that spot caused by excessive speed and loss of control. In the trooper's opinion, the accident in this case was caused by speeding and driving too fast for the road and weather conditions present.

A blood sample taken from the decedent's body at 12:45 a.m., October 31, 1976, showed a blood alcohol level of .165 percent. Rajean Jones, the decedent's widow, testified that Jones had called her by telephone from Pennsylvania at approximately 10 p.m., on October 30, 1976, and talked with her for some time. His voice sounded normal, he talked distinctly, and did not slur his words. Her testimony was

confirmed by the person who answered the telephone at the Jones' residence.

An expert witness testified that in his opinion a blood alcohol level of .165 percent would have impaired and interferred with the physical and mental functions necessary to operate a motor vehicle. The expert testified that an individual's hand-eye coordination and judgment would have been impaired, along with his distance and time perception, and that he would have had decreased control of his body and mind. The expert admitted, however, that he did not know Kenneth Youan Jones, and that there was a difference in reaction to alcohol between individuals and also between persons who chronically abused alcohol and those who did not. He also testified that even at the same blood alcohol level the effects of alcohol vary from person to person, and that with a blood alcohol level of .165 percent a person could still operate a motor vehicle without driving off the road.

Under Department of Transportation regulations, Hilt had 30 days after hiring Jones in which to complete its investigation of his application and driving record. At the time of Jones' death 24 days had expired and none of the requests for the decedent's motor vehicle reports had been returned. After Jones' death it was discovered that he had a previous driving record under the name of Kenneth Troy Cook. The investigation also disclosed that the decedent, under the name of Kenneth Troy Cook, had been convicted in Michigan on a charge of driving while intoxicated on April 24, 1974. He had also been convicted in Colorado under the name of Cook for driving under the influence of alcohol on October 22, 1975. In addition, the decedent, under the name of Kenneth Troy Cook, had been convicted in Nebraska on February 10, 1976, for driving while intoxicated. The evidence was undisputed that if Hilt or Thurston had known of any of these convictions or misrepre-

sentations the decedent would not have been employed, and that if they had been discovered prior to the accident Jones would have been discharged immediately.

The Workmen's Compensation Court found that the decedent, Kenneth Youan Jones, also known as Kenneth Troy Cook, was in the employ of the plaintiff, Hilt Truck Lines, Inc., on October 31, 1976, and that he suffered fatal injuries and died as a result of an accident in the course of his employment. The Workmen's Compensation Court also determined that his dependents, Rajean W. Jones, widow, and his minor children by a previous marriage, Kenneth Troy Jones, Renise Kay Jones, and Todd Alan Jones, are entitled to dependents' benefits under the Nebraska Workmen's Compensation Act.

The Workmen's Compensation Court also found that the decedent, in applying for employment, misrepresented his traffic violations and accident record, and failed to disclose that he had previously used the name of Kenneth Troy Cook, and that plaintiff would not have accepted decedent for employment if it had known of his driving record. The court determined that there was insufficient evidence to raise or support an inference of a causal connection between the false representations and the subsequent accident, and that the evidence is legally insufficient to void the employment relationship retroactively.

The court also found that the plaintiff had failed to meet its burden of proving the defense of intentional willful negligence or intoxication, and entered judgment against the plaintiff and in favor of the decedent's dependents for the appropriate death benefits. The plaintiff has appealed.

The plaintiff's primary contentions on this appeal are that because of the decedent's misrepresentations at the time of his employment, the employment contract was void ab initio; and that the decedent's

dependents are not entitled to benefits because the decedent's death was caused by his willful negligence or intoxication.

Plaintiff concedes the general rule that false statements made at the time employment was secured are ordinarily insufficient to terminate the relation of master and servant existing at the time of the injury, even though they may constitute grounds for rescinding the contract of employment, at least where there is no causal connection between the injury and the misrepresentation. See 56 C. J. S., Master and Servant, § 180 (e), p. 872. Plaintiff relies on a related rule that a contract obtained by fraud through another impersonating the employee will bar recovery in an action by the employee for personal injuries. The difficulty with that rule here is that the decedent did not impersonate anyone, and there was no assumption by the plaintiff that Jones was anyone but himself.

The general rule is set out in 1 B Larson, Workmen's Compensation Law, section 47.53, page 8-201: "[I]t has been held that employment which has been obtained by the making of false statements—even criminally false statements—whether by a minor or an adult, is still employment; that is, the technical illegality will not of itself destroy compensation coverage. * * * The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury."

In the case now before us, the Workmen's Compensation Court specifically found that there was insufficient evidence to raise or support an inference

of a causal connection between decedent's misrepresentations and his subsequent accident. Obviously, issues of causation are for determination by the factfinder. Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92. Although it is quite clear from the findings of fact here that the contract of employment was voidable or subject to rescission upon discovery of the misrepresentations, the employment contract was not void from the beginning and the misrepresentations did not destroy compensation coverage.

As an affirmative defense the plaintiff alleged that the decedent's dependents were not entitled to workmen's compensation benefits because the decedent's death was caused by his intoxication or willful negligence.

Section 48-127, R. R. S. 1943, provides: "If the employee is injured by reason of his intentional willful negligence, or by reason of being in a state of intoxication, neither he nor his beneficiaries shall receive any compensation under the provisions of this act."

In a workmen's compensation case the burden of proof on the defense of intoxication or willful negligence is on the employer. See, Johnson v. Hahn Bros. Constr., Inc., 188 Neb. 252, 196 N. W. 2d 109; Hoff v. Edgar, 133 Neb. 403, 275 N. W. 602.

In the present case the employer was required to prove that the accident and resulting death of the decedent were caused by decedent's intoxication, and the evidence on this issue is in conflict. Issues of causation are for the factfinder to determine and the Workmen's Compensation Court specifically found that the evidence was insufficient to establish that the accident and the resulting death of the decedent were caused by intoxication.

The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. § 48-185, R. R. S. 1943.

The findings of fact made by the Workmen's Com-

pensation Court after rehearing will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom. Hyatt v. Kay Windsor, Inc., *supra*.

The findings of fact made by the Workmen's Compensation Court on rehearing here were supported by the evidence and the judgment of the court was correct and is affirmed.

AFFIRMED.

TERRANCE JAIXEN, APPELLEE, V. DON C. TURNER, DOING BUSINESS AS TURNER INSURANCE AGENCY, APPELLEE, IMPLEADED WITH IOWA MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.

281 N. W. 2d 404

Filed July 17, 1979. No. 42401.

Judgments: Statutes: Offer and Acceptance. An offer to confess judgment, and its acceptance pursuant to section 25-901, R. R. S. 1943, requires the entry of a judgment according to the offer and acceptance.

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

Hunter, Houlihan & Katz, for appellant.

John J. Higgins and Nanfito & Nanfito, for appellee Jaixen.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is an appeal by defendant, Iowa Mutual Insurance Company, from a consent judgment in favor of plaintiff, Terrance Jaixen, for the amount prayed for in his petition, plus prejudgment interest, costs, and attorney's fees. We reverse.

Jaixen sued Iowa Mutual and Don C. Turner, its agent, to recover on a policy of fire insurance issued by Iowa Mutual through Turner. The petition claimed an insured loss of $8,119.25 and prayed for judgment for that amount plus interest from July 9, 1977, (the date of the loss), attorney's fees pursuant to section 44-359, R. R. S. 1943, and costs. After the issues were framed and discovery was completed, the case was set for trial. Before the trial Jaixen moved for summary judgment on the issue of liability. The motion was submitted and taken under advisement. Prior to a ruling, Iowa Mutual filed an offer to confess judgment for $8,119.25 and costs pursuant to section 25-901, R. R. S. 1943. The following day Jaixen filed his acceptance of Iowa Mutual's offer, "pursuant to Section 25-901 R. R. S. Neb., 1943, et. seq." On September 25, 1978, after receiving in evidence the offer and acceptance and evidence on the value of attorney's services, the trial court entered judgment against Iowa Mutual for $8,119.25 plus prejudgment interest of $568.31, and costs. Finding that Jaixen had recovered judgment for more than the amount of Iowa Mutual's offer of judgment, the court awarded his attorney a fee of $3,000 citing as authority section 44-359, R. R. S. 1943.

We agree with Iowa Mutual's contention that the court erred in including prejudgment interest in its judgment and in awarding the attorney's fees.

This case comes squarely within the language of section 25-901, R. R. S. 1943. It requires that the judgment be entered according to the offer and acceptance.

Jaixen contends that his was a liquidated claim,

and that he was entitled to interest from the date of the loss. If the case had proceeded to a verdict that may have been so. But it did not. Having accepted Iowa Mutual's offer, he was not entitled to more, and the trial court was bound to enter judgment according to the agreement. Therefore, plaintiff was not entitled to an attorney's fee under the proviso in section 44-359, R. R. S. 1943.

Wendt v. Cavalier Ins. Corp., 197 Neb. 622, 250 N. W. 2d 243 (1977), is cited by Jaixen as authority for his position, but it is not. The offer and acceptance in that case did include prejudgment interest, and judgment was entered accordingly. This court held that Wendt was not entitled to attorney's fees under section 44-359, R. R. S. 1943. In this case Jaixen may not rely upon the entry of an erroneous judgment to entitle him to attorney's fees.

Jaixen also asserts that Iowa Mutual's offer to pay the amount demanded in his petition was not a compromise offer within the meaning of section 25-901, R. R. S. 1943, but was a voluntary acknowledgment of an indebtedness arising by the insurance contract. The answer is that however characterized, the offer and acceptance were explicitly referenced to section 25-901, R. R. S. 1943, and obligated the trial court to enter judgment accordingly.

The case is reversed and remanded with directions to enter a judgment for Jaixen for $8,119.25 (effective September 25, 1978) and costs in the District Court. Costs in this court are taxed to Jaixen.

REVERSED.

JAMES B. BUTT, APPELLEE AND CROSS-APPELLANT, V. CITY WIDE ROCK EXCAVATING CO., APPELLANT AND CROSS-APPELLEE.

281 N. W. 2d 406

Filed July 17, 1979. No. 42410.

1. **Workmen's Compensation.** The general rule is that an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment.
2. _____. Where transportation to the place of work is furnished by the employer and the injury occurs while the workman is being transported in a vehicle under the control of the employer, the injury may arise out of and in the course of the employment.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

William J. Riedmann and Eric W. Kruger of Riedmann & Kruger, for appellant.

Richard L. Swenson of Lathrop, Albracht & Swenson, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and HAMILTON and HENDRIX, District Judges.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff was employed by the defendant as a heavy equipment mechanic. On April 21, 1977, the plaintiff was injured while driving a truck owned by the defendant from the plaintiff's home to the defendant's shop in Omaha, Nebraska. The injury occurred when the truck struck a light pole while the plaintiff was attempting to avoid striking a pedestrian who ran in front of the truck.

The evidence shows that the defendant employed five or six mechanics. The defendant supplied trucks to two of the mechanics so that they could repair the defendant's equipment at its two quarries and repair trucks which broke down on the road. Approximately a year before the accident the de-

fendant supplied a truck to the plaintiff. The plaintiff was instructed to put all of his tools and equipment in the truck and to use the truck to drive back and forth from his home to work. The plaintiff was not allowed to use the truck for personal use. All expenses of operating and maintaining the truck including fuel, repairs, and insurance were paid by the defendant.

The plaintiff was an hourly employee and his time commenced when he arrived at the shop and stopped when he left the shop to go home. The plaintiff was not paid for the time spent driving to and from work. On five or six occasions the plaintiff had been directed to report at one of the quarries instead of the shop, and on those occasions his time commenced when he arrived at the quarry. Although the plaintiff on occasion worked after normal working hours, the evidence does not indicate that the plaintiff had been called for emergency purposes after he had returned to his home.

After the hearing before a single judge of the compensation court, and again upon rehearing, the plaintiff recovered an award. The defendant has appealed and contends that the injury to the plaintiff did not arise out of and in the course of his employment by the defendant.

The general rule is that an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment. Acton v. Wymore School Dist. No. 114, 172 Neb. 609, 111 N. W. 2d 368. However, where transportation to the place of work is furnished by the employer and the injury occurs while the workman is being transported in a vehicle under the control of the employer, the injury may arise out of and in the course of the employment. Schademann v. Casey, 194 Neb. 149, 231 N. W. 2d 116.

The evidence in this case shows that the truck was not furnished to the plaintiff for his convenience and

benefit alone. The tools and equipment used by the plaintiff in performing the duties of his employment for the defendant were kept in the truck so that they would be available at all times. This permitted the defendant to direct the plaintiff to report at one of the quarries instead of the shop so that the time which would be used in going to the shop before going to the quarry, or to the scene of a breakdown, was eliminated. In the event of an emergency the plaintiff would be able to go directly to the place where his services were required without first going to the shop.

At the time of the accident in this case the plaintiff was operating the truck in accordance with the directions of the defendant. The truck was under the control of the defendant to the same extent as the truck involved in Schademann v. Casey, *supra*. Under these circumstances, the plaintiff was engaged in the course of his employment at the time of the accident and the injury arose out of the employment. See, 1 Larson, Workmen's Compensation Law, § 17.10, p. 4-180; Soncrant v. Soncrant, Inc., 59 Mich. App. 287, 229 N. W. 2d 419: Thomas v. Certified Refrig., 392 Mich. 623, 221 N. W. 2d 378; 99 C. J. S., Workmen's Compensation, § 235, p. 834.

The plaintiff cross-appeals from that part of the award which directed the defendant to pay "to the plaintiff and the party making said payments" $6,183.20 in medical and hospital expense that had been paid "on behalf of the plaintiff." The record before us does not show who paid the $6,183.20. The award was as favorable to the plaintiff as the evidence would allow. The cross-appeal is without merit.

The judgment of the Workmen's Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY EUGENE MAEZ, APPELLANT.

281 N. W. 2d 531

Filed July 17, 1979. No. 42438.

1. **Criminal Law: Constitutional Law: Prisoners.** A criminal statute is not constitutionally deficient merely because it applies only to inmates of penal institutions.
2. **Statutes: Intent.** A statutory construction which leads to absurd, unjust, or unconscionable results will be avoided. A literal meaning which would have the effect of defeating the legislative intent will not be placed upon a statute when a sensible construction which will effectuate the object of the legislation is possible.
3. **Criminal Law: Statutes: Legislature.** Section 28-743, R. R. S. 1943, applies only to situations where either the means used to compel or induce the performance of an act or where the end to be accomplished by such means, the performance of the act itself, are of a nature which the Legislature might prohibit under a reasonable exercise of its police power.
4. **Criminal Law: Constitutional Law: Prisoners.** A criminal statute applying only to inmates of prisons is not unconstitutional merely because the inmate might have been prosecuted under another statute applicable to everyone and prohibiting the same acts.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Bert E. Blackwell, for appellant.

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

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

CLINTON, J.

The defendant Maez was prosecuted in the District Court for Red Willow County, Nebraska, on two counts of violation of the provisions of section 28-743, R. R. S. 1943, which provides in part: "Whoever, being an inmate of any jail or correctional or penal institution, shall assault, threaten, imprison, or detain any person for the purpose of compelling or inducing the performance of any act by such person,

or by any other person, shall be guilty of a felony . . . ." A jury trial was waived and the defendant was found guilty by the court on both counts and sentenced to two concurrent terms of 11 years each in the Nebraska Penal and Correctional Complex. He has appealed to this court and assigns and argues the following errors: (1) The trial court erred in not dismissing the charge because the statute is vague and uncertain and as a result is unconstitutional because it violates the due process and equal protection clauses of Article XIV, section 1, of the Constitution of the United States, and the due process clause of Article I, section 3, of the Constitution of Nebraska. (2) The proof of the commission of the specific acts, i.e., compelling the commission of a sexual offense by threat, is insufficient to support the conviction because of lack of corroboration of the testimony of the victim. (3) The evidence is insufficient to permit a finding of guilt beyond a reasonable doubt. We affirm.

In order to understand the import of the defendant's constitutional arguments, it is necessary to summarize the general nature of the facts which are relied upon to support the conviction. On the 18th and 19th days of January 1978, the defendant Maez and the victim, along with certain other males, were inmates of the Red Willow county jail. On those 2 days, the evidence, if believed by the court, would show that, by means of threats of physical harm, defendant compelled the victim to perform upon the defendant an act of sodomy per os and to submit to an act of sodomy per anum. The evidence also indicates that the victim was compelled to perform the same acts with another inmate, one Crabtree, who was one of the defense witnesses.

The equal protection argument is founded upon the fact that the statute applies only to inmates of penal institutions. The vagueness argument is essentially that the statute fails to define the nature of

the threats prohibited and to describe the nature of the acts, the inducement or compulsion of which are prohibited. It is argued, therefore, the statute may prohibit even lawful "threats," or prohibit the compulsion of lawful acts such as expressions of a purpose to sue prison officials if they do not perform acts which the law requires them to perform for the benefit of inmates. A second aspect of the argument is that the statute is so broad all sorts of acts made unlawful by other statutes might be prosecuted under it, e.g., as illustrated by this case, sodomy accomplished by force or threat. The defendant supports this argument with a long list of hypothetical illustrations, some of which are clearly possible, others of which are not. The defendant also argues the operation of the statute should be confined to so-called "hostage" situations.

In considering these arguments it is necessary to analyze the statute. The crime defined contains three elements: (1) It can be committed only by one who is an inmate of a penal institution; (2) the inmate must either assault, threaten, imprison, or detain some person; and (3) it must be done for the purpose of compelling or inducing that person or some other person to perform "any act."

The argument, that the statute violates the defendant's right to equal protection because it applies only to that class of persons who are inmates of penal institutions, has been considered and rejected by this court in the case of State v. Eckstein, 188 Neb. 146, 195 N. W. 2d 194, where we said: "The dangers to society, custodians, and prisoners which are inherent in administration and control of penal institutions are by now well known to everyone. The legislative classification here was not arbitrary or unreasonable. 'A State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment.' Skinner v. Oklahoma, 316 U. S.

535, 62 S. Ct. 1110, 86 L. Ed. 1655." A statute is not constitutionally deficient merely because it applies only to inmates. We need not further discuss that point.

The remaining constitutional arguments are intertwined and we will discuss them together. It seems apparent from the language of the statute that the legislative purposes of section 28-743, R. R. S. 1943, are the maintenance and enforcement of good order as well as the protection of the safety of persons, including inmates and institutional personnel, in penal institutions. The language of the statute is necessarily broad, as otherwise its objectives could not be accomplished. Is it so broad it would make harmless or essentially lawful acts unlawful, or is it so vague the courts and others cannot determine what acts are prohibited?

At this point let us consider the elements of the offense as defined by the statute. Certain acts included in the second element, to wit, "assault, . . . imprison," are themselves unlawful acts and, of course, cannot be lawfully used by an inmate to accomplish any purpose whatever. Conversely, of course, force or restraint used in self-defense would not come within the definition of those two terms. The term "detain" ought to be interpreted, not in the sense of mere delay, but in the sense of a restraint of lawful freedom to move, imposed either physically or by threat. This meaning harmonizes with the other terms used. The term "threaten" does not, in and of itself, necessarily import an unlawful act and must therefore be restricted in its meaning in the light of the objective or purpose sought to be accomplished by the threats. If one "threatens" to sue in order to enforce one's lawful or presumed lawful rights, nothing illegal is done; however, a mere expression of an intention to enforce one's legal rights in a peaceable and lawful manner is not the type of threat which the statute was enacted to restrict.

Is the prohibition against compelling "any act" too broad? In State v. Saltzman, 194 Neb. 525, 233 N. W. 2d 914, this court had to consider the phrase, "for the purpose of compelling the performance of any act," by the victim or any other person, contained in the kidnapping statute. § 28-417, R. R. S. 1943. We there approved as constitutional, "a broad and comprehensive application of the term 'any act.' "

In Saltzman, the means of compulsion used was the pointing of a gun. The act compelled was the disclosure by a law enforcement officer of the place of residence of the prosecutor. In that case it would, of course, have been lawful for the defendant to ask for the information. The Legislature could, however, prohibit the compulsion of any disclosure by the use of coercive methods. An analogous situation is covered by the statute which we have for consideration in this case, in that even a lawful end may not be compelled by the coercive means described in the statute. See, also, People v. Agnello, 259 Cal. App. 2d 785, 66 Cal. Rptr. 571, where, under a statute providing that if it reasonably appeared to an officer of a state campus or facility that a person not a student or employee was committing "any act" likely to interfere with the conduct of the activities of the campus, such person could be directed to leave and was guilty of a misdemeanor upon failure to leave, the court held the words "any act" were not unconstitutionally vague.

In Saltzman, we said: "It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent." Accordingly, we hold that section 28-743, R. R. S. 1943, embraces only those situations where either the means used to com-

pel or induce performance of an act or where the end to be accomplished by such means, the performance of the act itself, are of a nature which the Legislature may prohibit under a reasonable exercise of the police power. As so construed and limited, the statute is constitutional.

As applied to the facts before us, the acts clearly were within the terms of the statute under a reasonable construction thereof and the language of the statute is sufficiently definite to give any reasonable person notice that the acts in question were prohibited. In Saltzman we said: "The statute here is sufficiently clear that a person of ordinary intelligence has fair notice of exactly what is forbidden. The actions of the defendant were clearly prohibited under any reasonable construction of the statute. Although hypothetical factual situations might be imagined where the application of the statute might raise constitutional issues, such imaginary factual situations do not help the defendant, nor make the statute unconstitutional."

The next facet of the plaintiff's argument is essentially that sodomy committed by force or threat is made a crime by another statute and so it must be prosecuted under that statute. Defendant makes a hypothetical list of numerous other crimes which might be prosecuted under section 28-743, R. R. S. 1943, as well as under a statute which defines those crimes. No doubt the defendant could have been prosecuted under the sodomy statute. However, he cites no authority whatever which holds that making such a statutory alternative available to the prosecutor renders the statute unconstitutional. As we see it, this argument is another version of the equal protection argument and is answered by our holding in State v. Eckstein, 188 Neb. 146, 195 N. W. 2d 194.

The defendant's second contention is that, since the crime in question is under the facts a sexual assault, the testimony of the victim must be corrobo-

rated. Assuming arguendo that corroboration is required, an examination of the record indicates corroboration was clearly sufficient. The pertinent rules, as stated in State v. Narcisse, 187 Neb. 209, 188 N. W. 2d 715, a case involving prosecution for sodomy, are: "Testimony of the alleged victim in a criminal prosecution for sodomy with a human being is insufficient for conviction unless it is corroborated in accordance with rules pertaining to other sexual offenses." Corroboration is generally sufficient under those rules if there are material facts tending to support the testimony of the victim as to the principal fact. The evidence here shows the victim, the defendant, and several others were in an area of the jail where there was open access between two cell blocks and the recreation area. One of the prisoners testified he had been threatened by defendant, for no apparent reason, with a plunger handle. Defendant held the plunger in one hand, pounded it on the other hand, and looked at the witness in a menacing manner for a considerable length of time. Later the defendant asked the witness to perform sexual acts with him. The witness refused, despite the fact the defendant threatened to beat him up if he did not submit. This same witness also testified the defendant and the inmate Crabtree, who was prosecuted for similar offenses with the victim, made remarks about the attractiveness of the "victim's butt," and expressed a desire to have sexual intercourse with him. There was also evidence showing opportunity for the commission of the offense, that is, that defendant and the victim were in the bunk area of the jail at a time when the others were watching TV in the adjoining recreation room.

The contention the evidence is insufficient to support the charge is not well grounded. It is unnecessary to recite the repulsive details of the unnatural acts in question. Suffice it to say the evidence supports the conclusion that the victim submitted

and acted through fear of physical violence. Both the defendant and Crabtree testified. Their testimony was that they took no part in such acts and would not. They said sodomy did occur between the victim and another prisoner who, at the time of trial, was not available as a witness. The stories of Crabtree and the defendant dovetailed very closely. However, the trial judge heard and saw these two witnesses and apparently regarded their versions as a fabrication and accepted the evidence of the State.

AFFIRMED.

DON PETERSON, DOING BUSINESS AS DON PETERSON AND ASSOCIATES, APPELLEE, V. THE NEBRASKA NATURAL GAS COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH E. I. DUPONT DE NEMOURS & COMPANY, INC., ET AL., APPELLEES.

281 N. W. 2d 525

Filed July 17, 1979. No. 42457.

1. **Res Judicata: Courts: Judgments.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
2. **Estoppel.** Mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel.
3. _____. Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.
4. _____. The trial court has some discretion as to whether collateral estoppel may be invoked in a particular case.

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

Terry J. Grennan and Stephen A. Davis of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Richard E. O'Toole and Thomas J. Walsh of Walsh, Walentine and Miles, for appellee Peterson.

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

BOSLAUGH, J.

The plaintiff owns a 2-story business building located at Sixth and Park Streets in Fremont, Nebraska, approximately 1 block east of the Pathfinder Hotel which was destroyed in an explosion and fire on January 10, 1976. The explosion caused extensive glass damage to the plaintiff's building.

The explosion and resulting fire which destroyed the Pathfinder Hotel were caused by natural gas which escaped from a main owned by the defendant, The Nebraska Natural Gas Company (Gas Co.). This action was brought against the Gas Co. to recover the damages to the plaintiff's building caused by the explosion.

In Hammond v. The Nebraska Nat. Gas Co., *ante* p. 80, 281 N. W. 2d 520, decided today, a judgment against the Gas Co. for the damages resulting from the destruction of the hotel and its contents by the explosion and fire was affirmed. After the Hammond case had been tried in the District Court, the plaintiff's motion for partial summary judgment in this case on the issues of negligence and proximate cause was sustained. The issue of damages was then tried to the court which found for the plaintiff in the amount of $917.26. The defendant has appealed.

The entire record in the Hammond case was received in evidence in this case. The trial court sustained the motion for summary judgment on the grounds that there was no genuine issue of material fact in regard to the issues of negligence and

proximate cause and that the doctrine of collateral estoppel or issue preclusion was applicable to the defendant in this action.

The evidence in the Hammond case established that the explosion was caused by natural gas which escaped from the defendant's main because a 2-inch plastic pipe had been negligently joined to an existing steel main by use of a standard compression coupling without any additional precaution being taken to avoid pull-out from thermal contraction of the pipe. The evidence established that the joint was not installed in accordance with applicable safety standards prescribed by federal and state law and the standards of care prevailing in the industry. The Gas Co. attempted to defend on the ground that it had relied upon the instructions and advice of the manufacturer of the pipe. The defense was unavailing as against the plaintiff because the duty to use due care which the Gas Co. owed to the public was nondelegable. Hammond v. The Nebraska Nat. Gas Co., *supra*.

The evidence in the Hammond case, standing alone, did not establish that the damage to the plaintiff's building was caused by the January 10, 1976, explosion of the Pathfinder Hotel. Additional evidence was received at the trial on the issue of damages. This evidence, when considered with the evidence in the Hammond case, established that the explosion of the Pathfinder Hotel was the proximate cause of the damage to the plaintiff's building.

With respect to collateral estoppel we held in Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366, that where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

In Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661, this rule was applied where the defendant had negligently constructed an inadequate drain under its canal. In a prior case brought by a different party but involving the same drain, Faught v. Platte Valley Public Power & Irri. District, 147 Neb. 1032, 25 N. W. 2d 889, the defendant had been held to be negligent in the construction of the drain which was inadequate. This court held that the issue of the defendant's negligence had been finally decided in the prior case and could not properly be again submitted to a jury for it to determine whether the prior decision was correct. We said: "To hold otherwise would be a travesty upon justice and permit a trifling with judgments duly rendered according to law."

The defendant contends that the doctrine of collateral estoppel is not applicable to it in this case because there is no mutuality of estoppel and it did not have a full, fair, and complete opportunity to litigate the issues in the first case.

Generally, mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel. It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. See, Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P. 2d 892; Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., 58 Cal. 2d 601, 25 Cal. Rptr. 559, 375 P. 2d 439; Blonder-Tongue v. University Foundation, 402 U. S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788; Parklane Hosiery Co., Inc. v. Shore, 439 U. S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552. The trial court has some discretion as to whether collateral estoppel may be invoked in a particular

case. Parklane Hosiery Co., Inc. v. Shore, *supra*; Restatement Second, Judgments, (T. D. No. 3), § 88, p. 161.

In Cover v. Platte Valley Public Power & Irr. Dist., *supra*, the plaintiff who had not been a party to the earlier Faught case was permitted to invoke the judgment in the Faught case against the defendant.

The judgment in the Hammond case was final for the purposes of collateral estoppel even though the defendant perfected an appeal to this court. See, Kometscher v. Wade, 177 Neb. 299, 128 N. W. 2d 781; Restatement Second, Judgments, (T. D. No. 1), § 41, p. 2.

The fact that the cross-claims filed in the Hammond case have not been tried did not affect the finality of the judgment as between the plaintiff in the Hammond case and the defendant. The issues raised in the cross-claims are separate and distinct from the issues between the plaintiff and the Gas Co. in the Hammond case and did not affect the plaintiff's right to recover in that case.

The record in the Hammond case establishes that the defendant had a full, fair, and complete opportunity to litigate the issues of negligence and proximate cause, and that in fact those issues were fully and fairly litigated.

We conclude that the partial summary judgment against the defendant was properly granted.

The judgment of the District Court is affirmed.

AFFIRMED.

ATS MOBILE TELEPHONE, INC., APPELLEE, V. GENERAL COMMUNICATIONS COMPANY, INC., OMAHA, NEBRASKA, APPELLANT, IMPLEADED WITH NORTHWESTERN BELL TELEPHONE COMPANY, APPELLEE.

282 N. W. 2d 16

Filed July 24, 1979. No. 42102.

1. **Constitutional Law: States Rights: Federal Laws.** When Congress has unmistakably entered a field and has enacted regulations to govern a field, state laws regulating that aspect of commerce must fall. This result is required whether Congress specifically directs such a result in the legislation or such a result is required by reason of the purpose of the act.
2. **Licenses and Permits: Federal Laws.** No state law can hinder or obstruct the free use of a license granted under an act of Congress.
3. **States Rights: Federal Laws.** It is well-settled law that all federal regulations done in pursuance of one of Congress' delegated powers are capable of preempting any state legislation or regulation on the same subject.

Appeal from the Nebraska Public Service Commission. Reversed and remanded with directions.

Frank Meares, for appellant.

Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellee ATS.

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

KRIVOSHA, C. J.

This is an appeal by the appellant, General Communications Company, Inc., Omaha, Nebraska, (GCC), from an order of the Nebraska Public Service Commission (PSC), entered January 16, 1978, directing GCC to cease and desist from operation as a radio common carrier in Nebraska intrastate commerce until such time as GCC had satisfied and fulfilled the requirements of section 75-604, R. R. S. 1943, including the obtaining of a certificate of public convenience and necessity. Among its several assignments of error, GCC alleges: (1) That the regulation and control of the activity conducted by GCC

is solely within the authority of the Federal Communications Commission (FCC) which has preempted the field, thereby precluding any action by the PSC; and (2) that the activity conducted by GCC was not "telephone service" within the meaning of section 75-604, R. R. S. 1943. For reasons more specifically given hereafter, we determine that the FCC has preempted the field and that the PSC is without jurisdiction to assert any authority over GCC in the instant matter. Accordingly, the PSC being without authority, its act of ordering GCC to cease and desist from exercising its rights under a license granted by the FCC must be and is reversed.

A brief description of the activity conducted by GCC is necessary to understand the problem involved herein. On September 21, 1977, GCC received from the FCC a license for Station KWW288. That license was issued as a "business radio service" license for frequency 152.48 and permitted the operation of a transmitter at 30th and Grover Streets in Omaha, Nebraska. The license was issued pursuant to Part 91, Industrial Radio Services, of the Code of Federal Regulations. See 47 C. F. R., § 91.1 et seq. (1978).

The license permits the operation of a one-way paging device for the use and benefit of a license holder. The system operates through the use of a touch-tone dial telephone, a leased telephone line, a device described in the record as an "STC Coupler," a transmitter, an encoder, and a portable receiving device commonly referred to as a "beeper."

To operate the system, one dials a previously assigned seven-digit telephone number which activates a telephone located at the base station. The system is designed to be activated by the tones of a touch-tone dial, and therefore the conventional dial-up phone cannot be used. The telephone located at the base station is in essence a telephone answering service, and upon receipt of the seven tones sends an

impulse back to the caller advising that the phone has been answered and will now accept further instructions. The caller then has a limited period of time in which to transmit an additional two tones which constitute the security system and permit the call to then pass from the receiving telephone into the terminal. Once the two-tone security code has been transmitted to the terminal, the caller then has access to an encoder which will permit the caller to transmit an additional three tones through the encoder to the transmitter. The encoder serves the function of screening the three tones and directing the transmitter to the correct beeper. Each beeper has its own three tones assigned to it and no other beeper has the same three tones. Upon receipt of the three tones by the transmitter, a tone is transmitted by radio wave to the beeper. Thereafter, either a tone alone or a tone and a voice message is received by the beeper and the holder of the beeper then knows to either call his base number or respond to the message received over the beeper.

GCC constructed the antenna and transmitter at 30th and Grover Streets and then offered to share the facilities with other licensees for a fee of $6.50 a month. In order for another individual to share in the facilities the individual was required to likewise file with and obtain from the FCC an FCC business radio license. The record indicates that at the time of hearing before the PSC there were some 45 to 48 pagers in use on this system, all of which had obtained FCC licenses as a business licensee, pursuant to 47 C. F. R., § 91 (1978), all operating under a frequency of 152.48 and all authorized to use the transmitter at 30th and Grover Streets in Omaha, Nebraska.

In finding that it had jurisdiction over GCC, the PSC reviewed the history of paging devices in Nebraska. In particular, it pointed out that our decision in Radio-Fone, Inc. v A.T.S. Mobile Telephone,

Inc., 187 Neb. 637, 193 N. W. 2d 442, held that the PSC had authority over "mobile telephone service." As a result of our holding in Radio-Fone, Inc., *supra*, the PSC promulgated rules and regulations to reflect its authority over mobile telephone communication, including "paging service." See, Rules of Nebraska Public Service Commission, "Radio Common Carriers," Chapter VI, sections 1.(k) and 1.(l). The rules defined "paging service" of all types to be "Radio Common Carrier Service."

Further in its order of January 16, 1978, the PSC noted our decision in ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc., 194 Neb. 404, 232 N. W. 2d 248, where again we held that the PSC had authority over mobile radio telephone communications as radio common carrier service. Our decision in that case was based, in part, upon our interpretation of Title 47 U. S. C. A., § 221 (b), which reads as follows: "Subject to the provisions of section 301 of this title, nothing in this Act shall be construed to apply, or to give the (FCC) jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point *radio telephone exchange service*, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority." (Emphasis supplied.)

We then went on to say in the Curtin Call case: "The section specifically covers mobile radio telephone exchange service, *exactly* the type of service we are dealing with in this case." (Emphasis supplied.) The unfortunate fact of the matter is that we were wrong about that conclusion. The term "telephone exchange service" is a statutory term of art and means service within a discrete local exchange system. See, 47 USCA § 153 (r), p. 68. This precise

matter was considered and discussed by the United States Court of Appeals for the Fourth Circuit in the case of North Carolina Utilities Commission v. F.C.C., 552 F. 2d 1036 (4th Cir., 1977), in which the PSC filed a brief amicus curiae. The court in the North Carolina Utilities Commission case said: "As we pointed out in North Carolina I [North Carolina Utilities Commission v. F. C. C., 537 F. 2d 787, 4th Cir., 1976] the legislative history of section 221 (b) leaves no doubt that the purpose of section 221 (b) is to enable state commissions to regulate local exchange service in metropolitan areas, such as New York, Washington or Kansas City, which extend across state boundaries. * * * Section 221 (b) simply does not apply to the 'facilities' with which this appeal is concerned."

Likewise, section 221 (b) is not concerned with paging devices involved in this appeal or involved in the Curtin Call case. Nor are one-way paging devices, as licensed by the FCC, "mobile radio telephone service" over which the FCC has agreed to permit the states to exercise some jurisdiction. See, United Telephone Co. of Ohio, 26 F. C. C. 2d 417; ATS Mobile Telephone, Inc., 35 F. C. C. 2d 443. A "one-way" paging service of the type exercised herein by the FCC cannot be "a Radio Common Carrier." See 47 C. F. R., § 91.2 (1978). The issue of preemption in the instant matter is not answered by our previous decisions in either the Radio-Fone case or the Curtin Call case, and requires a full and independent review of the preemption question.

The problems created by federal preemption and the resolution of those problems have given courts some difficulty throughout the history of our country and its dual federal-state system. As pointed out in cases exemplified by Florida Avocado Growers v. Paul, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248, not all acts of Congress constitute preemption thereby precluding state action in a similar field. Prior de-

cisions on preemption, however, are not precise guidelines for each case turns on the peculiarities and special features of the federal regulatory scheme in question. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U. S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547. When Congress has unmistakably entered a field and has enacted regulations to govern a field, state laws regulating that aspect of commerce must fall. This result is required whether Congress specifically directs such a result in the legislation or such a result is required by reason of the purpose of the act. See, Jones v. Rath Packing Co., 430 U. S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604; City of Burbank v. Lockheed Air Terminal, Inc., *supra*; Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447.

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. United States Constitution, Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established by case law. See Jones v. Rath Packing Co., *supra*. No state law can hinder or obstruct the free use of a license granted under an act of Congress. Pennsylvania v. Wheeling & B. Bridge Co., 13 How. 518, 14 L. Ed. 249 (1851). Our inquiry here must therefore be whether Congress has specifically preempted the field through the Federal Communications Act of 1934 and subsequent regulations promulgated by the FCC under its authority, and whether there is an irreconcilable conflict, between federal law on the one hand and state law on the other, to the end that the federal purpose is thwarted. We believe the answer to both questions must be in the affirmative.

The PSC in its order of January 16, 1978, determined from the evidence that in fact the operation by GCC and its other licensees was not a shared

cooperative venture using radio waves. It found that GCC was engaged in business as a radio common carrier and therefore was subject to the jurisdiction of the PSC.

An examination of the federal regulations under which the licenses in this matter were issued by the FCC will not permit that conclusion. It must be kept in mind that the FCC issued to GCC and the others a "Business License" to operate at a frequency of 152.48 and under no other license or at any other frequency.

Business radio licenses are issued under Subpart L of Part 91 of the regulations of the FCC. 47 C. F. R., § 91.551 et seq. (1978). Subpart L is a section of Part 91 of the same regulations entitled "Industrial Radio Services," 47 C. F. R., § 91.1 et seq. (1978).

Section 91.2 of Part 91 prescribes general limitations on the use of an industrial radio license of which a business radio license is one type. That section provides, in part: "(a) The radio facilities authorized under this part *shall not* be used for any of the following purposes: (1) Rendition of a communications common carrier service * * *." (Emphasis supplied.) The first conflict between federal and state law becomes apparent. The FCC regulations prohibit the holder of a business radio license from being a common carrier while PSC regulations declare that such licensee must be a common carrier and obtain a certificate of public convenience and necessity.

Section 91.552 further provides in part as follows: "* * * (c) Pursuant to the provisions of § 91.8, frequencies authorized to stations in the Business Radio Service can be used *only* on a shared and cooperative basis * * *." 47 C. F. R., § 91.552 (1978). Again, we see the conflict. The PSC says that GCC's claim of operation as a shared and cooperative system is a sham and that GCC in fact "* * * has dedicated its service for common use by the public. * * * GCC

does not conform to the traditional characteristics normally attributable to a shared system." The PSC's solution to this problem is to require GCC to become a common carrier under PSC regulations. That would cause GCC and its other licensees to be in direct violation of the FCC regulations and their own licenses. Such a conflict cannot be permitted to exist. Furthermore, frequency 152.48 can *only* be used for industrial purposes and *only* for one-way paging. See 47 C. F. R., §§ 2.106 and 91.554 (1978).

If in fact GCC is in violation of its FCC license in that it is not operating a true shared service or is not collecting a proper tariff or for any other reason, it is for the FCC to make that determination. Applying to and receiving from the PSC a certificate of public convenience and necessity cannot solve those problems. There is clearly a direct conflict between the FCC rules and PSC rules. Under the applicable law, the PSC rules must give way.

There is still a further reason why federal preemption must apply. The paging devices are so interrelated to interstate commerce as to fall within the FCC exclusive jurisdiction absent its agreement to the contrary.

Section 91.1 of Title 47 of the C. F. R. reads as follows: "The basis for the rules following in this part is the Communications Act of 1934, as amended, and applicable treaties and agreements to which the United States is a party. The rules in this part are issued pursuant to the authority contained in Title III of the Communications Act of 1934, as amended, which vests authority in the Federal Communications Commission to regulate radio transmissions and to issue licenses for radio stations." It could not be made clearer that the rules promulgated in 47 C. F. R., § 91.1 et seq. (1978), were clearly within the authority and jurisdiction of the FCC pursuant to the Communications Act of 1934, and intended to be exercised by the FCC except as otherwise delegated

to the states. In this particular case, we find no such delegation in the rules as is the case in certain aspects of Domestic Public Land Mobile Radio Service, 47 C. F. R., § 21.500 (1978).

In Sherdon v. Dann, 193 Neb. 768, 229 N. W. 2d 531, we reviewed and discussed the issue of federal preemption and the relationship between the FCC and the PSC. Therein we said: " 'At the outset we point out it is well-settled law that all federal regulations done in pursuance of one of Congress' delegated powers are capable of preempting any state legislation or regulation on the same subject.' " We there further said: "It should be noted further that under Title 3 of the Federal Communications Act, the Federal Communications Commission is given *exclusive* jurisdiction under the act to license radio facilities. In Nebraska, as in every other state, the telephone companies and many of their interconnecting customers are users of radio facilities, and as to all such facilities are subject *solely* to the regulatory jurisdiction of the Federal Communications Commission." (Emphasis supplied.)

In a dissenting opinion in the Sherdon case, it was noted that the majority opinion was based primarily on the case of Telerent Leasing Corp., 45 F. C. C. 2d 204, which was then on appeal to the United States Court of Appeals for the Fourth Circuit. Since that time, the decision in Telerent Leasing Corp., *supra*, has twice been reviewed by the United States Court of Appeals for the Fourth Circuit, and on each occasion the preemption by the FCC has been sustained. See, North Carolina Utilities Commission v. F. C. C. (North Carolina I), *supra*; North Carolina Utilities Commission v. F. C. C. (North Carolina II), *supra*.

It is appropriate that the FCC have jurisdiction over the pagers in order to develop uniform regulations. It is suggested that pagers are purely local in use. Such suggestion fails to recognize the move-

ment of radio waves. A Nebraska licensee living in Omaha can be contacted by this system while in Council Bluffs. Similarly, one in South Sioux City can be contacted in Sioux City, Iowa. The same is true for a significant distance along Nebraska's entire border with that of any other state. The radio waves moving from a transmitter in one state to a beeper located in another certainly are involved in commerce between the states. Unless uniformly regulated, such radio communications could create much disruption between the states, particularly where one state permitted the transmission but the adjoining state prohibited its reception. Not only does the FCC have authority to regulate paging devices, in fact they have regulated them and issued licenses for their use. That should be sufficient to constitute preempting and preclude the PSC from interfering.

Here the licensee has been granted authority to act in a particular way by the FCC and is precluded from so doing by the PSC. Moreover, the action of the PSC has likewise denied all other licensees sharing the use of the transmitter the right to use their FCC license even though they were not made parties to the PSC proceedings. The irreconcilable conflict is apparent and should be prevented.

To the extent that our previous holdings in the Radio-Fone case and the Curtin Call case are inconsistent with our decision herein, they are overruled. Particularly they are overruled to the extent they granted to the PSC jurisdiction over one-way pagers authorized and licensed by the FCC under "Industrial Radio Service." Whether GCC and the other licensees can continue operation as they were doing at the time of the hearing or must change either because they are in fact in violation of thier licenses or because of new regulations adopted by the FCC and now in effect is not decided by this appeal. That is for the FCC to determine. We simply hold that the

PSC does not have authority over GCC and the other licensees of the shared systems insofar as they are operating one-way paging devices.

In view of our disposition of the matter, we need not consider any other assignments of error suggested by GCC.

The judgment of the PSC ordering GCC to permanently cease and desist from operation until such time as it has satisfied and fulfilled the requirements of section 75-604, R. R. S. 1943, and any other applicable statute or rule, is reversed and vacated and the cause remanded with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

PFIZER GENETICS, INC., A CORPORATION, APPELLEE, V. WILLIAMS MANAGEMENT CO., APPELLANT.

281 N. W. 2d 536

Filed July 24, 1979. No. 42171.

1. **Instructions: Appeal and Error.** A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence and a failure to do so is prejudicial error.
2. **Warranties.** Disclaimers of warranty made on or after delivery of the goods by means of an invoice, receipt, or similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Reversed and remanded.

Thomas H. DeLay of Mueting & DeLay, for appellant.

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

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

VAN PELT, District Judge.

This is an action by the plaintiff-appellee, Pfizer Genetics, Inc., against the defendant-appellant, Williams Management Co., to recover the contract price of seed corn sold by plaintiff to defendant. Defendant's cross-petition sought damages arising out of a breach of both express and implied warranties. The jury returned a verdict for plaintiff on both its petition and on defendant's cross-petition.

The defendant has appealed assigning as errors that the trial court erred (1) in overruling defendant's motion for a directed verdict on the issue of whether the disclaimers were part of the basis of the agreement of the parties, and (2) in refusing to give defendant's requested instructions Nos. 2 and 5.

On August 4, 1975, plaintiff and defendant entered into a written contract for the sale of seed corn at a specified price, received in evidence as exhibit 32, the purported second page of which contained disclaimers of warranty. The purchase included several different brands, including one known as Trojan TXS 111. Prior to August 4, 1975, plaintiff furnished defendant a booklet entitled "Trojan The Gold Book," a field test summary for 1975, and a field agronomy test result pamphlet. As a result of these documents, the defendant claims express warranties, as well as an implied warranty of fitness for the ordinary purpose for which the goods were to be used.

The seed was delivered during the latter part of December 1975. The reverse side of the shipping order and invoice set forth full disclaimers of any express and implied warranties. The seed bags themselves also contain such disclaimers.

The defendant planted the seed in the spring of 1976 in one of five adjoining quarter sections that it managed in Knox County. A portion of the same quarter and the other four adjoining quarters were planted to comparable hybrids. Whether the various

hybrids received similar farming practices is in dispute and is a fact question.

On July 31, 1976, the defendant noticed that the TXS 111 seed was developing without ears. The area so planted ultimately yielded an average of 60 bushels per acre, while another hybrid in the very same quarter section yielded 113 bushels per acre. Other hybrids in the adjoining quarters yielded from 145 to 168 bushels per acre. Defendant's expert testified that the low yield of TXS 111 was due to a low percentage of stalk-bearing ears and was not due to any difference in farming practices. On the other hand, Pfizer's expert testified that the low yield was due primarily to heat stress and insect damage.

The defendant contends it did not ever see or receive any disclaimers of warranty in August of 1975 and the disclaimers that it did receive on exhibit 6 and on the seed bags were delivered after the agreement was made and were therefore ineffectual. Thus, defendant contends an instruction on the law pertaining to subsequent disclaimers was essential to a proper presentation of its theory of the case to the jury. Defendant submitted the following as proposed instruction No. 5: "Where a sales transaction has been entered into on the basis of anterior warranties, any attempt to disclaim binding effect of such warranties upon or after delivery of the goods by means of language on invoice, receipt, or similar notice, is ineffectual unless buyer assents or is charged with knowledge of nonwarranty as to the transaction." This proposed instruction was refused by the trial court.

Plaintiff answers defendant's contention by claiming the original contract contained conditions of sale which abrogated or eliminated express or implied warranties. The admission into evidence of the second page of exhibit 32 which does set forth specific disclaimers of both express and implied warranties is critical to the resolution of this contro-

versy. Exhibit 32 is a photocopy of an invoice form, the first page of which was admittedly signed and seen by the defendant's president on August 4, 1975. However, the original of the second or reverse page apparently has been lost, and the form received in evidence at trial is a fabrication and copy of some other similar form. The foundational evidence in support of the second page of exhibit 32 does not meet any of the requirements for authentication of documents set forth in section 27-901 or 27-902, R. R. S. 1943. Under these circumstances, there was no foundation for the admission of page 2 of exhibit 32, the same should not have been received in evidence by the trial court over defendant's objection, and motion in limine, and defendant cannot be held to any disclaimers contained therein.

Since there was no competent evidence in the record of any disclaimer given by the plaintiff to the defendant as part of the basis of the original bargain in August of 1975, an instruction on the law pertaining to subsequent disclaimers such as that requested by the defendant in proposed instruction No. 5 was essential to the jury being instructed on defendant's theory of the case. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence and a failure to do so is prejudicial error. Bodtke v. Bratten, 166 Neb. 36, 88 N. W. 2d 159.

Section 2-316, U. C. C., pertains to the exclusion or modification of warranties. The relevant portion provides that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no war-

ranties which extend beyond the description on the face hereof.' "

The statute is silent as to when the disclaimer must be made. The first comment following the above-quoted section states: "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."

Although this court has not specifically addressed the question, other jurisdictions have generally held that disclaimers or warranty made on or after delivery of the goods by means of an invoice, receipt, or similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction. Christopher & Son v. Kansas Paint & Color Co., 215 Kan. 185, 523 P. 2d 709; Mack Trucks v. Jet Asphalt, et al., 246 Ark. 101, 437 S. W. 2d 459; Klein v. Asgrow Seed Company, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609; Anderson, Uniform Commercial Code, Vol. 1, p. 695.

The above proposition of law is both an equitable and logical interpretation of the Uniform Commercial Code, and should be followed in this case. The plaintiff cites five cases in its brief as authority for a contrary rule. McCarty v. E. J. Korvette, Inc., 28 Md. App. 421, 347 A. 2d 253; Schroeder v. Fageol Motors, 86 Wash. 2d 256, 544 P. 2d 20; K-Lines, Inc. v. Roberts Motor Co., 273 Or. 242, 541 P. 2d 1378; Ebasco Services Inc. v. Pennsylvania Power & L. Co., 402 F. Supp. 421 (E. D. Pa., 1975); Ray Farmers Union Elevator Co. v. Weyrauch, 238 N. W. 2d 47 (N. D., 1975). These cases have been examined and none involve a disclaimer, limitation, or exclusion

of warranty subsequent to the original contract, on or after delivery of goods, as in the present case. Therefore, all of the above-cited cases are distinguishable and inapplicable.

Defendant also contends that the trial court erred in failing to give defendant's proposed instruction No. 2. That proposed instruction, which simply paraphrases portions of the Uniform Commercial Code, was given in substance by the trial court as part of paragraph I of instruction No. 7. Thus, the trial court properly refused to give defendant's requested instruction No. 2.

However, by refusing to give defendant's requested instruction No. 5 or one similar to it, the court did not instruct the jury on the defendant's theory of the case. Failure to do so was prejudicial error and the judgment dismissing defendant's cross-petition is reversed and the cause remanded accordingly.

REVERSED AND REMANDED.

FRED STEINHEIDER AND SONS, INC., A CORPORATION, APPELLANT, V. IOWA KEMPER INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

281 N. W. 2d 539

Filed July 24, 1979. No. 42213.

1. **Insurance.** Insurance companies have the same right as individuals to limit their liability.
2. **Insurance: Contracts.** In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms.
3. **Pleadings.** In the furtherance of justice the trial court may exercise its discretion in granting an amendment to the pleading at any stage of the proceedings.

Appeal from the District Court for Seward County: WILLIAM H. NORTON, Judge. Affirmed.

Blevens, Blevens, & Jacobs, for appellant.

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

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and RONIN and HAMILTON, District Judges.

KRIVOSHA, C. J.

This appeal seeks to reverse an order of the District Court for Seward County, Nebraska, sustaining the appellee's (Iowa Kemper) motion for a directed verdict and dismissing appellant's (Steinheider) petition for a declaration of its rights under an insurance policy issued by Iowa Kemper to Steinheider. From an examination of all of the matters involved in this action, we believe the trial court acted correctly and therefore affirm the judgment of the trial court.

The facts which give rise to the present controversy are essentially without dispute. Steinheider was engaged in a seed and farm supply business and in connection therewith purchased from Iowa Kemper a comprehensive general liability insurance policy. The policy provided, in part: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence * * *."

The policy further contained, among other definitions, a specific definition for "completed operations hazard" and for "products hazard." "Completed operations hazard" is defined to include "bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and

occurs away from premises owned by or rented to the named insured. * * * Operations shall be deemed completed at the earliest of the following times: (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed, (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project."

"Products hazard" is defined as "bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;"

The policy further contained a specific endorsement page entitled "EXCLUSION (Completed Operations Hazard and Products Hazard)" and recited: "This endorsement *modifies* such insurance as is afforded by the provisions of the policy relating to the following: COMPREHENSIVE GENERAL LIABILITY INSURANCE * * *. It is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and the Property Damage Liability Coverage *does not apply* to bodily injury or property damage included within the Completed Operations Hazard or the Products Hazard." (Emphasis supplied.) In other words, the policy specifically provided, by endorsement, that any coverage for bodily injury or property damage occasioned by reason of acts within the definition of "completed operations hazard" or "products haz-

ard" was excluded and not provided.

On April 30, 1975, a customer of Steinheider placed an order with it for a product known as "Teat-Dip" to be used as a mastitis preventative on dairy cattle. Due to the apparent negligence of an employee of Steinheider, a different chemical, "Wayne-O-Dyne," packaged similarly to "Teat-Dip," was mistakenly delivered to the customer. The chemical was used by the customer in his dairy operation. After approximately 10 days of use, the customer reported that he was running into trouble with his cows. The cows were experiencing sore udders, sore teats, and the customer, himself, was experiencing problems with the skin on his hands from using the product delivered.

The record indicates that "Teat-Dip" is a chemical used on the teats of the cows after milking as a disinfectant to reduce the incidence of mastitis, and is not as stringent as "Wayne-O-Dyne." "Wayne-O-Dyne" is a very strong disinfectant which is used for sterilizing hog barns and is supposed to be effective in killing any residue that might cause problems with hogs or dairy barn floors. The containers of both products are equal in size, color, and material, and both contain a disinfectant chemical known as taimodine.

The evidence reflects that on July 14, 1975, Steinheider's counsel wrote to Steinheider concerning the claim made by the customer against Steinheider. The letter indicated Steinheider had been advised by Iowa Kemper that coverage was being denied. The letter recites, in part: "We understand the company has suggested the Completed Operations Hazard and Products Hazard exclusion affixed to your policy would exculpate it from liability * * *." On August 7, 1975, a letter from Iowa Kemper to Steinheider's counsel indicated "there was no products liability or completed operations coverage" at that time, and further made specific reference to en-

dorsement L-9141 and set out in detail that coverage was denied because it did not apply to " 'bodily injury or property damage included within the completed operations hazard or the products hazard.' "

Steinheider filed a petition for declaratory judgment praying that it be declared and determined the liability insurance coverage provided by Steinheider's policy did not exclude the negligence of an employee in misdelivering a product. Attached to the petition was the letter of August 7, 1975, from Iowa Kemper to Steinheider's counsel, wherein coverage was denied because of the absence of a products liability or completed operations coverage. Iowa Kemper filed a general denial and trial was had on the matter before the court on December 9, 1977, and January 6, 1978. On January 6, 1978, following the taking of evidence in this matter on December 9, 1977, but before a decision was issued by the trial court, Iowa Kemper sought leave to file an amended answer, affirmatively pleading the exclusions contained in the endorsement referred to in its letter of August 7, 1975. After argument, the trial court granted leave to file the amended answer.

Steinheider maintains the trial court erred in two major respects: (1) In finding that the alleged negligent delivery of the wrong product to Steinheider's customer was either within the completed operations hazard or the products hazard, thereby excluding coverage under the policy by reason of the endorsement; and (2) in permitting Iowa Kemper to amend its answer after trial to affirmatively plead the exclusions of the policy.

It appears to us the language of the policy and the endorsement containing the exclusion are clear and unambiguous and in no manner contrary to public policy. As we noted in the case of Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co., 195 Neb. 658, 240 N. W. 2d 28: "It can be clearly seen that the insurance policy in this case plainly speci-

fied that completed operations coverage was not purchased. There is no ambiguity in the language of the policy and 'insurance companies have the same right as individuals to limit their liability.' " See Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245.

Likewise, in construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms. Wyatt v. Woodmen Acc. & Life Co., 194 Neb. 614, 234 N. W. 2d 217; Kent v. Dairyland Mut. Ins. Co., 177 Neb. 709, 131 N. W. 2d 146. We are unable to see how or in what manner the language of the policy or its endorsement of exclusion could be any clearer. Under the plain language of the policy, except for the exclusion, bodily injury and property damage would be provided for both "completed operations hazard" and "products hazard." It could not be made any clearer that the policy does not provide bodily injury or property damage if either arises out of an occurrence within the definition of "completed operations hazard" or "products hazard." Under both "completed operations hazard" and "products hazard," bodily injury or property damage which occurs away from the premises after the insured has relinquished possession is no longer covered under the policy, and Iowa Kemper is not obligated to make payment on behalf of Steinheider.

While it may very well be true that the alleged negligence occurred on the premises and, in fact, Steinheider may have liability to the customer, it is likewise clear the "property damage" did not occur until after delivery and was off the premises as contemplated by the "completed operations hazard" or the "products hazard."

A case similar in point and one we believe instructive in this case is the case of Tidewater Associated

Oil Co. v. Northwest Casualty Co., 264 F. 2d 879 (9th Cir., 1959). In the Tidewater case, the customer had ordered stove oil, but fuel oil was delivered through the negligence of the insured's employee. The day after delivery, when the customer attempted to light her stove, the fuel oil exploded injuring her. The policy in question had a property damage provision similar to the "completed operations hazard" provision of the instant policy. The plaintiff argued that the insured oil company was liable for its employee's negligence in delivering the oil and that coverage was provided under the policy notwithstanding the referred-to language. The court, however, noted that, while the negligence may have occurred by reason of a misdelivery, the injuries sustained by the customer were caused when she started the fire in the kitchen stove and, therefore, occurred away from the premises owned, rented, or controlled by the insured, after the insured had relinquished possession of such goods or products to others. "* * * In practically every case in which injury or damage is caused by the handling or use of a product, or by a defective condition in such product, the occurrence causing the injury or damage can be traced to some pre-existing negligence. Indeed, were this not so the injured party would have no basis for a tort claim against the insured. Thus, if the allegation of pre-existing negligence were to be regarded as controlling, the result would be to emasculate the product liability exclusion."

Similarly, in the case of Parma Seed, Inc. v. General Insurance Co. of Amer., 94 Idaho 658, 496 P. 2d 281, the Idaho Supreme Court construed a products hazard — completed operations exclusion similar to the one at issue in the instant case. In the Parma case, employees of the seed company ordered a specific weedkiller for a customer and failed to note, when they received the order from their supplier, that it was a more powerful product than the one

specified. They delivered it to their customer whose use of it on several alfalfa fields destroyed the crop. The seed company's general liability policy included an exclusion almost identical to the one involved in the case at bar. In rejecting the argument that there was coverage, the Idaho Supreme Court said: "We read this exclusionary clause to exclude coverage if the liability for which respondent is seeking indemnification arose out of products manufactured, sold, handled, or distributed by respondent, if the accident giving rise to the liability occurred after possession of the goods has been relinquished to others, and if the accident occurred away from respondent's premises. Indeed, it would be difficult to phrase the exclusion any more succinctly than it is phrased in the policy exclusionary clause. We think it is clear that when liability results from the functioning or malfunctioning of a product sold by respondent, and the event establishing liability (i.e., the accident) occurs after relinquishment of possession of the product by respondent, and occurs away from respondent's premises, coverage is excluded." To the same or similar effect, see, Hultquist v. Novak, 202 Minn. 352, 278 N. W. 524; Hagen Supply Corp. v. Iowa National Mutual Insurance Co., 331 F. 2d 199 (8th Cir., 1964).

As noted by the Idaho Supreme Court in the Parma case, we cannot imagine a situation which would be more closely within the coverage of either the "completed operations hazard" or the "products hazard" than the events which occurred in the instant case. Except for the specific exclusionary endorsement, coverage would clearly have been provided. Until the chemical was turned over to the customer and applied by him to the cows, no property damage had yet occurred. While the employees placing the wrong chemical on the truck for delivery may have been negligent, until it was applied to the cows and caused property damage, Stein-

heider was not obligated to pay anything to the customer. If the truck had turned over before it got to the customer and before the cows had been injured, no cause of action would exist. The damage clearly occurred off the premises after the insured had relinquished possession. There could be no coverage.

Having therefore disposed of the principal issue, we turn for a moment to Steinheider's claim that the trial court in some manner abused its discretion in permitting Iowa Kemper to amend its answer. Section 25-852, R. R. S. 1943, provides as follows: "The court may, either before *or after judgment*, in furtherance of justice, and on such terms as may be proper, amend any pleading * * * by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." (Emphasis supplied.)

We have many times said that in the furtherance of justice the trial court may exercise its discretion in granting an amendment to the pleading at any stage of the proceedings. We have authorized such amendments after evidence is closed. See Swan v. Bowker, 135 Neb. 405, 281 N. W. 891. We have even permitted such amendment for the first time in this court on appeal. See Lippire v. Eckel, 178 Neb. 643, 134 N. W. 2d 802.

In the instant case, Steinheider knew the position of Iowa Kemper from an early time in the dispute. The record indicates that more than 2 years before trial Steinheider was advised as to the basis for Iowa Kemper's denial of coverage. The record further reflects that Steinheider even attached Iowa Kemper's letter of August 7, 1975, to its petition. That letter of August 7, 1975, contained specific reference to the exclusion and the specific endorsement. Certainly, appellant is not in a position to claim suprise or argue that justice in some manner is affected by permitting the amendment. To the

contrary, under the facts in this case it would appear the failure of the trial court to permit such an amendment would have been a denial of justice. For the reasons contained herein, the judgment of the trial court is in all respects affirmed.

AFFIRMED.

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, A CORPORATION, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF EDUCATION, APPELLANT, NEBRASKA SCHOOL FOR THE DEAF EDUCATION ASSOCIATION ET AL., INTERVENORS-APPELLEES.

281 N. W. 2d 544

Filed July 24, 1979. No. 42286.

1. **Court of Industrial Relations: Elections: Labor and Labor Relations: Collective Bargaining.** In order to warrant the setting aside of an election held under the order and auspices of the Court of Industrial Relations by employees to decide who shall represent them in collective bargaining proceedings, the burden is upon those objecting to and moving to set aside the election to prove by a preponderance of the evidence that material misrepresentations of relevant facts were made in the campaign statements in question and that such misrepresentations had a substantial impact on the outcome of the election.
2. **Court of Industrial Relations: Appeal and Error.** The scope of review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the Court of Industrial Relations. Affirmed.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellant.

Steven D. Burns of Noren and Burns, for appellee.

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

BRODKEY, J.

This case originated as an action brought by the Nebraska Association of Public Employees, a corporation and labor organization, hereinafter referred to as NAPE, in the Court of Industrial Relations seeking to be designated as the exclusive bargaining representative of certain employees of the appellant, State of Nebraska, Department of Education. On April 14, 1978, the Court of Industrial Relations, hereinafter sometimes referred to as the Court, entered an order with reference to election procedures and set the date of the election for May 22, 1978, within the voting units previously determined in an opinion and order of the Court, dated March 14, 1978. The report of election discloses that NAPE was successful in the election and was designated as the exclusive bargaining agent of the employees in the two voting units, the voting being 190 to 56 in the main unit, and 38 to 6 in the teacher's unit.

On June 5, 1978, appellant filed an objection to the election, claiming that on Friday, May 19, 1978, prior to the election which was held on Monday, May 22, 1978, the plaintiff, NAPE, caused to be distributed to employees of the appellant eligible to vote in the election a certain publication or leaflet entitled "NAPE 76 NEWSLETTER" containing an article entitled "HAS COLLECTIVE BARGAINING WORKED WITH OTHER STATE AGENCIES?" in which article NAPE represented it was responsible for obtaining certain employees' benefits through the collective bargaining process for the Nebraska Game and Parks Commission, which representations were untrue and misleading, and may have been relied upon by the voting employees and have influenced them to vote in favor of NAPE in the election. It was further alleged that the actions of NAPE were an effort to mislead the employees and prevented them from making an informed choice in

the election. Three days later, on June 8, 1978, appellant also filed a motion to void the election.

A hearing on the objection and motion was held on June 28, 1978, before the Honorable Richard L. DeBacker, one of the judges of the Court of Industrial Relations, at which time evidence was adduced and the matter was taken under consideration. Thereafter, on July 12, 1978, there was filed in the office of the clerk of the Court of Industrial Relations a document entitled "Findings and Order" in the above matter, reciting that it had been entered on July 11, 1978, and had been heard before Judges DeBacker, Kratz, and McGinley. In the order of the Court, written and signed by Judge DeBacker, the Court reviews the claims of the appellant that the newsletter distributed by NAPE contained untrue and misleading misrepresentations which its employees may have relied upon, and concludes: "As we interpret the evidence, there is at least a grain of truth in the claims made in the newsletter. But the position of the Department is that the representations are twisted in that grievance discovery procedures, for example, are available to all state employees who fall under the state personnel system, albeit they are available as the result of requests made by NAPE to the personnel department and the language in the agreement between NAPE and the Commission is slightly different from the general policy. A similar characterization can be made of each of the other claims by NAPE and the criticisms of them by the Department.

"We are unable to find that the claims of NAPE, even if exaggerated, go beyond usual political or commercial sales puffing. There is no solid evidence that the Department's employees relied upon or were influenced by the representations and not even any inference that the representations had a substantial impact on the outcome of the election, given the overwhelming majority in favor of repre-

sentation by NAPE." The Court then overruled the objection to the election and denied the motion to void the election. Appellant's subsequent request for a rehearing en banc was denied on July 25, 1978, and appellant then perfected its appeal to this court "from the order of this court overruling the respondent's objection to election and denying the respondent's motion to void the election, and from the order of this court denying the respondent's request for rehearing en banc on these matters." For reasons hereinafter set out, we affirm the ruling of the Court of Industrial Relations as to the order and issues appealed from.

The newsletter in question was distributed by an employee of the Nebraska Department of Education, Peggy Weeks, who was vice president of the Department of Education, chapter No. 76, of the Nebraska Association of Public Employees. She testified that she had distributed the newsletter on the morning of May 19, prior to her work hours. She picked up copies of the newsletter from the president's office, took them around to the offices in the Department of Education, and laid them on the desks of most of the employees on the 6th floor. She did not attempt to distribute any of the material outside of the 6th floor and has no idea of the number she distributed. We note at this point that there is absolutely no evidence in the record as to the number of newsletters which were distributed, received, and read; any impact upon the voters; or whether the newsletter in question had the effect of changing the result of the election, although at the hearing there was an offer of proof made that one witness had been riding on a bus with a person, who identified herself as an employee of the Department of Education, who told him she believed the employees of the Game and Parks Commission had received certain benefits from being a member of the union.

The portion of the "NAPE 76 Newsletter" pub-

lished by the Department of Education, chapter No. 76, of the Nebraska Association of Public Employees, which was distributed on May 19, 1978, and which is in controversy in the present case, reads as follows: "HAS COLLECTIVE BARGAINING WORKED WITH OTHER STATE AGENCIES? YOU BET! Let's look at some history of how collective bargaining helped GAME & PARKS in just one year:

"1) It now appears that Game and Parks will have bargained a cash advance system for travel by December 1 of this year. This will mean that an employee is paid travel expenses before travelling — not 30 days later.

"2) Game and Parks established a 'discover' procedure in grievance cases where each party can learn in advance of the hearings what information the opposition has to present. This will permit better hearings and more rapid solutions to grievance cases.

"3) Game and Parks was successful in bargaining for five days of funeral leave instead of four. This has now become a part of all state government personnel policies — THUS WE ARE NOW SHARING THE RESULTS OF COLLECTIVE BARGAINING ACHIEVED BY ANOTHER STATE AGENCY.

"In addition, an employee of Game and Parks may now take up to two weeks of vacation leave whether earned or not but charged to future leave for the purpose of clearing estate matters following a funeral.

"4) Other items bargained by Game and Parks include broader paid training programs for both support and professional personnel, a procedure for updating personnel files and the establishment of a joint employee/management committee to deal with and resolve minor (less than grievable) problems.

"Games and Parks employees will tell you COL-

LECTIVE BARGAINING IS A VERY GOOD THING. Vote for representation by NAPE on May 22!"

Appellant contends the statements and claims made in the aforementioned article were untrue and may have influenced the vote of the eligible voters in the election, and, therefore, the election should be voided and set aside. On the other hand, NAPE contends there were no material misrepresentations in the article, and, in any event, appellant failed to establish by any evidence at the trial that any misrepresentations contained in the article in question influenced any of the voters, or in any way affected the result of the election. In its order entered following a hearing upon the objections filed by the appellant, the Court of Industrial Relations found: "As we interpret the evidence, there is *at least* a grain of truth in the claims made in the newsletter." (Emphasis supplied.) The evidence adduced in connection with the items in question was somewhat conflicting and subject to different interpretations. The principal misrepresentation claimed by appellant is contained in paragraph 1 of the article with reference to the "cash advance" system allegedly obtained by the Game and Parks Commission. Dissatisfaction had been voiced by employees of that department with reference to them having to advance travel and expense money in the performance of their duties and the necessity of waiting for a reimbursement thereafter. John Russell, the chief of labor relations for the State Department of Personnel, testified at the hearing that no agreement was reached upon a cash advance system of payment, but only an agreement to consider an "expense payment" system. The language appearing in paragraph 1 of the newsletter specifically stated: "It now appears that Game and Parks *will have bargained* a cash advance system for travel by December 1 of this year." (Emphasis supplied.) The record also reveals that the possibility of a "credit card" system was discussed dur-

ing the negotiation sessions. In any event, the distinction between the alleged misrepresentation and the actual statement contained in the article is obvious. It should also be noted that the actual contract entered into with the Game and Parks Commission stated that the Game and Parks Commission would attempt to establish such a system by December 1, 1978, subject to approval from the Department of Administrative Services.

With regard to the statements contained in paragraph 2 of the newsletter with reference to the establishing of "discover" procedure in grievance cases, appellant argues that procedure is already available to state employees under the personnel rules and regulations of the State of Nebraska. However, it appears from the record that there may be a question of whether those rules are applicable to the employees of the Game and Parks Commission, and, also, there may have been some significant procedural changes between the discovery procedure in the personnel rules and those finally contained in the contract with the Game and Parks Commission.

Paragraph 3 of the newsletter alleges the success of the Game and Parks Commission in bargaining for additional funeral leave and vacation leave. The article clearly states: "This has now become a part of all state government personnel policies — THUS WE ARE NOW SHARING THE RESULTS OF COLLECTIVE BARGAINING ACHIEVED BY ANOTHER STATE AGENCY." With regard to additional vacation leave to clear up estate matters following a funeral, the evidence shows that the contract with the Game and Parks Commission provides that an employee's request for up to 10 days of vacation leave may not be "unreasonably denied." This is a slight variance from the rule as contained in the personnel rules.

Finally, paragraph 4 of the newsletter appears to

be a "catchall" for a number of minor matters allegedly the result of collective bargaining by NAPE on behalf of the Game and Parks Commission. The only witness testifying with reference to these latter matters was John Russell, the chief of labor relations for the State Department of Personnel. In his testimony, Russell admitted he was not familiar with the terms of the contract with the Game and Parks Commission as they modified the personnel rules and regulations which existed at the time of the negotiations of the contract, and had no knowledge whether the terms of the '77-78 contract included broader paid training programs for both support and professional personnel or whether it included procedures for updating personnel files which were different from the personnel rules and regulations at that time, but testified nothing was agreed upon that violated the personnel rules and regulations. As previously stated, the Court of Industrial Relations specifically found "[T]here is *at least* a grain of truth in the claims made in the newsletter." (Emphasis supplied.)

However, even assuming the statements contained in the newsletter were in some respects inaccurate and not completely true and, perhaps, to some extent misleading, we now examine the existing law with reference to the effect of false misleading statements in elections in labor matters, and whether, under the evidence in the record in this case, it is necessary to void the election in question.

The question involved appears to be one of first impression in this state, and we have been unable to find any Nebraska cases or statutes specifically dealing with the problem. In this situation, however, we have frequently considered decisions and opinions issued by the National Labor Relations Board to afford us guidance. In American Fed. S., C., & M. Emp. AFL-CIO v. County of Lancaster, 196 Neb. 89, 241 N. W. 2d 523 (1976), we stated: " 'In

reaching its decision the Court of Industrial Relations found that decisions under the National Labor Relations Act were helpful but not controlling upon the court. We think this is a correct statement as to the consideration to be given to the decisions under the federal law.' " See, also, City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860 (1971).

With the above limitations in mind, we now examine the position of the National Labor Relations Board in connection with the recurring problem of misrepresentations in elections for bargaining representatives. For many years, the National Labor Relations Board took the position that false statements, which constituted an interference with free choice, either for or against the bargaining representative, constituted grounds for setting aside a representation election. 48 Am. Jur. 2d, Labor and Labor Relations, § 798, p. 639; Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962). In its decision in that case, the National Labor Relations Board stated: "The Board has limited its intervention to cases of this type because an election by secret ballot, conducted under Government auspices, should not be lightly set aside, and because we realize that additional elections upset the plant routine and prevent stable labor-management relations. We are also aware that absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees. * * * We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a

message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimis* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements."

However, in 1977 the board reversed its position on this question, holding that misleading campaign statements in which employees decide whether a union will represent them in collective bargaining will not necessarily void an election. "The assumption, said the Board, that misleading campaign propaganda will interfere with employees' freedom of choice is completely unverified, and the Board will view employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." 48 Am. Jur. 2d, Labor and Labor Relations, § 798, p. 639; Shopping Kart Food Market, 228 NLRB 1311 (1977). Two of the five members of the board that sat upon it and rendered the decision in that case filed dissenting opinions. We quote from the majority opinion in that case: "In sum, we decide today that the Board will no longer probe into the truth or falsity of the parties'

campaign statements. Accordingly, we hereby overrule Hollywood Ceramics. * * * Despite the many difficulties in administering the Hollywood Ceramics rule, we, too, would nevertheless choose to continue to adhere to it if we shared the belief that employees needed our 'protection' from campaign misrepresentations. * * * Based on assumptions of employee behavior which we find dubious at best and productive of a host of ill effects, we believe that on balance the Hollywood Ceramics rule operates more to frustrate free choice than to further it and that the purposes of the Act would be better served by its demise. Accordingly, we decide today that we will no longer set elections aside on the basis of misleading campaign statements. However, Board intervention will continue to occur in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is. While the former standard represents no change in Board law, by our adoption of the latter we choose to revert to our earlier policy of setting an election aside not on the basis of the *substance* of the representation, but the deceptive *manner* in which it was made. * * *."

Apparently, there was a change in the membership of the board between April 8, 1977, on which date the board issued Shopping Kart, and December 6, 1978, when the board issued its decision in General Knit of California, Inc. and United Steelworkers of America, AFL-CIO, 239 NLRB No. 101, 1978-79 CCH NLRB, par. 15,317, p. 28,616. In General Knit, the board overruled its 1977 decision in Shopping Kart in which it had limited remedial action to deceptive practices that involved use of NLRB processes or forged documents, or an "egregious mistake of fact," and reverted to its policy toward election campaign misrepresentations enunciated in Holly-

wood Ceramics, to the effect that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. We note that the Shopping Kart case was heard before members Penello, Walther, and Murphy, who wrote the majority and a concurring opinion, and before members Jenkins and Fanning, who dissented. The General Knit case was heard before members Fanning, Jenkins, and Truesdale, representing the majority, and with Penello and Murphy writing vigorous dissenting opinions, pointing out the beneficial results that had accrued even during the short time Shopping Kart was in existence and also pointing out statistically that the decisions of the Board had been reversed by the courts on appeal at least 50 percent of the time.

With reference to court decisions, our research discloses that the two most recent decisions discussing the Shopping Kart case are Oshman's Sporting Goods, Inc. v. N. L. R. B., 586 F. 2d 699, decided November 20, 1978, by the United States Court of Appeals, 9th Circuit; and N. L. R. B. v. Wagner Elec. Corp., 586 F. 2d 1074, decided by the United States Court of Appeals, 5th Circuit, on December 26, 1978. In Oshman's Sporting Goods the court stated: "In Shopping Kart Food Market, Inc., 1977, 228 NLRB 1311, the Board has announced that it 'will no longer probe into the truth or falsity of the parties' campaign statements,' thus accepting, in part, the conclusions of the study.

"It is tempting to us to seize upon the study and go farther than the Board did in Shopping Kart, holding that we will no longer sustain orders setting aside elections, or set aside orders sustaining them,

in cases of threats as well as in cases of claimed misrepresentations in election campaigns. However, we resist the temptation because it is the Board, not the courts, that is presumed to be expert in this field."

In N. L. R. B. v. Wagner Elec. Corp., *supra*, the court, after setting forth the holding of Shopping Kart, continued: "Shopping Kart could, of course, be applied to this case because of the rule that an intervening change in the law while a case is on appeal will be applied by the appellate court. However, as in NLRB v. J. C. Penney Co., Inc., 5 Cir. 1977, 559 F. 2d 373, 377, we do not base our decision on the less restrictive standard established in Shopping Kart, because the misstatements of the effective dates of the cost-of-living increases were not sufficiently material or significant to trigger the Hollywood Ceramics standard."

Because of the unsettled state of the law in this very important area, as indicated by the foregoing authorities, we do not deem it advisable *at this time* to adopt either of the foregoing standards discussed above, nor are we required to follow them. It would appear, as pointed out by plaintiff-appellee NAPE in its brief, that it is fairly inferable from the opinion issued by the Court of Industrial Relations in this case that it has developed a standard which is somewhere between the Hollywood Ceramics philosophy and the new Shopping Kart philosophy, which standard appears to be that where there are material misrepresentation of relevant facts and where there is evidence that those misrepresentations influenced the voters or had a substantial impact on the outcome of the election, the Court of Industrial Relations would set aside the election. In this case, however, the Court decided that the newsletter did not contain material misrepresentations of relevant issues and that there is no evidence of either influence upon the voters or a substantial impact on the

election. We see no reason to depart from the standard adopted by the Court at this time. The evidence in this case convinces us that the misrepresentations claimed by appellant are not of an egregious nature, and while it is true appellant was probably not afforded a proper interval of time to answer the alleged misrepresentations, which should in future cases be done, in the absence of any proof as to the effect of those representations upon the voters involved or the outcome of the election, or any compelling reason to indulge in a per se rule or presumption in this regard, notwithstanding the nature of the misrepresentations, we conclude that no compelling reason exists for setting aside the election in this case.

Our scope of review on appeals from orders and decisions of the Court of Industrial Relations was recently set out in American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1 (1977), as follows: "We now hold that review by this Court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. To the extent prior cases hold that appeals from the Court of Industrial Relations are heard de novo in this court, they are overruled."

We conclude that there was substantial evidence in the record to support the decision of the Court of Industrial Relations, that it acted within the scope of its statutory authority, and that its action was not arbitrary, capricious, or unreasonable.

We have also examined appellant's second assignment of error to the effect that the Court failed to follow its own rules of procedure in entering a decision in the case on the ground that at the conclusion of the hearing on June 28, 1978, the hearing

judge granted the parties 14 days to file briefs. The State's brief was filed with the Court on July 12, 1978, 14 days later; the order entered in the case was "Entered" July 11, 1978, 1 day before the State's brief was filed, but was not filed until July 12, 1978. NAPE's brief was filed with the Court on July 13, 1978. Rule 15D of the Rules of the Court of Industrial Relations provides: "Cases shall be deemed submitted to the Court and the hearing thereon deemed concluded ten days after the last brief day set for the parties by the Court." NAPE points out, however, that there is nothing in the record with reference to any brief date being suggested or ordered by the Court, any evidence as to whether Judge DeBacker did or did not read appellant's brief, nor is there any demonstration of prejudice experienced by appellant under the circumstances. We deem this assignment of error to be without merit, and, at the most, to constitute harmless error under section 25-853, R. R. S. 1943.

We also note that on November 28, 1978, appellant filed a motion in this court requesting an order directing that all materials filed with this court by the clerk of the Court of Industrial Relations, in excess of the materials required by the rules of this court and the appellant's praecipe, be removed from the record in this case and the appellant not be held responsible for any costs incurred in the creation and filing of the bill of exceptions and exhibits for the hearing held on July 19, 1977, and the bill of exceptions for the hearing held May 4, 1978. The bill of exceptions for the hearing on the objections to the election, held June 28, 1978, reveals that at the end of said hearing the following transpired: "THE COURT: * * * Anything more, Mr. Brown? MR. BROWN: No. THE COURT: Do you have any witnesses, Mr. Burns? MR. BURNS: The only thing I would like to do is to submit to the Court a part of the record of the Court in this case dealing

with the issue of the names and addresses to be supplied by the respondent to the partitioner [sic]. And I would ask that those documents of the Court be entered as an exhibit and also the rulings of the Court thereon. THE COURT: A hearing was held with respect to that problem, was there not? MR. BURNS: Yes. THE COURT: The record made at the time of that hearing and at any previous hearing in this matter is a continuing record along with this one, does that satisfy your request? MR. BURNS: Yes it does." All of the foregoing transpired in the presence of Mr. Brown, attorney for appellant, and with no apparent objection. That being so, we do not feel we can in good conscience sustain appellant's motion, and take upon ourselves the burden of editing out the material objected to by counsel without any specification to the court of what that might be, and the reasons therefor. Appellant's motion will be overruled.

No reversible error appearing in the record, the decision of the Court of Industrial Relations must be affirmed.

AFFIRMED.

IN RE ESTATE OF ROSE ELIZABETH JACOBSON, DECEASED. J. HERBERT JACOBSON, APPELLANT, V. ROSALIE NEMESIO, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSE ELIZABETH JACOBSON, DECEASED, APPELLEE.

281 N. W. 2d 552

Filed July 24, 1979. No. 42321.

1. **Estates: Wills.** The right of a surviving spouse to widow's allowance, homestead allowance, exempt property, or any of them, is purely a personal right which the surviving spouse alone can exercise and enjoy. When the surviving spouse dies, the right terminates.
2. **Estates.** Even though one may have died prior to January 1, 1977,

if no letters testamentary were issued before January 1, 1977, the estate is governed by the provisions of the Nebraska Probate Code which became effective on January 1, 1977.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Norris G. Leamer and Kurt T. Rager, for appellant.

Smith, Smith & Boyd, for appellee.

Heard before KRIVOSHA, C. J., CLINTON, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

KRIVOSHA, C. J.

This is an appeal from the District Court for Dakota County, Nebraska, dismissing objections filed by appellant, J. Herbert Jacobson, the surviving spouse of the deceased, Rose Elizabeth Jacobson. We have reviewed the record in this case, and affirm the judgment of the trial court.

Rose Brauckman Jacobson and J. H. Jacobson were married on June 10, 1950. It was apparently a second marriage for the parties and therefore, on June 9, 1950, the parties executed an antenuptial agreement. Under the terms of the antenuptial agreement, it was provided that the property of each of the parties owned as of the date of the marriage shall continue to be their own respective property, and all other property acquired or accumulated after the date of the marriage shall be held in joint and equal ownership and upon the death of either, the one remaining shall have an undivided 50 percent interest in the property of the other acquired after the date of the marriage.

Apparently the parties recognized that certain of their property might lose its identity over the years, and therefore they provided in paragraph 3 of the antenuptial agreement: "In the event the identity of the property held by the parties as of this date, shall in the future become confused or lost because

of a succession of conveyances, transfers and acquisitions of property, then there shall be set aside to the Bride and Bridegroom respectively, property from the joint holdings sufficient to make up for the value of the property whose identity has been lost." The antenuptial agreement then provided that in the event of the wife's death, the property having become confused or commingled, her estate shall receive $6,400 from the joint assets of the parties. In the event of the bridegroom's death, his estate shall receive $4,500 from the joint assets.

Subsequent to the marriage ceremony, Rose Elizabeth Jacobson executed a last will and testament wherein she acknowledged the antenuptial agreement and incorporated the agreement as part of her last will and testament. She then provided that upon her death the $6,400, which would come to her from the joint property of the parties, pursuant to the antenuptial agreement, should be devised to her sister, Rosalie Nemesio. She devised and bequeathed 50 percent of the remainder of her estate to her husband with the balance of the estate being devised and bequeathed to specific individuals, including her sister, Rosalie Nemesio.

Rose Elizabeth Jacobson died on October 20, 1976. On January 17, 1977, appellant, the surviving spouse, filed the will and later the antenuptial agreement in the county court of Dakota County, Nebraska. Both the will and antenuptial agreement were admitted to formal probate by order of the county court on February 16, 1977, without objection. The first publication and notice to creditors was on February 24, 1977. On September 26, 1977, appellant filed what was entitled "Application and Election," purporting to waive his rights under the will and seeking to take against the will pursuant to the statutes of the State of Nebraska. By the document, he sought certain personal property, wearing apparel, homestead exemption, and widow's allowance. Appellant died

on October 19, 1978, after appeal had been perfected to this court.

The first issue which we need to address is whether the application filed by the appellant requesting that he be allowed all the wearing apparel, ornaments, and household furniture of the deceased, and the request for the granting of a temporary allowance, survives his death so as to be before this court subsequent to his death. We believe the law in that regard is clear, and the rights in question, being personal to the surviving spouse, terminated upon his death as did the cause of action. Appellant's right to the personal property, the widow's allowance, and the wearing apparel, as well as the homestead exemption, are all provided by statute and are personal in nature. We have found no statute, nor are we cited to any statutory provision, declaring that these rights, personal in nature, survive the death of the surviving spouse. It is fundamental that when a party to a pending suit dies and the right is personal in nature, the right dies with the person. The personal representatives of a deceased party to a suit cannot prosecute or defend a suit after his death unless the cause of action on which the suit was brought is one that survives by law. In re Estate of Sampson, 142 Neb. 556, 7 N. W. 2d 60; § 30-2315, R. R. S. 1943. We therefore need not further discuss appellant's request for granting of these rights in view of his subsequent death.

The second issue which requires our attention is whether or not appellant's election to waive his rights under the will and take by statute was timely made. We believe it was not. Appellant maintains that because his wife died prior to the effective date of the Nebraska Probate Code, January 1, 1977, the previous probate code applies. The Nebraska Probate Code, however, anticipated this very situation and made provision therefor.

Section 30-2901 (b) (2), R. R. S. 1943, provides as

follows: "[T]he code applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code." That provision makes it clear the estate, not having been filed for probate until after the effective date of the Nebraska Probate Code, is governed by the provisions of the Nebraska Probate Code. To determine if the election was timely we must look at the Nebraska Probate Code.

Section 30-2317, R. R. S. 1943, provides, in part: "The surviving spouse may elect to take his elective share in the augmented estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share *within six months after* the first publication of notice to creditors for filing claims which arose before the death of the decedent, *or within one year after the date of death*, whichever time limitation *first expires*. * * *." (Emphasis supplied.) It is clear in this case that the 6-month period first expired, and that an attempt by appellant on September 26, 1977, to elect to take his elective share, came too late.

Appellant argues, however, that the provisions of section 30-2901 (b) (4), R. R. S. 1943, provide him with additional time. Section 30-2901 (b) (4), R. R. S. 1943, provides as follows: "[A]n act done before the operative date in any proceeding and any accrued right is not impaired by this code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has *commenced to run* by the provisions of any statute before the operative date, the provisions shall remain in force with respect to that right." (Emphasis supplied.) Apparently it is appellant's contention that the provisions of the former probate code granted

him a right which started to run prior to the effective date of the Nebraska Probate Code since his wife died prior to January 1, 1977. It is therefore claimed that appellant is entitled to 1 year in which to make an election, pursuant to the provisions of former section 30-108, R. R. S. 1943.

The difficulty with that argument is that the former section 30-108, R. R. S. 1943, did not grant to appellant a right prior to January 1, 1977. Under the provisions of former section 30-108, R. R. S. 1943, the surviving spouse had 1 year "after the issuance of letters testamentary" in which to make the election. The record in this case, however, discloses that the letters testamentary were not filed until after January 1, 1977. Therefore, the appellant's right had not "commenced to run by the provisions of any statute before the operative date," and therefore could not be applicable. Having failed to make his election within the 6-month period required by the Nebraska Probate Code, the election is ineffective.

We are left with the final issue as to whether or not the identity of certain property owned by the deceased wife at 1507 Pierce Street, Sioux City, Iowa, had so lost its identity and the property of the parties had become so confused because of succession of conveyances as to bring into play paragraph 3 of the antenuptial agreement. We have examined the record in this case and believe the best that can be said is that the identity of the property owned at the time of the death of the deceased wife was indeed confused and the identity of property owned by either party immediately prior to their marriage had become so commingled as to no longer be identifiable.

In any event, it makes little difference if we determine, as apparently urged by appellant, that he in fact had substantially purchased the property at 114 East 37th Street, South Sioux City, Nebraska, from his own proceeds and not from the proceeds of the

property at 1507 Pierce Street, Sioux City, Iowa. We would then be left with the situation wherein we could no longer identify what happened to the proceeds from the sale of the property owned by Mrs. Jacobson in Sioux City, Iowa, and again would be required to apply paragraph 3 of the antenuptial agreement. We believe the evidence justifies a finding that the identity of the property had become confused and the origins of the same lost. We further find the provisions of the will of Rose Elizabeth Jacobson, when read together with the provisions of the antenuptial agreement, should be carried out. The order of the trial court did in fact direct that the provisions of the will be fulfilled, and we find the order was in all respects correct. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID M. ANDERSON, APPELLANT.

281 N. W. 2d 743

Filed July 24, 1979. No. 42344.

1. **Criminal Law: Witnesses.** When information concerning a crime is furnished by the victim or witnesses to a crime, proof of veracity or reliability of the information is not generally required.
2. **Criminal Law: Police Officers and Sheriffs: Searches and Seizures.** Even where probable cause sufficient to justify a formal arrest does not yet exist, in appropriate circumstances a police officer may informally detain a person in an appropriate manner in order to investigate possible criminal behavior or to maintain the status quo while obtaining more information, and the officer may conduct a limited protective search for concealed weapons when he has reason to believe the suspect is armed.
3. **Criminal Law: Police Officers and Sheriffs: Probable Cause.** The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved.

4. **Criminal Law: Searches and Seizures: Arrest: Probable Cause.** Probable cause justifying a search and/or an arrest exists where the facts and circumstances within the police officer's knowledge and those of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.
5. **Criminal Law: Police Officers and Sheriffs: Probable Cause: Searches and Seizures.** In considering whether probable cause exists, the collective knowledge of the law enforcement agency for which the officer acts may be added to the personal knowledge of the officer making the search and seizure provided there has been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure.

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

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

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

CLINTON, J.

Defendant Anderson was found guilty by a jury of robbery and was sentenced to a term of 5 to 7 years in the Nebraska Penal and Correctional Complex. On appeal to this court, the only error assigned is that the trial court erred in denying the defendant's motion to suppress certain evidence consisting of a sum of currency and coins, a "cake-cutter" comb with a green handle, and a pair of horn-rimmed sunglasses which were found upon the person of the defendant at the time of his apprehension and later taken from him by police officers. The bases of the motion are that the search and seizure were not supported by facts which gave rise to probable cause for the search, and the search was not incident to a lawful arrest. We affirm.

The evidence adduced at the suppression hearing

and at trial would permit the triers of fact to find as fact those evidentiary matters hereafter discussed. Unless otherwise indicated in the later discussion, the facts are without dispute.

On June 21, 1978, at approximately 10:45 a.m., an armed robber pointed a handgun at the attendant of the Sinclair service station at 69th and Dodge Streets in Omaha, Nebraska, and took a sum of money which the attendant carried on his person for use in making change in the course of serving customers. At approximately 11 a.m., notification of the robbery was broadcast on the police radio and a number of officers in cruiser cars converged toward the scene. One of these officers was Kenneth R. Tyler, who was at 60th and Lake Streets at the time he received the call. Officer Tyler was apparently informed that the robber was an armed, black male about 25 years of age, 5 feet 6 inches tall, weighing about 120 pounds, dressed in dark-colored pants, and wearing a reddish shirt. Upon receiving this information, Tyler drove to 66th Street and started south toward the robbery scene. It is inferable from the testimony that Tyler had been informed that the robber left the station on foot and was northbound.

Shortly thereafter, Tyler reached the intersection of 66th and Burt Streets, which is about 10 or 11 blocks from the Sinclair station in question, and saw the defendant, a black male, walking northward on the west side of 66th Street. Tyler knew this area was an entirely or predominantly white neighborhood and that the nearest mixed race neighborhood was a considerable distance away. Tyler observed that this individual matched the broadcast description of the robber in all respects except he wore no shirt and was bare from the waist up. In one hand, the defendant carried a white cloth or article of clothing, later determined to be a thermal shirt, which was draped over an object held in the defendant's hand. The object was somewhat larger than

a person's hand, and Tyler suspected it was a gun.

As Tyler passed the defendant, the defendant looked back over his shoulder several times and then turned west on Cuming Street. At that time Tyler decided to turn his cruiser about and did so. In the meantime the defendant had disappeared from Tyler's view. By the time Tyler had completed his turn, the defendant had changed direction and was walking east on Cuming Street and then turned north on 66th Street again. Tyler observed that, although the defendant still held the shirt in his hand, the object no longer appeared to be under the shirt.

Tyler decided to investigate and stopped the defendant on 66th Street a short distance north of Cuming Street. He asked the defendant to identify himself which the defendant did. Tyler then "patted down" the defendant and found no weapon. He did note, however, the defendant seemed to have a considerable quantity of loose money in his pockets. At about that time another cruiser officer, Nared, arrived as did Sergeant Hughes, the officer in charge of the felony investigation. Tyler left the defendant with them and walked west on Cuming Street along the path the defendant had taken to search for a weapon which he suspected the defendant had disposed of when he disappeared from view, but he found no weapon.

At some time not precisely shown by the testimony, Tyler had informed Sergeant Hughes of his observations with reference to the defendant and also of the loose money in the defendant's pants pockets. While Tyler was searching for the weapon, Nared, at the direction of Sergeant Hughes, made the defendant empty his pockets. The contents included three $20 bills, one $10 bill, five $5 bills, thirteen $1 bills, 24 quarters, 31 dimes, 1 half dollar, 13 nickels, and 8 pennies, as well as the comb and a pair of horn-rimmed sunglasses. After the pockets

were emptied, the property was returned to the defendant and he was taken to the Sinclair station for a showup. The victim could not positively identify the defendant as the robber although he fitted the physical description. The victim particularly noted the defendant did not have on a red shirt or the dirty red stocking cap which were worn by the robber at the time of the holdup. Later, a search was made for the red shirt and stocking cap but these were never found.

After the showup, Sergeant Hughes directed Tyler and Nared to take the defendant to the police station for interrogation by other officers. Sergeant Hughes and two other police officers then went back to 66th and Cuming Streets and, after a short search, found a handgun in some shrubs at the residence at 904 North 66th Street at a point about 75 feet west of the intersection of 66th and Cuming Streets. This weapon was identified at trial as the style of weapon used by the robber. The victim also identified the "cake-cutter" comb as being like the one he observed in the hip pocket of the robber when the latter turned to walk away, and identified the sunglasses as being like those worn by the robber. He was uncertain of the exact amount of money taken, but was able to estimate the approximate amount, including the fact that it included only three $20 bills, a few $5 and $10 bills, a considerable number of $1 bills, and a large number of coins.

The defendant did not testify at trial nor at the suppression hearing.

An analysis of the issue raised by the defendant and the evidence leads to two inquiries. Was Tyler's investigative stop of defendant justified, and was there probable cause for the later search of defendant's person at the direction of Sergeant Hughes?

In this particular case we begin with the undisputed fact that a felony had been committed and all

of the officers knew this. They were acting upon the complaint and information furnished by the victim of the crime and not merely upon information from an informant, nor merely upon their own observations of suspicious conduct. Generally, proof of veracity or reliability is not required in the case of information furnished by the victim or witnesses of the crime. Jaben v. United States, 381 U. S. 214, 85 S. Ct. 1365, 14 L. Ed. 2d 345. Such persons are not to be viewed in the same way as the usual police informant. See, State v. Paszek, 50 Wis. 2d 619, 184 N. W. 2d 836; Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419; United States v. Wilson, 479 F. 2d 936 (7th Cir., 1973).

In Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, the Supreme Court of the United States said: "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." See, also, State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90. In Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612, the court reiterated what it had said in Terry v. Ohio, *supra*, adding that a brief stop for investigative purposes is permissible under appropriate circumstances and the officer may conduct a limited protective search for concealed weapons when he has reason to believe the suspect is armed. In that case, a police officer, acting on the information of an informant that the defendant who was seated in a nearby car had a weapon and drugs on his person, reached through the open window of a car in which the suspect was seated and removed a loaded handgun from the suspect's waistband. The informant in that case was known to the officer and had previously furnished reliable information. The court said the action of the officer was justified. No definite rule can be laid down which will cover all circumstances.

Let us now reexamine the information which would justify the investigative stop by Tyler in this instance. The physical description of the robber which Tyler had received from the victim through police channels did fit the defendant. The only item which did not conform to that information was that the defendant was not wearing a reddish shirt but rather was bare from the waist up, but that fact would not necessarily mean that he was not earlier attired in such a shirt. The defendant points out that Sergeant Hughes testified the initial information given to the police of the robber's description was simply that he was a black male. Tyler, however, said he had the more detailed description which we have earlier recited. The conflict in the testimony between the two officers presents a question of fact for the trial judge to determine and is not for this court on appeal. We note, moreover, that Sergeant Hughes also testified the robbery call came at 10:20 a.m. All of the other testimony and evidence, including the official police report of the incident, was that the robbery occurred at about 10:45 a.m., and the call came at about 11 a.m. This included the testimony of the victim and officers Tyler and Nared. It is apparent Sergeant Hughes was mistaken as to the hour and it appears he may well have been mistaken as to the time the detailed description was communicated.

A second factor which Tyler, an experienced police officer who was familiar with the geographic area surrounding the scene of the robbery and the location where the defendant was first observed, was entitled to consider was the defendant's proximity in time and space to the robbery scene. United States v. Holland, 510 F. 2d 453 (9th Cir., 1975); Hampton v. United States, 340 A. 2d 813 (D. C. Cir., 1975); Commonwealth v. Jones, 457 Pa. 423, 322 A. 2d 119; People v. Lucero, 182 Colo. 39, 511 P. 2d 468. In the case before us, the robber was believed to have

left the scene on foot and to be moving in a northerly direction. The place where defendant was first seen was 10 or 11 blocks north of the place where the robbery occurred and the time was about 15 minutes after its occurrence.

A third and significant factor was Tyler's observation of the defendant's conduct immediately before the stop. Tyler had been informed the robber was armed. He noted defendant was carrying an object in his hand about the size of a handgun which was covered by a cloth or article of clothing. He further noted when he passed the defendant that the latter appeared to be watching to observe what the officer's actions would be. Defendant then changed directions, passed out of the officer's view, shortly came back into sight, and proceeded on what appeared to have been his original course. At that time Tyler noted the object was no longer carried in the defendant's hand. A permissible conclusion would be that defendant had disposed of it, or hidden it elsewhere on his person. A police officer, in determining whether to make an investigative stop, is entitled to take into consideration deliberate, furtive action of the person, including that which appears to have been occasioned by the suspect's awareness of the officer's presence. State v. Booth, 202 Neb. 692, 276 N. W. 2d 673; Sibron v. New York, 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917; United States v. Owens, 472 F. 2d 780 (8th Cir., 1973); Commonwealth v. Jones, *supra*.

Finally, Tyler was entitled to consider the probability that the defendant was the robber because the area where the defendant was walking was a neighborhood where many blacks fitting the description of the robber were not likely to be present. Furthermore, several police cars converged on the general area. It does not appear that any of them sighted any person other than the defendant who fitted the description which had been given. There is

no reason to believe the police used a dragnet approach. See People v. Harris, 15 Cal. 3d 384, 124 Cal. Rptr. 536, 540 P. 2d 632.

The manner in which Tyler carried out the investigative stop was appropriate under the circumstances. When he approached the defendant, he did nothing more than ask him to identify himself and then patted him down. This he was entitled to do for his own protection under existing circumstances. Terry v. Ohio, *supra*; Adams v. Williams, *supra*; State v. Booth, *supra*. As was said in United States v. Holland, *supra*, police officers are not required to rule out all possibility of innocent behavior before initiating a brief stop and making a request for identification. The proper test is reasonable suspicion founded on articulable facts. See, State v. Von Suggs, 196 Neb. 757, 246 N. W. 2d 206; Adams v. Williams, *supra*. Officers must be permitted to act before their reasonable beliefs are verified by escape or resulting harm which it is their duty to prevent. United States v. Holland, *supra*.

We next examine the question of whether the evidence shows that the search of the defendant and the seizure of the items found were supported by probable cause. In that connection, all of the facts which we have heretofore enumerated were entitled to be considered. The pat down by Tyler did not reveal a weapon, but it did disclose one additional important item of information in that it revealed the defendant was carrying a considerable amount of loose money in his pockets. This was not an ordinary circumstance and was one which, taken together with the other facts known to Tyler, indicated the likelihood the money was loot from the robbery and, of course, increased the probability that the defendant was the perpetrator. At this time there was clearly probable cause for search and/or arrest.

The record shows Tyler informed Sergeant Hughes of his observations concerning the defendant

and also informed him of the presence of the money on the defendant's person. Officer Nared actually made the search. It is not shown precisely what information Nared had. When he approached the defendant, Tyler had already stopped the defendant and was talking to him. At that time Sergeant Hughes was sitting in a police car apparently getting additional information through police channels, although the record is not precise enough to disclose exactly what this information was or when it was received. Nared asked the defendant to identify himself and to give his name. Nared testified the defendant told him he had nothing to identify himself and gave his name as Money. It was apparently after this that Sergeant Hughes gave the search order, while Tyler was away from the scene making his unsuccessful search for the weapon.

The principles applicable to the above circumstances are these: "Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595; State v. Dussault, 193 Neb. 122, 225 N. W. 2d 558; Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790. It is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts. However, in that case there must have been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure. United States v. Wixom, 460 F. 2d 206; United States v. Canieso, 470 F. 2d 1224; United States v. Nieto, 510 F. 2d 1118; United States v. Del

Porte, 357 F. Supp. 969, affirmed 483 F. 2d 1399." State v. Aden, 196 Neb. 149, 241 N. W. 2d 669. See, also, State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90; State v. Dussault, 193 Neb. 122, 225 N. W. 2d 558; Brinegar v. United States, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DUANE FULLER, APPELLANT.

281 N. W. 2d 749

Filed July 31, 1979. No. 42125.

SUPPLEMENTAL OPINION.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Motion for rehearing overruled.

Richard L. Schmeling, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

BOSLAUGH, J.

The State has filed a motion for rehearing requesting that we reconsider our analysis concerning the admissibility of the testimony of Clark concerning statements made to him by the defendant while Clark was equipped with a transmitter. Upon further consideration we have concluded that our original opinion holding the testimony was admissible was in error.

At the time the statements were made, the defendant was confined in prison as a result of having been convicted and sentenced on other charges. Since Clark was acting as a police agent, this was custodial interrogation and the defendant was entitled to the warnings required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. See, Mathis v. United States, 391 U. S. 1, 88 S. Ct. 1503, 20 L. Ed.

2d 381; Beatty v. United States, 377 F. 2d 181 (5th Cir., 1967), reversed, 389 U. S. 45, 88 S. Ct. 234; United States ex rel. Milani v. Pate, 425 F. 2d 6 (7th Cir., 1970); State v. Peters, 545 S. W. 2d 414 (Mo. App., 1976). Since the warnings were not given, the testimony of Clark as to the statements made by the defendant were inadmissible.

That part of our opinion in State v. Fuller, 203 Neb. 233, 278 N. W. 2d 756, which held the testimony admissible is withdrawn. The motion for rehearing is overruled.

MOTION FOR REHEARING OVERRULED.

CLINTON, J., dissenting.

I respectfully dissent from the holding of the supplemental opinion which makes inadmissible the testimony of the inmate Clark as to his conversations with the defendant Fuller. It is my view that the opinion of the United States Supreme Court in Mathis v. United States, *supra*, does not require such a result.

In Mathis, because the Miranda warnings had not been given, the court excluded evidence relating to violation of the income tax laws obtained by an agent of the Internal Revenue Service as a result of an interview of a defendant while he was incarcerated in the penitentiary on other charges. Miranda applies to in-custody interrogations by officers about matters which may tend to incriminate. Part of the rationale is that confinement, plus the official presence, tends to intimidate.

Neither Miranda nor Mathis involves the testimony of an informer. It surely cannot be contended that every time one inmate talks to another the Miranda warnings must be given. The fact that the informer in this case was acting for the investigators is irrelevant to the purpose of the Miranda rule where the intimidation of official presence is absent in a situation such as this where the defendant knows only that he is talking to a fellow prisoner.

Miranda defined custodial interrogation as follows: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. It is clear from the factual context of both Miranda and Mathis that it is the official presence in addition to confinement which brings the Miranda rule into play. In Miranda the court refers (in reaffirming Escobedo) to "rights which were put in jeopardy in that case through official overbearing." Miranda v. Arizona, *supra*, at p. 442. The court then engages in a lengthy discussion of "the nature and setting" of in-custody interrogation. Miranda v. Arizona, *supra,* at p. 445 et seq. The court winds up that discussion by referring to the "intimate connection between the privilege against self-incrimination and police custodial questioning." Miranda v. Arizona, *supra*, at p. 458. Later the court uses the term "informal compulsion exerted by law-enforcement officers during in-custody questioning." Miranda v. Arizona, *supra*, at p. 461.

United States Circuit Judge Henry J. Friendly, in an article entitled "The Fifth Amendment Tomorrow: The Case For Constitutional Change," 37 Uni. of Cincinnati L. Rev., p. 671, has characterized the Mathis decision as "the most inexplicable decision yet rendered in this area." Then in a footnote he adds the following: "The doctrinal evolution of this decision shows how the Court goes about its work of constantly expanding the privilege. The fifth amendment says that no person 'shall be *compelled* in any criminal case to be a witness against himself.' There is every reason to believe the framers meant just what they said; as the historian of the amendment has written: 'The element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incrimin-

nating interrogatories.' Levy 328. When, in Miranda v. Arizona, 384 U. S. 436 (1966), the Court prescribed warnings to be given persons being interrogated as to a crime for which they had been arrested, Chief Justice Warren was evidently concerned over this point; he met it by describing coercive techniques often employed by the police and then laying down a conclusive presumption: 'An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.' *Id.* at 461. Whatever may be said of this in the context of a person who is being held in custody as the probable perpetrator of the crime as to which the police are interrogating him, and who may believe that he will continue to be held unless he talks, see H. Friendly, Benchmarks 272-73 (1967), the considerations in Miranda have no relevance to a person whose 'custody' consists of being a tenant in a state prison as a result of a conviction of an unrelated crime. Yet five Justices joined in an opinion characterizing these basic differences as 'minor and shadowy,' Mathis v. United States, 391 U. S. 1, 4 (1968), in the face of a dissent clearly pointing out that 'Miranda rested not on the mere fact of physical restriction but on a conclusion that coercion — pressure to answer questions — usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime.' *Id.* at 7. Predictably the majority's next step will be that since Mathis' custody did not, in the dissent's language, coerce him any more than 'the citizen interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews,' these too will be brought within the requirement for Miranda warnings. *Id.* See pp. 715-16 *infra*.''

Other courts have not, just because the person be-

ing interrogated is a prisoner, given to Mathis the per se custodial interrogation result which this court now does. In Cervantes v. Walker, 589 F. 2d 424 (9th Cir., 1978), the prisoner made such a contention. That court said: "To interpret Mathis as Cervantes urges would, in effect, create a per se rule that any investigatory questioning inside a prison requires Miranda warnings. Such a rule could totally disrupt prison administration. Miranda certainly does not dictate such a consequence. 'Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.' Miranda v. Arizona, *supra*, 384 U. S. at 477, 86 S. Ct. at 1629.

"Adoption of Cervantes' contention would not only be inconsistent with Miranda but would torture it to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart. We cannot believe the Supreme Court intended such a result. Thus, while Mathis may have narrowed the range of possible situations in which on-the-scene questioning may take place in a prison, we find in Mathis no express intent to eliminate such questioning entirely merely by virtue of the interviewee's prisoner status."

The Supreme Court of the United States, in Oregon v. Mathiason, 429 U. S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), seems to make it clear that Miranda relates to interrogation by police or other officials. In that case they said: "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of

warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."

The compulsion of official presence is absent in the case of interrogation by police informers. In the case before us, Clark and Fuller were alone when Fuller disclosed to Clark the full details of how air was injected into the victim's blood vessels. Furthermore, the general nature of what had occurred was already known by Clark from having been present during Gerheardt's earlier attempts to inject air into his bloodstream and from having information he obtained while present at the time of the acts which resulted in Gerheardt's death, when, although feigning sleep, he overheard what was happening although not actually seeing the events.

No cases have been cited in which the Miranda rule has been applied to information given by informants. See the annotation: Custodial Interrogation Within Rule of Miranda v. Arizona, 31 A. L. R. 3d 565. Interrogation by persons, other than police officers or in the presence of police officers or other officials, have almost uniformly been held to be noncustodial. 31 A. L. R. 3d 666 et seq.

The fact that Clark was in this case cooperating with the prosecutor and the investigating officers does not supply any factor of compulsion. As far as Fuller was concerned, the situation was not any different than if Clark were acting entirely on his own initiative and then later supplied the information to the prosecution.

In addition to Miranda and Mathis, the supplemental opinion cites: Beatty v. United States, 377 F. 2d 181, reversed, 389 U. S. 45, 88 S. Ct. 234; United States ex rel. Milani v. Pate, 425 F. 2d 6; State v. Peters, 545 S. W. 2d 414 (Mo. App., 1976). These cases are not at all in point and introduce into the opinion an element of confusion of principle. All

three cases involve statements taken after indictment and relate to the right of counsel under the Sixth Amendment and have as their base the holding of the United States Supreme Court in Massiah v. United States, 377 U. S. 201, 89 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), that right to counsel attaches at the time of indictment or the filing of the complaint or information and that statements taken by officers or their agents, including informants, after that time, without presence and consent of counsel, are inadmissible without regard to whether the statements are voluntary. The original opinion of this court concedes that the right of counsel does not attach absolutely until judicial proceedings have been instituted. Brewer v. Williams, 430 U. S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

Miranda, on the other hand, has to do with the voluntariness of the statements as tested by the objective standard laid down in that case. Before indictment the right of counsel may be waived.

Mathis does not require the result reached by the court in this case because the alleged coercive effect of official presence was absent.

The rule announced in Mathis, even if one accepts it on its own facts, is, if it is to be interpreted by this court as embracing information obtained through informants prior to indictment, an unsound rule for it would require that in any investigation of a crime occurring in a penal institution Miranda warnings be given to every inmate interrogated, whether or not he is a suspect. Such a procedure would inevitably, in a large number of cases, make it impossible to get any information at all, for everyone questioned would immediately believe he is a suspect. Investigation of crimes committed in penitentiaries already must be difficult and this court should not place additional unwarranted procedural obstacles in the path. That is not in society's best interest. It is not in the best interest of the general welfare of penal

inmates for it places extreme obstacles in the way of the carrying out of the government's obligation to do what it can to protect inmates from violence inter se.

The probable effect of the court's ruling is to prevent prosecution of Fuller for the murder which he has admitted. Even worse, perhaps, is the obstacle which the opinion places in the way of appropriate and effective investigation of crimes committed in our penal institutions. The facts of the present case uniquely illustrate the problem. The felonious act occurred in the cell occupied by Gerheardt and three others. It was immediately apparent to the investigating authorities after the autopsy that if Gerheardt was murdered the other three occupants of the same cell were the prime suspects. They were also, as the only occupants of the cell, the probable witnesses. Only Clark gave information and later testified for the State. The information came only after he was assured of protection from the retribution which would be his as a "snitch."

I add one further explanatory item which is not properly part of this dissent, but an explanation of my view of the purport of the court's original opinion. The Attorney General, as indicated by the comments in his brief in support of the motion for rehearing, appears to have some difficulty in understanding that opinion even though the critical portion of it is printed in italics. The statement given by the defendant to the prosecutor was excluded because it was clearly induced by the misrepresentation made to Fuller to the effect that he could not give a mitigating statement to the prosecutor if he insisted on having counsel present at the interrogation. That, of course, simply was not true. The fact that the representation was made is not in dispute. Presence of counsel would not prevent the accused from making a statement. The effect of the misstatement was to induce Fuller not to exercise his right to counsel after he had already stated that he

desired to consult counsel. The statement made to the prosecutor was therefore not voluntary under the doctrine of Miranda.

IN RE INTERESTS OF CHARLES ANTHONY LOGAN, TYRONE LAMONT LOGAN, AND RONELLE LOGAN, CHILDREN UNDER EIGHTEEN YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DONNA LOGAN, APPELLANT.

281 N. W. 2d 753

Filed July 31, 1979. No. 42177.

1. **Appeal and Error: Juvenile Courts.** An appeal of a juvenile case is heard in this court by trial de novo upon the record; notwithstanding, findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Parent and Child: Minors: Constitutional Law.** The integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed by the Constitution of the United States.
3. **Parent and Child: Minors: Custody: Constitutional Law.** The constitutional right of family integrity and the parental rights of custody and control create a duty of care and support.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Lawrence J. Corrigan and Lisa C. Lewis, for appellant.

Donald L. Knowles, Douglas County Attorney, and Lee C. Brawner, for appellee.

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

BARTU, District Judge.

Defendant-appellant and natural mother, Donna Logan, appeals from the judgment of the Separate

Juvenile Court of Douglas County, entered March 7, 1978, terminating parental rights to her children, Charles Logan, born February 18, 1970; Tyrone Lamont Logan, born September 5, 1971; and Ronelle Logan, born June 18, 1973, and from the order overruling her motion for a new trial entered May 17, 1978. The juvenile court found that the minor children were children "within the meaning of Section 43-202 (2) R. S. Supp., 1974," and that reasonable efforts under court supervision had failed to correct conditions leading to such determination. Parental rights were terminated pursuant to section 43-209 (6), R. R. S. 1943.

In substance appellant assigns as error that the evidence was insufficient to support the juvenile court's findings and order. Appellant also assigns as error that the juvenile court considered hearsay evidence in making its determination. This issue was not presented in written or oral arguments. Accordingly, we do not consider the same to be of merit.

Section 43-202 (2), R. R. S. 1943, defines children within its meaning as "* * * any child under the age of eighteen years (a) who is abandoned by his parent * * * (b) who lacks proper parental care by reason of the fault or habits of his parent * * * (c) whose parent * * * neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; * * * or (e) who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child."

Section 43-209, R. R. S. 1943, in part provides: "* * * The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: * * * (6) Following

upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct conditions leading to the determination."

The following principles govern our review. An appeal of a juvenile case is heard in this court by trial de novo upon the record; notwithstanding, findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. See, State v. Johnson, 196 Neb. 795, 246 N. W. 2d 591 (1976); State v. Jenkins, 198 Neb. 311, 252 N. W. 2d 280 (1977); State v. Tibbs, 197 Neb. 236, 248 N. W. 2d 330 (1976).

Does the evidence support the juvenile court's findings? In early January 1974, appellant, then 20 years of age, left her three children, all born out of wedlock by three different fathers, in the care and custody of an uncle to one of the children, Michael Neal, 16 years of age, while she went to Denver, Colorado, to seek a better place in which to raise her children and to find employment. While appellant was in Denver, the uncle delivered the children to appellant's mother, and they were subsequently picked up on February 11, 1974, and put into the custody of the Douglas County social services, because the grandmother could not provide care and support for them. The children were then placed in foster care.

An adjudication hearing was scheduled for May 2, 1974, but was continued at the request of the appellant to August 7, 1974.

On August 7, 1974, the parental rights of the natural fathers were terminated, and the matter was further continued to October 15, 1974, again at the request of the appellant, so that she could return to Denver to

make suitable arrangements for housing and find employment. She returned to Denver and during the next 11 months obtained several different jobs, attended college, joined the Moslem faith, and successfully completed drug counseling; but her efforts to rehabilitate herself were unsuccessful. During the same period of time, she was arrested numerous times, convicted of two or more felonies, cohabited with known criminals, was incarcerated in both Denver and Colorado Springs; and on July 10, 1975, she received a 5-year suspended sentence for possession of narcotic drugs.

Appellant returned to Omaha on July 14, 1975, for further hearing on the termination of parental rights. Again, at the request of the appellant, the hearing was continued to December 15, 1975, to allow her to return to Denver to find suitable housing for herself and her children and to find employment.

On December 15, 1975, appellant was granted temporary custody of the children under reciprocal supervision by the Denver department of child welfare upon favorable reports from her Colorado probation officer and drug counselor. She and the children returned to Denver, but efforts as a mother were unsuccessful. She voluntarily relinquished custody of the children to the Colorado department of social services on February 25, 1976, after which they were placed in a Denver foster home. Subsequently, the children were flown back to Omaha; and on May 18, 1976, the Separate Juvenile Court resumed jurisdiction. A detention hearing was held, and the children were placed back in the custody of the Douglas County social services and thereafter placed in foster homes where they presently reside.

The appellant returned to Omaha in November 1976, for further hearing. Thereafter she lived with her mother for 2 months and then obtained her own apartment. She enrolled in beauty school and attended classes regularly.

Further hearing was held February 28, 1977, at which time the court interviewed two of the children. Visitation by the appellant was expanded. Appellant remained in Omaha during the summer of 1977, but she was unsuccessful in getting and keeping employment. She gave birth to another child, born out of wedlock, in late summer of 1977. She then left Omaha for Sacramento, California, where she was arrested for the possession of heroin. Charges were later dropped.

A final hearing was held on February 27, 1978, at which time the appellant was living with an adoptive grandmother in Sacramento, California, having no steady employment or means of support. At that point in time, the children had been in foster homes for most of 4 years and were well adjusted to foster care.

The record stands uncontroverted that on January 31, 1974, the appellant had abandoned her children; failed to provide proper parental care; and had neglected, or was unable or refused, to provide proper and necessary subsistence and other care for the well-being of the children for 4 years. The record further establishes that although given numerous opportunities to rehabilitate herself as a parent, she failed to do so. The appellant was given opportunity after opportunity by the juvenile court to demonstrate her ability to obtain and hold suitable employment and to reorganize her life so that she might provide the proper care for her children. Each time she failed.

The integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed by the Constitution of the United States. See, State v. Metteer, 203 Neb. 515, 279 N. W. 2d 374 (1979); Stanley v. Illinois, 405 U. S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). It is also clear that the integrity of the family unit depends upon the protec-

tion of its individual members from abuse and neglect. State v. Metteer, *supra*. The parental right of custody and control creates a duty of care and support. De novo review establishes that the appellant failed in her parental duties to provide a home, support, subsistence, education, and other care necessary for the health and well-being of her children for more than 4 years. She offered no evidence that there would be any change in her situation and circumstances in the future.

It was in the best interests of the children that parental rights were terminated. The judgment of the juvenile court was correct and is affirmed.

AFFIRMED.

COUNTRYSIDE MOBILE HOMES OF LINCOLN, INC., APPELLANT, V. RUBY E. SCHADE, APPELLEE.

281 N. W. 2d 756

Filed July 31, 1979. No. 42191.

1. **Appeal and Error.** Errors assigned but not discussed will generally not be considered by this court on appeal.
2. **Appeal and Error: Evidence: Offer of Proof.** Error cannot be predicated upon a ruling which excludes evidence where the substance of the evidence was neither made known to the judge by an offer of proof nor was apparent from the context within which questions were asked.
3. **Uniform Commercial Code: Revocation.** Under section 2-608, U. C. C., the buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured.
4. **Revocation: Time.** Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it.
5. **Judgments: Evidence.** In a trial to the court, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it.
6. **Uniform Commercial Code: Time.** If the buyer has before rejec-

tion taken physical possession of goods, the buyer is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them.

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

Sampson, Curry & Hummel, for appellant.

O. Wm. VonSeggern of Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and RONIN and HAMILTON, District Judges.

HAMILTON, District Judge.

This is an action tried to the court without a jury. Countryside Mobile Homes of Lincoln, Inc., appellant, filed an action in replevin against Ruby Schade, appellee, for the return of a 1977 Liberty mobile home purchased by appellee under an installment sales contract. The appellee filed an answer and cross-petition alleging she had rescinded the original contract and was entitled to the return of her downpayment. The appellant answered and amended its petition to ask for a deficiency judgment, the mobile home having been sold after appellant regained possession of it at the preliminary hearing in replevin.

The issue tried to the court was whether appellee could rescind the contract and, if so, whether such a rescission took place.

The trial court found generally for Ruby Schade in that after accepting physical possession of the mobile home she discovered defects in it and appellant did not remedy the defects within a reasonable time. She was awarded a judgment in the amount of her downpayment.

On July 8, 1977, at Lincoln, Nebraska, the appellee purchased the mobile home for the sum of $14,364.76, with a downpayment of $5,599.76. This left a bal-

ance of $8,765 to be financed under the installment sales contract.

The mobile home was transported on July 11, 1977, to a trailer court in the Grand Island area and placed on a lot selected by appellee. The lot was muddy because of recent rain at the time the appellant's employees installed the trailer. A neighbor, Judy Small, testified that she observed the installation and the trailer became stuck about 3 feet from where it was to be placed. She stated: "[T]hey kept bringing it forward and rocking it really hard, you know, so it really shook it, and this went on for about a couple of hours."

Testimony of Michael Small, Judy's husband, indicated he was asleep when the men arrived but the noise from the installation caused him to awaken. He observed the employees hook a tractor with a chain to the trailer and attempt to pull the trailer, but the tractor became buried to its axles. At this point, they turned the tractor around, lifted the trailer with the tractor bucket, and blocked the trailer where it was sitting.

The appellant's employee, Gary Lange, acknowledged that when he installed the trailer it became stuck about 4 feet from the intended position and that it was necessary to rock the trailer, but denied the trailer was rocked excessively or that they used a tractor during the installation process. After attempting to rock the trailer free from the mud, he just installed the trailer 4 feet short of the intended position.

Ruby Schade testified that she moved into the trailer a few days after its installation, immediately noticed defects, and stopped unpacking. She noticed that panels were buckled, wind came through doors and windows, doors were jammed and one door could not be locked, windows would not open, and bath water from the tub ran onto the floor. She further testified that when it rained, water came in the

trailer and would run out from underneath the stove.

Appellee was unable to fix an exact date but indicated she complained to appellant about the defects within the first or second week of her possession. She was promised repairs but the man never showed up. She then notified appellant that there was so much wrong they ought to bring up a new trailer. Subsequently, repairmen did arrive on August 22, 1977, and appellee refused to allow any work to be done.

The appellant's salesman testified that he visited the mobile home the latter part of July and compiled a list of items to be repaired. This list was even more extensive than that testified to by the appellee. The witness said that the defect list was unusually long for a mobile home setup, but all of the items were repairable.

The appellant's assignments of error as summarized are: (1) The decision of the court is contrary to the evidence and the law; (2) the court erred in sustaining appellee's objection to cross-examination regarding an agreement of November 30, 1977; and (3) the court erred in sustaining appellee's objection to testimony relating to statements made by appellee's attorney.

The assignments of error will be discussed in reverse order. During direct examination of appellant's general manager, Wayne Matthes, the witness attempted to testify concerning statements made by appellee's counsel during a telephone conversation. Objection to this evidence was sustained by the trial court, and appellant made no offer of proof. The assignment of error is not argued nor discussed in appellant's brief. Errors assigned but not discussed will generally not be considered by this court on appeal. Rule 8a 2 (3), Revised Rules of the Supreme Court, 1977; Cofer v. Perkins, 199 Neb. 327, 258 N. W. 2d 807. In addition, error cannot be predicated upon a ruling which excludes evidence where the

substance of the evidence was neither made known to the judge by an offer of proof nor was apparent from the context within which questions were asked. § 27-103 (1) (b), R. R. S. 1943.

During the course of cross-examination of Ruby Schade, the appellant questioned her concerning an alleged agreement entered into on November 30th between the witness and appellant's general manager. The discussion concerning the alleged agreement was had at the courthouse subsequent to the preliminary hearing in replevin. The record discloses the following: "Q. (By Mr. Curry) Do you recall a conversation between Mr. Matthes and yourself and myself in the courtroom? A. Outside of anything that the judge said, and I was sent out in the hallway, and I don't know what anybody said inside. Q. No, I mean after the hearing was over with, didn't we talk at length — A. No. Q. About the problems with the — A. I was sent out in the hall, and the rest of you stayed inside. I never got to hear anything. Your lawyer and you and the witnesses all stayed inside, and Mr. Kelly and me sat out in the hallway. Q. Isn't — A. I didn't hear nothing that was said. Q. Do you recall an agreement that you entered into whereby you were going to make some payments to your attorney and he — A. There was no agreement, no. He told me that I would have to put up a bond."

The appellee objected to the above line of questioning on the basis of relevancy and the objection was sustained. The appellant's offer of proof indicated that if the line of questioning was allowed to proceed, the witness would testify such an agreement was entered into between the parties which would indicate there had been no rescission or no revocation of the installment sales contract.

It is impossible to determine the relevancy of the alleged agreement without the offer of proof show-

ing its relevancy, and, in the absence of such a showing, no error can be predicated upon the rejection of evidence. Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574.

It would further be difficult to say that any rejection of evidence concerning an alleged agreement was prejudicial where the witness has already denied the existence of a conversation or an agreement.

The last assignment of error, that the findings of the court are contrary to the facts and the law, requires a discussion of the facts as applied to the law controlling the issues raised.

Section 2-608, U. C. C., provides, in part, "(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or * * * (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it * * *."

The testimony of the appellee indicates that immediately upon moving into the mobile home, appellee noticed some defects sufficient in magnitude to cause her to stop unpacking. She further testified that other defects were undiscoverable until it rained and leaks developed. Appellee notified appellant within the first or second week of the defects, and was told that repairmen would fix the defects but they did not show up as promised. Sometime around the middle of August, appellee notified appellant that she wanted a new unit.

Appellee's evidence by Dave Ragland, a mobile home repairman, was to the effect that there were numerous things which had to be repaired and that the time element and cost of repair would make them beyond trying to repair.

Appellant's evidence for the most part supported the appellee's evidence with regard to the defects,

but appellant asserts that all defects were repairable.

The appellant's general manager testified that repeated telephone calls from appellee indicated she was extremely upset with the house, and he had made arrangements to have persons go out and reassure her that whatever was wrong with the house could be and would be repaired. This was done on the 16th of August and arrangements were made to send a serviceman to the mobile home on the 22nd of August. The general manager and his employee, Galen Staley, testified that the defects were normal items found in a mobile home after pulling a trailer the distance involved.

Appellant's evidence further showed that after regaining possession of the mobile home it was sold at public auction for the sum of $7,000.

In a trial to the court, the findings and judgment of the trial court on the facts have 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.

There is sufficient evidence in the record to support the finding of the trial court that after acceptance the appellee found defects that substantially impaired the value of the mobile home. Although neither conclusive nor the only evidence supporting diminution of value is the fact that the mobile home at public sale on January 16th brought $7,000. This was less than one-half its value when sold to the appellee.

There is sufficient evidence in the record that the appellee reasonably assumed the defects or the nonconformity of the mobile home would be cured and, upon not being seasonably cured, revoked her acceptance of the mobile home and demanded replacement.

Appellee was promised repairs and she testified that appointments were made for repairmen to arrive and start work, but they never arrived. Appellant claimed that repairmen were delayed because

of an automobile accident and unavailability of parts, even though the factory was located in Kansas. In any event, the trial court, sitting without a jury, chose to believe from the evidence that the delay was unreasonable under all of the circumstances.

Appellant asserts that since the appellee remained and lived in the mobile home until possession was obtained under the replevin action she exercised ownership of the unit and waived her right to revoke. This position overlooks the duty placed upon the buyer by section 2-608 (3), U. C. C., which states: "A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." Section 2-602, U. C. C., provides for the manner and effect of rejection and subsection (2) (b) states: "[I]f the buyer has before rejection taken physical possession of goods * * * [buyer] is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; * * *." It was the duty of the appellee to hold the goods for a reasonable length of time for the appellant to remove the same.

The appellant asserts that an agreement was entered into on November 30th following the replevin hearing wherein the appellee agreed to make payments to her attorney to be held until appellant could repair the mobile home. This was testified to by appellant's general manager. It is appellant's position that this agreement is inconsistent with a theory of revocation of the contract and inconsistent with the findings of the trial court.

The appellee denied there was any such agreement entered into between the parties. It is true, had such an agreement been entered into, the effect of that agreement could have favorable results for the appellant, but this result need not be decided since the appellant cannot be heard to complain where on conflicting evidence the trial court, sitting

without a jury, chose to believe to the contrary on appellant's theory.

The evidence supports the findings and judgment of the trial court and they are affirmed.

AFFIRMED.

PATRICIA ANN BOROFF, APPELLEE AND CROSS-APPELLANT, V. EUGENE ALLAN BOROFF, APPELLANT AND CROSS-APPELLEE.

281 N. W. 2d 760

Filed July 31, 1979. No. 42194.

1. **Courts: Judgments.** The proper method of determining whether a trial court abused its discretion must be based on facts in the record and not from extrinsic criteria.
2. **Divorce: Judgments: Child Support.** The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed.

William G. Line of Kerrigan, Line, Martin & Hanson, for appellant.

Thomas R. Wolff, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and RONIN and HAMILTON, District Judges.

HAMILTON, District Judge.

This is an appeal from the modification of a decree of dissolution alleging the amount of child support fixed by the trial court was excessive.

The petitioner cross-appeals from a refusal of the trial court to award attorney's fees for petitioner's efforts in the trial court.

In previous proceedings the father had received custody of the two children of the marriage; subsequently, the daughter Vicki expressed a desire to

live with her mother and an application to change custody was prepared and filed. The matter was set for hearing and on the morning of the hearing the parties stipulated to a change of custody and the matter proceeded on the question of the amount of child support.

The hearing commenced at 10:10 a.m., and concluded at 11:43 a.m., with the parties as the only witnesses, at which time the trial court entered an order changing custody of Vicki Boroff from respondent to petitioner and ordered the respondent to pay petitioner the sum of $300 per month as child support, but denied an award of attorney's fees for petitioner.

The petitioner works at a cafe. Her net earnings are $300 per month and she receives an additional $150 per month under the terms of her property settlement, which will continue through 1982.

The respondent has remarried, has the former family house, and has purchased a new house in Valley, Nebraska. Both houses are subject to mortgages, which requires respondent to pay much higher house payments than normal, until such time as one of the houses is sold. Respondent is postmaster at Valley, Nebraska, and his present wife is a public accountant. His son Robert attends high school. At the time of the hearing respondent's gross salary was $18,687 per year, with a net takehome pay of $1,039 per month.

Both parties testified to having expenses that exceeded their net incomes.

While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Patton v. Patton, 203 Neb. 638, 279 N. W. 2d 627 (1979). Obviously a trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given

the greater weight in arriving at a factual determination on the merits. The testimony need not be accepted in its entirety and the trier of fact must use a commonsense approach and apply that common knowledge which is understood in the community.

There is no mathematical formula for computing child support awards and each case must stand on its own facts. In determining the amount of child support to be awarded, the status, character, and situation of the parties, and all attendant circumstances, including the financial position of the husband and wife, must be considered. Scarpino v. Scarpino, 201 Neb. 564, 270 N. W. 2d 913 (1978). A resort to other cases, although similar factually, cannot be determinative of the child support issue, since each case requires subjective reasoning and analysis based on the evidence and witnesses before the court.

Respondent seeks to compare the award with prior cases before this court where lesser amounts have been approved. Without lengthy detailing of the evidence in each case, it is sufficient to say that all cases are distinguishable and of limited value in measuring the propriety of an award. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. Brus v. Brus, 203 Neb. 161, 277 N. W. 2d 683 (1979). The proper method of determining whether a trial court abused its discretion must be based on facts in the record and not from extrinsic criteria.

The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion. Scarpino v. Scarpino, *supra*.

The decision of the trial court is entitled to great weight when the review is de novo in this court. Harding v. Harding, 174 Neb. 371, 117 N. W. 2d 800 (1962).

Petitioner on her cross-appeal implies that statutorily allowed attorney's fees under section 42-351, R. R. S. 1943, are mandatory and the failure to grant a fee is automatically an abuse of discretion. The statutory allowance is discretionary with the trial court and is based upon factors as set out in Campbell v. Campbell, 202 Neb. 575, 276 N. W. 2d 220 (1979).

"The award of attorney's fees 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 of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services." Weber v. Weber, 200 Neb. 659, 265 N. W. 2d 436 (1978).

The trial court did not abuse its discretion in the award of child support or the disallowance of attorney's fees. The judgment of the District Court is affirmed. The petitioner is awarded a fee of $500 for services of her attorney in this court.

AFFIRMED.

PPG INDUSTRIES CANADA LTD., APPELLANT, V. GLENN W. KREUSCHER, DIRECTOR OF AGRICULTURE, STATE OF NEBRASKA, AND PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEES.

281 N. W. 2d 762

Filed July 31, 1979. No. 42257.

1. **Criminal Law: Statutes.** Criminal prosecution cannot be grounded on nebulous definitions of crime. All crimes are statutory in this state. The validity of a statute purporting to define a crime cannot be based on an indefinite, uncertain, and obscure basis of validity.

2. **Legislature: Statutes.** Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes.
3. **Legislature: Statutes: Intent.** 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 lawmakers.
4. _____: _____: _____. The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect.
5. _____: _____: _____. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention.
6. _____: _____: _____. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied.
7. _____: _____: _____. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
8. **Statutes: Intent.** A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.

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

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

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

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

KRIVOSHA, C. J.

This is an appeal from a decision of the District Court for Lancaster County, Nebraska, determining that plaintiff herein was subject to the provisions of the Nebraska Commercial Fertilizer and Soil Conditioner Act, sections 81-2,162.01 et seq., R. R. S. 1943, as amended (the Act). For the reasons set out herein we find that the plaintiff is not subject to the

provisions of the Nebraska Commercial Fertilizer and Soil Conditioner Act, and reverse and remand the trial court's decree.

Plaintiff (PPG) is a Canadian corporation involved in the mining and processing of potash through a division known as Kalium Chemicals. Kalium mines its potash at a site near Regina, Saskatchewan, Canada. It has no mines in the United States and all Kalium potash is shipped by Kalium to its customers in interstate commerce. Customers of PPG include "national accounts which are major corporations," "independent accounts which are smaller companies, some of which only have 1 plant, or maybe 2 or 3 plants," and "industrial accounts which use potash for things other than agricultural purposes." PPG attempts to sell its chemical only to fertilizer manufacturers who in turn combine PPG's potash with one or more of the plant food elements, such as phosphate or nitrogen. PPG sells no potash to the ultimate consumer in Nebraska and has no facilities or outlets for distribution within the state.

PPG sells its potash products to several companies located outside Nebraska which direct PPG to ship the products to companies, including fertilizer manufacturers located within Nebraska. These customers include Land-O-Lakes, Inc., of Fort Dodge, Iowa, and Farmland Industries of Kansas City, Missouri. Those companies are, under the Department of Agriculture's present interpretation of the Act, required to register with the State of Nebraska the potash they have purchased from PPG and from other suppliers, and they have in fact done so.

While there was some evidence that potash is occasionally applied to the ground without being mixed or blended, the evidence clearly established that PPG's customers who purchased potash were not the ultimate consumer and did not sell the product in the form in which they had received it from PPG, but rather in 99 percent of the cases cus-

tom blended the product or in some other manner mixed the potash with other chemicals.

PPG assigns several errors, including: (1) That the District Court erred in failing to hold that the specific provisions of the Act, and the actual regulatory scheme contemplated by the Act, evidenced the Legislature's intent that companies, such as PPG, selling a product that may be used by other manufacturers to produce fertilizer, but which had no instate facilities, were not to be directly regulated under the Act; and (2) that the District Court erred in holding that PPG "distributes commercial fertilizer" within the meaning of the Act in Nebraska. Several other assignments of error are raised, but in view of our decision in this case they need not be considered.

As noted by the trial court in its memorandum opinion, the Act is not a model of legislative draftsmanship and leaves much to be desired. An understanding of the problem, however, requires that we take the time to go through the Act as best we can. Section 81-2,162.02, R. S. Supp., 1978, defines the terms of the Act. Included in the definition is one for "commercial fertilizer," which is defined by the Act to mean: "* * * any formula or product distributed, except unmanipulated animal and vegetable manures, which contains one or more plant nutrients recognized by the Association of American Plant Food Control Officials in its official publication, which nutrients are used for their plant nutrient content and are intended to promote plant growth." § 81-2,162.02 (3), R. S. Supp., 1978. It is important here to note that the definition refers to "product distributed." The definition section further defines "distribute" to mean: "[T]o offer for sale, sell, barter, or otherwise supply commercial fertilizers or soil conditioners." § 81-2,162.02 (6), R. S. Supp., 1978. "Product" under the Act is defined to mean: "[B]oth commercial fertilizers and soil conditioners." § 81-2,162.02 (11), R. S. Supp., 1978. The statu-

tory definition of the word "product," while ultimately important to the determination of this matter, is of little help in that it appears to simply refer back to commercial fertilizers and soil conditioners which likewise contain within their definition reference to the word "product." We therefore have a situation in which a statutory term is defined by another definition.

One further definition of particular significance in the analysis of this Act is the definition of "custom blended product," which is defined under the Act to mean "any individually compounded commercial fertilizer or soil conditioner mixed, blended, offered for sale or sold in Nebraska to a person's specifications, when such person is the ultimate consumer; *Provided,* that the *ingredients* used in such product which are subject to the registration requirements of section 81-2,162.03 shall have been so registered." (Emphasis supplied.) § 81-2,162.02 (5), R. S. Supp., 1978.

The substance of the Act deals with two specific matters: (1) A requirement that the "product" be registered; and (2) that the manufacturer's or distributor's "facility" be registered.

The Act then provides that: "Each commercial fertilizer and soil conditioner shall be registered before being distributed in this state * * *." § 81-2,162.03, R. R. S. 1943. The Act does not, however, indicate *who* is supposed to be responsible for registering the fertilizer before distributing it in the state.

Section 81-2,162.06, R. S. Supp., 1978, establishes a procedure for the payment of an inspection fee on all registered fertilizer distributed in this state. Subsection (3) of section 81-2,162.06, R. S. Supp., 1978, provides: "Every person who distributes commercial fertilizer or soil conditioners *to the consumer* in this state shall file, not later than the last day of January and July of each year, a semiannual tonnage report on forms provided by the department setting

forth the number of net tons of commercial fertilizer and soil conditioners distributed in this state during the preceding six months' period, which report shall cover the periods from July 1 to December 31 and January 1 to June 30 * * * and upon filing such report shall pay the inspection fee at the rate stated in subsection (1) of this section." (Emphasis supplied.) Subsection (4) of the same section, however, provides: "When *more* than one person distributes a commercial fertilizer or soil conditioner in this state, the person who registers the product shall be responsible for the requirements of subsection (3) of this section." (Emphasis supplied.) However, as noted earlier, the Act does not indicate who it is that is responsible for registering the product.

In this case, the Department of Agriculture insists that PPG must register the raw product and refuses to permit the in-state manufacturer or distributor from registering even if he is willing to do so. PPG is left in the difficult position of either complying with the wishes of the Department of Agriculture or facing criminal prosecution. The failure to comply with the provisions of the Act, including the registration of the product and the facility, constitutes a criminal offense punishable as a Class II misdemeanor. § 81-2,162.17, R. S. Supp., 1978. The significance of that section is readily apparent. If we read the Act as suggested by the State, we have a criminal statute based upon a host of ambiguities which in turn might compel us to void the entire Act. Criminal prosecution cannot be grounded on nebulous definitions of crime. All crimes are statutory in this state. The validity of a statute purporting to define a crime cannot be based on an indefinite, uncertain, and obscure basis of validity. See Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227. Likewise, a criminal prosecution cannot be grounded on a nebulous definition of who the offender is. We fail to see how or in what manner the Department of

Agriculture can enforce the Act without acting unreasonably, arbitrarily, or capriciously. By interpreting the Act in a reasonable manner, however, we may be able to uphold its constitutionality, and where given that choice we should do whatever is reasonable to give the Act a constitutional interpretation. See, Bodenstedt v. Rickers, 189 Neb. 407, 203 N. W. 2d 110; Prendergast v. Nelson, 199 Neb. 97, 256 N. W. 2d 657.

Through the provisions of section 81-2,162.03 (2), R. R. S. 1943, custom blended products are said to be exempt from the requirements of registration, although by definition in section 81-2,162.02 (5), R. S. Supp., 1978, custom blended products are by definition made from ingredients which must be registered. Furthermore, section 81-2,162.03 (2), R. R. S. 1943, provides that although the custom blended product is exempt from registration (except as required by definition), the ingredients are "subject to the inspection fee requirements of section 81-2,162.06, except those ingredients brought to the manufacturer by the ultimate consumer for custom blending."

Further, section 81-2,162.23, R. S. Supp., 1978, in part, provides: "No person shall manufacture or distribute commercial fertilizers or soil conditioners in this state unless such person holds a valid registration for each manufacturing and distribution facility in this state. Any out-of-state manufacturer or distributor who has no distribution facility within this state shall obtain a registration for his *principal outlet* used for distributing products in this state." (Emphasis supplied.) To suggest that the provisions of the Act are a myriad of confusion is to give the Act the benefit of the doubt. Nevertheless, we must attempt, if possible, to bring some order out of this chaos. In order to do that, it appears that a determination with regard to three specific words used in the Act must be reached. Does the word "man-

ufacturer" encompass the nonresident supplier of raw material, or is it intended to describe the individual who produces for sale the final fertilizer product? Likewise, does the word "product" include in its definition ingredients supplied by a mining company to a local manufacturer, or is the word "product" intended to refer to the *final* product purchased by the ultimate consumer and placed upon the land? And, finally, does the term "distribute" include one who supplies raw materials to a local manufacturer? In attempting to determine those meanings we are fortunately aided by certain long-established and well-recognized rules of statutory construction.

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. 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 lawmakers. State v. Jennings, 195 Neb. 434, 238 N. W. 2d 477. To ascertain the intent of the Legislature, we examine the legislative history of the act in question. Norden Laboratories, Inc. v. County Board of Equalization, 189 Neb. 437, 203 N. W. 2d 152. The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. Pelzer v. City of Bellevue, 198 Neb. 19, 251 N. W. 2d 662. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. Matzke v. City of Seward, 193 Neb. 211, 226 N. W. 2d 340. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered

separately. Equal Opportunity Commission v. Weyerhaeuser Co., 198 Neb. 104, 251 N. W. 2d 730. All the rules should be considered when it is necessary to construe a statute, and no particular rule should be followed to the exclusion of all others. Equal Opportunity Commission v. Weyerhaeuser, *supra*. To ascertain such intent, a court will not examine an operative provision without likewise examining the statute as a whole in the light of objects and purposes of the act. King v. School Dist. of Omaha, 197 Neb. 303, 248 N. W. 2d 752. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N. W. 2d 232. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. Keller v. State, 184 Neb. 853, 172 N. W. 2d 782. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. Anderson v. Carlson, 171 Neb. 741, 107 N. W. 2d 535. With those statutory aids now in hand, we proceed to attempt to work our way through the statutory maze.

The evidence in this case is virtually without controversy to the effect that PPG maintains no manufacturing facilities in this state. The potash is removed from the ground and placed in train cars. No processing is done to or with the potash. It is without controversy that PPG has no distribution facility in the State of Nebraska, and delivers all of its potash to various manufacturers within Nebraska in bulk on railroad cars, although occasionally some may be delivered by truck. PPG likewise has no

principal outlet used for distributing products in this state. The records in this case indicate that plaintiff sold potash to various fertilizing manufacturers or distributors, both within and without the State of Nebraska, and could not in any manner ascertain who was the principal outlet in order to comply with section 81-2,162.23, R. S. Supp., 1978. Moreover, the evidence is clear, beyond question, that none of the customers of the plaintiff constituted an outlet, principal or otherwise, for distributing products of the plaintiff in this state. Customers who purchased potash from any outlet in the state were totally unaware of whether the potash came from the plaintiff's mine or from other potash miners, and as a matter of fact the evidence indicates that manufacturers and distributors in the state do in fact purchase from more than one mining company, may commingle the raw potash upon arrival in Nebraska, and certainly destroy the identity of the product. It is difficult to imagine whether any consumer in Nebraska is aware that he purchased potash from the plaintiff's mine when purchasing from Farmland Industries or any other co-op.

An examination of the history which resulted in the adoption of the Act and its amendments, makes it clear that the Legislature was attempting to adopt a consumer protection act. The purpose of the Act was to protect ultimate consumers from purchasing fertilizer which was represented to contain certain chemicals but which in fact did not. The Act was intended to make sure that consumers were not defrauded by unscrupulous manufacturers of finished fertilizer product, and was not intended to reach out and affect each and every producer of raw material.

The State in its brief argues that regardless of whether the product of the plaintiff herein is considered as a "consumer product" or only as an "ingredient," it is intended to be covered by the Act. That

conclusion is difficult to reach when one attempts to review the Act.

One may ask what is the purpose of requiring that a place of manufacture or distribution within the state be registered, or, if no place of manufacture or distribution be maintained within the state, that a principal outlet used for distributing the product be registered. The purpose obviously is to provide the state with information as to where they may go to inspect and test the product if they are uncertain whether it is in fact what it is represented to be. How could that possibly be accomplished if the product is commingled with all other products of other potash producers prior to being blended? What possible benefit could be served the state by permitting them to know that Farmland Industries, as an example, has a pile of potash which it uses to manufacture finished product. The inspector could not in any manner accomplish the intent of the Act.

Furthermore, the evidence makes it clear that the mining company does not warrant the quality of the potash in advance, and could not so register it. Each load of potash as it is sold is tested just prior to shipment so that the purchaser can be billed for the proper content, and so that the local manufacturer will know the exact amount of potash to blend with nitrogen and phosphates to obtain the proper blend of the three ingredients for its customers. Under that basis, each carload of potash would have to be separately registered with the Department of Agriculture, even though the plaintiff in this case made no representations or warranties, expressed or implied, to the ultimate consumer as to the quality of the product.

It seems that the intent of the Legislature was clear that it was "finished product" which they were seeking to regulate and not raw material ingredients.

Likewise, the reference to "manufacturer" appears

from an overall examination of the Act to mean that individual who combines raw product into a finished fertilizer. Section 81-2,162.03, R. R. S. 1943, after requiring that each commercial fertilizer and soil conditioner be registered before distribution, sets out the information which must be provided on the application, including information such as (a) the name and principal address of the person guaranteeing the product; (b) the name and principal address of the person manufacturing the product; and (c) the name and principal address of the person whose name appears on the label.

Subsection (2) of that section then provides that custom blended products are exempt from the requirements of registration, provided "such products shall bear a tag or invoice stating the name and principal address of the manufacturer, name and address of the purchaser * * *." If the word "manufacturer" in this case is intended to mean the plaintiff, then the "purchaser" must be the distributor or local manufacturer. What possible benefit could there be to the consumer to have that information? Obviously, the purpose of the information is to permit an inspector in the field to ascertain whether or not this product, that was custom blended, was made for the particular individual having possession of the exempted product and the name of the party blending the product so that if a violation was found, the state would know where to turn. What purpose could be served by totally exempting the custom blender and holding only the miner responsible? Likewise, in ordinary parlance, a "manufacturer" is someone other than the supplier of raw material. To "manufacture" is generally defined as making something from raw materials; the processing of a finished product from raw materials. See, Webster's Third New International Dictionary, p. 1378 (1968); United States v. Longhorn Portland Cement Company, 328 F. 2d 491 (5th Cir., 1964); Comptroller of

the Treasury v. American Can Co., 208 Md. 203, 117 A. 2d 559; Duke Power Co. v. Clayton, Comr. of Revenue, 274 N. C. 505, 164 S. E. 2d 289; Wauwatosa v. Strudell, 6 Wis. 2d 450, 95 N. W. 2d 257. Manufacturer here obviously means the manufacturer of a finished fertilizer or soil conditioner.

In section 81-2,162.05 (2), R. S. Supp., 1978, the requirement is made that if the product is "distributed in bulk," a written or printed statement containing information about the product must accompany delivery and be supplied to the "purchaser." Again, is this purchaser the resident manufacturer or distributor, or is it the ultimate consumer? If it is thought to be the ultimate consumer, it makes little sense to require that the Canadian mining company provide multiple copies attached to the side of a freight car for distribution to multiple purchasers out of a commingled pile. Obviously, the word "purchaser" refers to the ultimate consumer, and the sale in bulk must mean from the local manufacturer or distributor.

Section 81-2,162.06, R. S. Supp., 1978, further establishes that intent. After establishing a requirement for the payment of a fee, that section provides, "*Provided,* that sales to *manufacturers* or exchanges between them are hereby exempted." (Emphasis supplied.) Can this language mean then that sales to the plaintiff in Canada are exempt? Who would sell to the producer? Obviously, the word "manufacturer" in this case must mean the party putting together the finished product. Likewise, subsection (3) establishes the amount of fee to be paid based upon sales distributed in the state. How could the plaintiff ever ascertain what was being distributed to consumers in this state? The intent of the Legislature to regulate a finished product by the Act is further made clear by the provisions of section 81-2,162.06 (4), R. S. Supp., 1978. That section provides that where more than one person distributes a commercial fertilizer in this state, the person who

registers the product shall be responsible for the payment; but if "distributes" means simply selling the raw material in the state, then there is not more than one person distributing in this state in this case, and we are back to subsection (3) of section 81-2,162.06, R. S. Supp., 1978.

As pointed out by the plaintiff, the issue in this case is not whether plaintiff's products, when used to manufacture fertilizers in Nebraska, cannot or should not be regulated by the Nebraska Department of Agriculture. Rather, the question is whether the plaintiff must register and pay the fee or whether the manufacturer or distributor of the final product should be required to register and pay the fee. We believe the intent of the Legislature and the clear meaning of the Act require us to opt for the latter. To hold otherwise only makes the entire Act a meaningless exercise in futility and serves no purpose in providing consumer protection.

We therefore hold that "product" under the Nebraska Fertilizer and Soil Conditioner Act means the product which is sold in the normal course of business to the ultimate consumer, and consists of the finished product; that likewise "manufacturer" under the Act means the manufacturer of the finished product; and that "distributes" means distribution of a finished product, and not a mere ingredient.

If plaintiff should engage in intentionally distributing a finished product in Nebraska for use by an ultimate consumer without the intervention of another processor, such product might require registration under the Act. The evidence does not indicate that to be the situation.

The record discloses that the Department of Agriculture issued "stop-sale" orders to a number of plaintiff's customers because plaintiff had not registered under the provisions of the Act. The issuance of a "stop-sale" order is an extreme remedy and affects not only the party against whom the action is

directed, but most often innocent purchasers as well. Moreover, oftentimes the damage done by such an order can never be corrected even if the state is later found to be wrong. The parties against whom the "stop-sale" orders are directed are afforded virtually no due process before action is taken and have little, if any, way to be made whole either because the product must be sold within a specific time or must be used within a specific time.

It would appear to be a better practice to reserve the use of "stop-sale" orders to those cases when the public health, safety, and welfare is in danger and not when the violation is failure to register even though the product is what it claims to be and does not cause harm if used. In this case, the local manufacturer and the local farmers were denied the use and benefit of the potash. The state could have recovered its fees at any time the controversy was settled, and did not need to resort to so extreme a remedy.

We therefore hold that the Act does not require the plaintiff herein to register its raw material sold to in-state manufacturers or processors who in turn process the ingredient into a final product. The judgment of the District Court is therefore reversed and the cause remanded with instructions to enter a judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

AMAX CHEMICAL CORPORATION, APPELLANT, V. GLENN W. KREUSCHER, DIRECTOR OF AGRICULTURE, STATE OF NEBRASKA, AND PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEES.

281 N. W. 2d 771

Filed July 31, 1979. No. 42258.

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

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

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

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

KRIVOSHA, C. J.

This case is one of four cases which were consolidated for trial in the District Court for Lancaster County, Nebraska, and decided by the trial court at the same time as it decided the case of PPG Industries Canada Ltd. v. Kreuscher, *ante* p. 220, 281 N. W. 2d 762. The facts in this case are essentially identical with the facts in PPG Industries Canada Ltd. v. Kreuscher, *supra,* and this action is disposed of by reason of our decision in that case. The differences in the mining operations or manner of shipment into Nebraska are minor and not relevant to any different determination in this case. For the reasons more particularly set out in our decision in PPG Industries Canada Ltd. v. Kreuscher, *supra,* the judgment of the District Court for Lancaster County, Nebraska, is reversed and the cause remanded with directions in accordance with our opinion in that case.

REVERSED AND REMANDED WITH DIRECTIONS.

TEXASGULF, INC., APPELLANT, V. GLENN W. KREUSCHER, DIRECTOR OF AGRICULTURE, STATE OF NEBRASKA, AND PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEES.

281 N. W. 2d 771

Filed July 31, 1979. No. 42259.

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

Crosby, Guenzel, Davis, Kessner & Kuester, Donn E. Davis and Lucius W. Pullen, for appellant.

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

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

KRIVOSHA, C. J.

This case is one of four cases which were consolidated for trial in the District Court for Lancaster County, Nebraska, and decided by the trial court at the same time as it decided the case of PPG Industries Canada Ltd. v. Kreuscher, *ante* p. 220, 281 N. W. 2d 762. The facts in this care are essentially identical with the facts in PPG Industries Canada Ltd. v. Kreuscher, *supra,* and this action is disposed of by reason of our decision in that case. The differences in the mining operations or manner of shipment into Nebraska are minor and not relevant to any different determination in this case. For the reasons more particularly set out in our decision in PPG Industries Canada Ltd. v. Kreuscher, *supra*, the judgment of the District Court for Lancaster County, Nebraska, is reversed and the cause remanded with directions in accordance with our opinion in that case.

REVERSED AND REMANDED WITH DIRECTIONS.

IDEAL BASIC INDUSTRIES, INC., A CORPORATION, APPELLANT, V. GLENN W. KREUSCHER, DIRECTOR OF AGRICULTURE, STATE OF NEBRASKA, AND PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEES.

281 N. W. 2d 772

Filed July 31, 1979. No. 42260.

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

Crosby, Guenzel, Davis, Kessner & Kuester, Donn E. Davis, and Pryor, Carney & Johnson, for appellant.

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

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

KRIVOSHA, C. J.

This case is one of four cases which were consolidated for trial in the District Court for Lancaster County, Nebraska, and decided by the trial court at the same time as it decided the case of PPG Industries Canada Ltd. v. Kreuscher, *ante* p. 220, 281 N. W. 2d 762. The facts in this case are essentially identical with the facts in PPG Industries Canada Ltd. v. Kreuscher, *supra*, and this action is disposed of by reason of our decision in that case. The differences in the mining operations or manner of shipment into Nebraska are minor and not relevant to any different determination in this case. For the reasons more particularly set out in our decision in PPG Industries Canada Ltd. v. Kreuscher, *supra*, the judgment of the District Court for Lancaster County, Nebraska, is reversed and the cause remanded with directions in accordance with our opinion in that case.

REVERSED AND REMANDED WITH DIRECTIONS.

GENERAL DRIVERS AND HELPERS UNION, LOCAL 554, APPELLEE, V. CITY OF WEST POINT, NEBRASKA, APPELLANT.

281 N. W. 2d 772

Filed July 31, 1979. No. 42300.

1. **Court of Industrial Relations: Evidence: Burden of Proof.** The Court of Industrial Relations cannot, in a section 48-818, R. R. S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions.
2. **Court of Industrial Relations: Evidence: Judgments.** Findings made by the Court of Industrial Relations not supported by substantial evidence do not justify the entry of an order which therefore must be said to be arbitrary, capricious, and unreasonable.

Appeal from the Nebraska Court of Industrial Relations. Reversed and dismissed.

Nelson & Harding and Roger J. Miller, for appellant.

David D. Weinberg of Weinberg & Weinberg, P.C., for appellee.

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

HASTINGS, J.

Petitioner-appellee, a labor union (Union) and the certified collective bargaining agent for most of the employees of the respondent-appellant, City of West Point, filed its petition in the Court of Industrial Relations (CIR) on July 1, 1977, alleging that the parties had attempted, without success, to negotiate an agreement as to wages, hours, and conditions of employment, thereby creating an industrial dispute as defined in the Court of Industrial Relations Act, sections 48-801 et seq., R. R. S. 1943. After a hearing, the Court of Industrial Relations entered an opinion and order dated July 26, 1978, establishing wages for certain linemen, light plant operators, sewage

treatment plant operators, and street laborers effective August 1, 1976-77 and August 1, 1977-78. The City of West Point has appealed to this court.

The City's primary complaint as expressed in its assignments of error is that the CIR had no authority to conduct its own investigation as to wage comparability after Union had failed to sustain its burden of proof on that issue, and because of such failure, the case should have been dismissed. We agree.

Union, through two employees of the City and an international representative of another union, offered evidence of wages being paid certain employees of the City together with a description of the various jobs as compared with the cities of Fairbury, Beatrice, Grand Island, Fremont, and Cuming County, covering both years involved, except that Cuming County was not used for the year 1977-78. The populations of the City of West Point and the various political subdivisions in the array listed above were 3,385, 5,265, 11,600, 31,200, 23,900, and 11,817 respectively. The various job descriptions furnished by the witnesses were at best vague and indefinite. The two witnesses, employees of the City, who were the electric line foreman and light plant foreman respectively, were able to give comprehensive descriptions of those two job areas. However, they knew little about the duties of the street laborers or sewer treatment employees other than what might be expected of the average man on the street. The other witness, the union representative, had virtually no independent knowledge of the job skills for the various job descriptions, particularly for linemen and street laborers, and merely stated that street laborers repair the streets and keep them clean. It could be said without much argument that Union simply obtained wage information from the various cities by job title only without reference to job descriptions, skills, or requirements. Neverthe-

less, where as here the job titles were in and of themselves rather descriptive, we are not that concerned with the absence of a more detailed recitation of the nature of the jobs. However, there was no evidence offered of fringe benefits paid by the units within the array, nor was there anything from which any conclusion could be drawn either as to the labor market, job opportunities, or work opportunities anywhere.

In our review of orders and decisions of the Court of Industrial Relations, we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area, 203 Neb. 832, 281 N. W. 2d 201 (1979).

The opinion and order of the CIR contained the following language: "Petitioner offers two arrays * * * We find these comparables, properly adjusted, to be sufficient to carry the petitioner's burden of showing that West Point wages are not comparable to the prevalent. * * * For our own convenience, however, we prefer to operate in an array where we need not make continual and complex adjustments. Where the parties have not presented evidence deemed sufficient properly to appraise the value of the particular labor before it, the court may *sua sponte* direct the production of other or different evidence in order that it may properly execute its duty to protect the public interest and reach an accurate conclusion. * * * Executing this duty as empowered by the Legislature under § 48-817, R. R. S. 1943, we have had data produced on the various job classifications in cities in the state operating their own generation plants and within a population range of 2,000 to 3,850 to add to petitioner's proffered comparables."

The data referred to by the CIR was incorporated into two orders which were made a part of the tran-

script and copies of which were sent to both parties with notice that each would have 5 days to challenge, contradict, or rebut such information. The question we are called upon to decide is whether the CIR is empowered to go out in the first instance and conduct an investigation as to whether a particular wage is comparable to the prevalent, or whether it is entitled only to utilize this method to supplement and refine evidence which it finds to be sufficient, but not altogether satisfactory.

As we stated in Lincoln Fire Fighters Assn. v. City of Lincoln, 198 Neb. 174, 252 N. W. 2d 607 (1977), "* * * the burden is on the moving party in a section 48-818, R. R. S. 1943, case, to demonstrate that existing wages are not comparable to the prevalent wage rate, * * *." It is obvious that to do this it was necessary for Union first to establish by the evidence what were "the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." § 48-818, R. R. S. 1943. In making this comparison it is necessary to take into consideration not only the wages for time actually worked but also wages for time not worked, including vacations, holidays, and other excused time; all other benefits received including insurance and pensions; and the continuity and stability of employment. "This was not done in this case as no evidence was presented on fringe benefits received by the firemen in those cities used for comparison." Lincoln Fire Fighters Assn. v. City of Lincoln, *supra*. See, also, Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N. W. 2d 752 (1975).

With the exception of Fairbury, the municipalities tendered in Union's array were from over 3 to nearly 10 times the size of the City of West Point. Fairbury, retained by the CIR to construct its array, was almost twice as large. This is not to say that

such cities could not have been used if there was evidence of the labor market generally in those locations establishing comparable conditions. Beyond that, and perhaps of even more significance, is the finding of the CIR itself that "We find these comparables, *properly adjusted,* to be sufficient to carry the petitioner's burden of showing that West Point wages are not comparable to the prevalent." (Emphasis supplied.) The CIR is saying that the evidence presented, without adjustment, was not sufficient to carry Union's burden. We are in complete agreement with this position. However, there is nothing in the record to indicate what adjustment was made. This was a critical finding to have been made, and to permit it to stand without support in the record would eliminate the requirement of burden of proof. While this position may seem to exalt form over substance, it must be remembered that the CIR's sole function is to settle industrial disputes, and the principal onus in producing evidence is on the parties. The adversary nature of proceedings has been preserved in the CIR by the Legislature in providing that proceedings shall conform to the code of civil procedure applicable to District Courts, section 48-812, R. R. S. 1943; by the decision of this court as to burden of proof, Lincoln Fire Fighters Assn. v. City of Lincoln, *supra*; and, for that matter, by the procedures adopted and followed by the CIR itself. The result is that the CIR cannot, in a section 48-818, R. R. S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions. Therefore, we must disregard the evidence obtained by the CIR on its own motion and are left with findings not supported by substantial evidence, resulting in the entry of an unjustified order which is therefore arbitrary, capricious, and unreasonable.

The City has assigned other errors which, in view of our holding, we find unnecessary to consider.

The order and judgment of the CIR is reversed and the cause ordered dismissed.

REVERSED AND DISMISSED.

BOSLAUGH, J., concurs in the result.

BRODKEY, J., dissenting.

I must strongly dissent from that portion of the majority opinion which purportedly establishes the rule that: "[T]he CIR cannot, in a section 48-818, R. R. S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions." In my opinion there is no justification nor precedent or authority for such a rule; and, in fact, it would appear to fly in the teeth of the statutes themselves.

In the instant case, trial was commenced on June 19, 1978. On June 28, 1978, the Court of Industrial Relations gave written notice to the parties that the court had caused an investigation to be made, pursuant to section 48-817, R. R. S. 1943, as to the wages paid for the various job classifications in the seven cities in the State of Nebraska in the population range of 2,000 to 3,850 which operate their own generating plants; and ordered that such information shall be made part of the record, and that either party shall have 5 days from the date thereof to challenge, contradict, or rebut such information. On July 5, 1978, the Court of Industrial Relations entered a further order giving the parties until July 10, 1978, to rebut, supplement, or otherwise challenge the material contained in the court's "Order and Notice" of June 28, 1978; and on July 12, 1978, ordered that the parties would have until July 21, 1978, to submit final briefs in the matter. The court's "Opinion and Order" is dated July 26, 1978, and was filed on July 27, 1978. In the opinion of this court it is stated: "The City's primary complaint as expressed

in its assignments of error is that the CIR had no authority to conduct its own investigation as to wage comparability after Union had failed to sustain its burden of proof on that issue, and because of such failure, the case should have been dismissed." The majority of the court agrees with that statement and disagrees with the findings made by the Court of Industrial Relations in its opinion to the effect that: "Where the parties have not presented evidence deemed sufficient properly to appraise the value of the particular labor before it, the court may *sua sponte* direct the production of other or different evidence in order that it may properly execute its duty to protect the public interest and reach an accurate conclusion. * * * Executing this duty as empowered by the Legislature under § 48-817, R. R. S. 1943, we have had data produced on the various job classifications in cities in the state operating their own generation plants and within a population range of 2,000 to 3,850 to add to petitioner's proffered comparables." After reciting the rule, with which we wholeheartedly agree, that the function of the CIR is to *settle* industrial disputes, the majority of this court concludes: "The result is that the CIR cannot, in a section 48-818, R. R. S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions. Therefore, we must disregard the evidence obtained by the CIR on its own motion and are left with findings not supported by substantial evidence, resulting in the entry of an unjustified order which is therefore arbitrary, capricious, and unreasonable."

It will be helpful at this point to review certain provisions of the Court of Industrial Relations Act, which we believe to be pertinent. Section 48-816, R. R. S. 1943, provides in part as follows: "The court shall have the authority (1) to make studies and analyses of, and act as a clearinghouse of informa-

tion relating to, conditions of employment of public employees throughout the state; (2) to request from any government, and such governments are authorized to provide, such assistance, services and data as will enable the board properly to carry out its functions and powers; (3) to conduct studies of problems involved in representation and negotiation, including, but not limited to, those subjects which are for determination solely by the appropriate legislative body, and make recommendations from time to time for legislation based upon the results of such studies; (4) to make available to employee organizations, governments, mediators, fact-finding boards and joint study committees established by governments and employee organizations statistical data relating to wages, benefits and employment practices in public and private employment applicable to various localities and occupations to assist them to resolve complex issues in negotiations; and (5) to establish, after consulting representatives of employee organizations and administrators of public services, panels of qualified persons broadly representative of the public to be available to serve as mediators or members of fact-finding boards." Lest it be argued that the foregoing statute is general in nature and does not permit investigations to be made for the purpose of providing necessary data to decide a case under consideration, we point out that the following section of the statutes, being section 48-817, provides as follows: *"After the hearing and investigation* the court shall make its findings and enter its order or orders in writing, which decision and order or orders shall be entered of record. Such order or orders shall be in effect from and after the date therein fixed by the court, but no such order or orders shall be retroactive. In the making of any findings or orders in connection with any such industrial dispute, the court shall give no consideration to any evidence or information which it may

obtain or receive, except matters of which the district court might take judicial notice, *unless such evidence or information is made a part of the record in said hearing and opportunity is given, after reasonable notice to all parties to the controversy, to rebut such evidence or information either by cross-examination or testimony.*" (Emphasis supplied.) In the instant case, it is clear that the results of the investigation by the CIR is made part of the record in this case, and opportunity was given to the parties to rebut the evidence or information. The opening lines of the paragraph clearly indicate that the investigation may be made after the hearing, so long as it is done before the court makes its findings and enters its order in the matter. Even if it were to be assumed, which I do not, that the statutes referred to are ambiguous and need interpretation, it is clear from the public policy involved in the act, as specifically stated in the statute, and also by specific statutory direction, that the statutes in question should be liberally construed to effect such public policy. We therefore review some of these provisions.

Section 48-802, R. R. S. 1943, provides: "To make operative the provisions of section 9, Article XV, of the Constitution of Nebraska, the public policy of the State of Nebraska is hereby declared to be as follows: * * * It is contrary to the public policy of the state to permit any substantial impairment or suspension of the operation of governmental service, * * * by reason of industrial disputes therein." Under section 48-803, R. R. S. 1943, it is clear that although called a court, the Court of Industrial Relations is actually an administrative agency, and is referred to as an "industrial commission." Section 48-810, R. R. S. 1943, provides that all industrial disputes involving governmental service shall be "settled" by invoking the jurisdiction of the Court of Industrial Relations. See, also, School Dist. of Seward Educa-

tion Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752 (1972). Section 48-812, R. R. S. 1943, provides: "Except as modified by the Court of Industrial Relations under the provisions of section 48-809 or other provisions of sections 48-801 to 48-823, proceedings before the court shall conform to the code of civil procedure applicable to the district courts of the state * * *." Pursuant to the above statutes, the Court of Industrial Relations has from time to time modified the general rules of civil procedure of the District Courts of the State of Nebraska and has adopted "Rules of Procedure Before the Nebraska Court of Industrial Relations;" for example, in Rule 4 thereof it has set out the requirements for various types of petitions filed in that court including what must be alleged in a petition in "Proceedings Under Section 48-818" to establish or alter wages, hours, and conditions of work.

Finally, we point out that the intention of the Legislature in adopting the statutes relating to the Court of Industrial Relations is clearly set out in section 48-823, R. R. S. 1943, which reads as follows: "The provisions of sections 48-801 to 48-823 and all grants of power, authority and jurisdiction herein made to the Court of Industrial Relations *shall be liberally construed* to effectuate the public policy enunciated in section 48-802. All incidental powers necessary to carry into effect the provisions of sections 48-801 to 48-823 are hereby granted to and conferred upon the court herein created." (Emphasis supplied.)

The construction given to the statutes referred to by the majority of the court in today's opinion is, in my opinion, anything but a liberal construction of such statutes and will cripple and impede the efficient operation of the Court of Industrial Relations and the beneficent purposes for which it was created. Any needed changes in the act should, in my opinion, be done by the Legislature, and not by this court.

WHITE, J., joins in this dissent.

ALLIANCE TRACTOR & IMPLEMENT COMPANY, A CORPORATION DOING BUSINESS AS CROWN MANUFACTURING COMPANY, APPELLEE AND CROSS-APPELLANT, V. LUKENS TOOL & DIE COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE.

281 N. W. 2d 778

Filed July 31, 1979. No. 42339.

1. **Judgments.** In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Uniform Commercial Code: Warranties.** Lost profits proximately caused by a seller's breach of warranty are consequential damages which may be recovered under section 2-715, U. C. C., if proof of such loss is sufficient.
3. **Damages: Evidence.** Loss of profits from a business may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof.
4. **Damages: Evidence: Sales.** Although in many instances lost profits from a new business are too speculative and conjectural to permit recovery of damages, where the evidence is available to furnish a reasonable certain factual basis for computation of probable losses, recovery cannot be denied even though a new business venture is involved.
5. **Appeal and Error: Trial.** The rule that the trial court, as well as this court, is bound by a legal principle once determined in a case does not apply to decisions rendered on questions of fact.

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

Harry Meister of Winner, Nichols & Meister, for appellant.

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

Heard before KRIVOSHA, C. J., CLINTON, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

HASTINGS, J.

Defendant appeals an award of damages in the amount of $92,986.77 in favor of plaintiff entered by the court on a jury-waived trial. This is the third

appearance of this case in this court. The two previous cases appear under the same title at 194 Neb. 473, 233 N. W. 2d 299 (1975), and 199 Neb. 489, 260 N. W. 2d 193 (1977), wherein the factual background is set forth. However, in a hopeful effort to facilitate an understanding of this rather complicated and protracted litigation, some of the facts will be repeated as well as supplemented by additions. The previous cases will be referred to as Case I and Case II.

Plaintiff had been involved in the farm implement and, to some extent, the manufacturing business in Alliance since 1950. Defendant was a manufacturing engineer operating in Gering. Plaintiff has sold at retail many hay rake teeth, but in early 1971, because of the difficulty in finding an adequate supply, became interested in manufacturing them itself. An agreement was entered into between the parties whereby defendant agreed to build a machine capable of turning out such teeth for which defendant was to be paid an agreed amount. The details of that agreement and facts leading up to the original lawsuit are set forth in detail in Case I.

The initial litigation was for damages to the plaintiff for breach of warranty, but the trial court found against the plaintiff and for the defendant on its cross-petition for the balance claimed to be owed defendant for the construction of the machine. On appeal this court reversed the judgment of the trial court and remanded for a new trial, specifically finding: (1) That there was no substantial performance by the defendant, and (2) that there was no waiver of performance by plaintiff.

Upon a retrial, Case II, the District Court sustained plaintiff's motion for summary judgment "to the extent that issues of substantial performance by the Defendant, acceptance by the Plaintiff or waiver, except waiver of the time of performance by the Plaintiff are now eliminated from the lawsuit." Subsequently, the remaining issue of damages was

tried to a jury resulting in a verdict in favor of plaintiff. Defendant's counterclaim for the balance due on the contract was not submitted. Defendant filed a motion for a new trial alleging errors in instructions as to the proper measure of damages, which was granted.

Plaintiff appealed to this court and we affirmed. We found first of all that plaintiff had accepted the machine sometime prior to May of 1974, in spite of its nonconformance, but that the jury was not instructed to determine any date or fact as to acceptance. We also said: "The jury was not instructed as to what constituted acceptance of nonconforming goods, nor that the measure of damages for breach of warranty is the difference *at the time and place of acceptance* between the value of the goods accepted and the value they would have had if they had been as warranted."

Following argument and submission of the case, the trial judge stated: "I do view the first opinion of the Nebraska Supreme Court as saying, in essence, that upon the record they saw, there was no doubt but what the machine that was put in the plant over at Alliance had never been demonstrated to do what the written contract said it was going to do, and they therefore said, in that event, the defendant is liable to the plaintiff for whatever damage resulted from that, in accordance with the rules of the Uniform Commercial Code." He then went on to announce from the bench his decision and reasons therefor, as follows:

(1) Plaintiff accepted the machine as nonconforming goods on November 14, 1973.

(2) The value of the machine if it had been as warranted was $40,000, the value, as it was, amounted to $25,563, or a difference of $14,437.

(3) There was no proof of incidental damages.

(4) Consequential damages resulting from loss of profits, limited to the year 1974, were $105,000.

(5) Because of changes made in the design of the machine at plaintiff's request, the contract price became $37,681.55 rather than the original $25,000, $15,000 of which plaintiff previously paid.

(6) Adding the damages set forth in items (2) and (4) above, less $3,768.68 realized by plaintiff from the sale of substandard teeth, less the remaining unpaid balance of $22,681.55 still due defendant on the contract under (5) above, plaintiff's total damages for breach of warranty are $92,986.77.

Defendant assigns 29 separate errors. However, many of them are repetitious and redundant. Generally, they may be condensed into: (1) A request to reconsider our decision in Case I regarding waiver of performance by the plaintiff; (2) disagreement as to the date of acceptance; (3) insufficiency of the evidence to support a judgment for loss of profits; and (4) failure to find that plaintiff did not "cover" within the meaning of section 2-712 (1), U. C. C.

In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. McDowell Road Associates v. Barnes, 198 Neb. 207, 252 N. W. 2d 151 (1977). With this in mind it is necessary to examine some of the testimony.

Regarding waiver of performance, the additional evidence of the second and third trials added nothing substantial to that upon which our conclusions in Case I were based. There we said "the evidence indicated that the longest the equipment ever operated on any day without a major breakdown was * * * less than 5 hours on a day when 580 teeth were produced. There is no evidence in the record from which the court could infer that the plaintiff waived compliance * * * which required * * * a machine that would produce 100 rake teeth per hour for 100 hours. Evidence indicates the rake tooth manufactured did not

conform in one specific area to the specifications. * * * The plaintiff has a machine not yet operable, and of no benefit to him until it is so. We find no substantial performance. * * * Lukens, is not now in a position to claim that the modifications suggested and executed by the man he recommended to the plaintiff relieved him from his own obligation to fulfill his contract." Alliance Tractor & Implement Co. v. Lukens Tool & Die Co., 194 Neb. 473, 233 N. W. 2d 299 (1975). This was based on evidence adduced at a trial in April of 1974. Subsequent evidence revealed that although defendant continued to contend that the machine could be made operable in a matter of a few weeks, the fact remained that he had been unable to do so. There is no merit to defendant's claims that plaintiff waived performance or that the defendant had fully performed.

Without going into detail, the record is replete with evidence that plaintiff tried again and again to get the defendant to make the machine operable. Section 2-606, U. C. C., provides in part that after a reasonable opportunity to inspect the goods, acceptance of the goods occurs when the buyer signifies to the seller that the goods are conforming, or that he will take or retain them in spite of their nonconformity. Defendant urges that the date of acceptance was April 28, 1972, when all of the machinery had been delivered to the plaintiff. However, the evidence is undisputed that after this date portions of it had been returned to the defendant for further alterations or modifications and according to plaintiff's evidence, at least, this was because it didn't conform to specifications. It is also without dispute that sometime in the spring of 1973 the plaintiff filed a replevin action to have the machinery returned to it. The evidence is somewhat less than precise when plaintiff actually regained possession and unequivocally accepted it as nonconforming. The trial judge made a finding based on a motion filed by the

plaintiff on November 14, 1973, stating that was the date of acceptance. This is a finding of fact based on disputed evidence and, not being clearly wrong, will not be disturbed.

Defendant attacks the evidence as to lost profits as being insufficient and speculative. Plaintiff's evidence through Gordon J. Keeley, one of its two principal stockholders, was that it had been selling rake teeth for many years as a retailer. It had also done some manufacturing in years past, but not of this particular nature. In 1971 the availability of rake teeth had become curtailed primarily because one or both of the only two sources of manufacturing in the North American continent had temporarily, at least, discontinued making them. Based upon Keeley's knowledge of the market and the production capacity of the machine as suggested by defendant, plaintiff projected the manufacture and sale of 100,000 teeth in 1972, 133,000 in 1973, 150,000 in 1974, and 100,000 in 1975. Keeley calculated the costs of production at 70 cents per tooth and estimated the sale price at $1.40. Actually, at the time of his testimony in 1976, teeth were selling for something over $3.

Supportive of Keeley's testimony was that of Freeman Rowse, a manufacturer of hay rakes in Burwell, Nebraska, who had been, or still was, one of plaintiff's several rake teeth customers. He said that in 1973 he had purchased 64,000 teeth for use in his business, had 150,000 on order for the year 1974, but that International Harvester and Beal, the only two sources available, could not furnish his demands. He said that they had only received 30,000. He testified that as of April 1974 he would purchase 25,000 teeth from plaintiff if they would meet specifications.

Defendant's own testimony was perhaps even more favorable to the plaintiff. First of all, he felt the plaintiff's evidence as to cost of each unit was

too high, and even spoke in terms of 40 or 45 cents per tooth, but that the 70-cent cost was very reasonable as was the projected sale price of $1.40 per tooth. As of 1971, he had spent many hours surveying the market and he felt plaintiff "had a straight shot to success," that he could sell "a million of them if he wanted to make them." He said the same market conditions prevailed in 1973 and that 1974 was even worse, meaning it was getting more difficult to find a source of supply for rake teeth.

"Lost profits, proximately caused by a seller's breach of warranty, are consequential damages which may be recovered under section 2-715, U. C. C., if proof of such loss is sufficient. * * *

"Roto-Flex cites the general rule that lost profits of a new business may not be recovered because such damages are too speculative and conjectural. * * * The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor, however, 'is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty *both* their *occurrence* and the *extent* thereof * * * Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery, but uncertainty as to *amount* is not.' * * * Therefore, although in many, if not most, instances lost profits from a new business are too speculative and conjectural to permit recovery of damages, 'where the evidence is available to furnish a reasonable certain factual basis for computation of probable losses, recovery of lost profits cannot be denied, even though a new business venture is involved.' " El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 199 Neb. 697, 261 N. W. 2d 358 (1978).

In the first place, this was not altogether a new business. Rather, it would appear to be more a new source of supply merged with an established distribution system for the same product. Beyond that,

we do feel that the evidence, if believable, was sufficient to furnish a reasonable certain factual basis for the computation of probable losses. This was a fact question which the trier of fact resolved in favor of the plaintiff.

Whether defendant's claimed error regarding plaintiff's failure to "cover" is available to him because not pleaded as an affirmative defense is of no consequence. This is true because it was considered, it was a factual question, and the trial court did find that the damages for loss of profits were limited to the year 1974 because "the buyer could have reasonably prevented any additional losses by cover."

The remaining errors claimed by the defendant have been examined and found to be without merit.

Plaintiff has cross-appealed complaining that the trial court erred in not awarding incidental damages and in finding a modification of the terms of the contract supporting a payment to defendant of more than the original $25,000 contract price. Additionally, the plaintiff claims the trial court further erred in departing from the law of the case in Case I where we said that "All of the efforts of the parties were directed in an attempt to make the machine operate" and therefore none of defendant's activities were in connection with any agreed modification. The answer to both of these allegations is that factual questions were presented which were resolved in favor of the defendant. Additionally, as to the second contention, "The rule that the trial court, as well as this court, is bound by a legal principle once determined in a case does not apply to decisions rendered on questions of fact." System Meat Co. v. Stewart, 190 Neb. 682, 211 N. W. 2d 902 (1973).

The findings of the trial court are not clearly wrong and therefore its action and judgment are affirmed.

AFFIRMED.

MURPHY, District Judge, dissents.

RICHARD N. GATES AND BETTY B. GATES, APPELLANTS, V. SAM J. HOWELL ET AL., APPELLEES.

282 N. W. 2d 22

Filed July 31, 1979. No. 42347.

1. **Taxation: Legislature.** The Legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, and the constitutional rule of uniformity requires that all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law.
2. **Taxation.** Taxes on all tangible personal property are to be levied by valuation uniformly and proportionately except as otherwise specifically exempted.
3. **Taxation: Constitutional Law.** The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Article VIII, section 1, of the Constitution of the State of Nebraska.
4. **Legislature: Police Power: Property.** The Legislature may, in the exercise of its police power, prescribe reasonable regulations for the ownership of personal property, including the manner in which it is titled.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions.

Vard R. Johnson, for appellants.

Paul L. Douglas, Attorney General, Ralph H. Gillan, Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer, for appellees.

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

KRIVOSHA, C. J.

By this appeal the State urges us to declare that a "house is not a home;" or more specifically, to determine that a mobile home 24 feet wide and 60 feet long, containing approximately 1,400 square feet, with 3 bedrooms, a kitchen, living room, dining room, 1¾ baths, fully air-conditioned, and carpeted, is properly defined as "a motor vehicle" under the

provisions of section 77-1238, R. R. S. 1943, and as such may be assessed and taxed as a motor vehicle under the provisions of sections 77-1239 to 77-1242.02, R. R. S. 1943, as amended.

Plaintiffs, who are owners of a 1972 Marlette mobile home located in Douglas County, Nebraska, filed their petition in the District Court for Douglas County, Nebraska, seeking, among other things, to have the provisions of sections 77-1238 to 77-1241, R. R. S. 1943, insofar as they applied to plaintiffs' mobile home, declared to be in violation of Article VIII, section 1, of the Constitution of the State of Nebraska, and to further enjoin the collection of such taxes as assessed and levied upon plaintiffs' mobile home pursuant to sections 77-1239 to 77-1241, R. R. S. 1943. The various defendants filed answers generally denying the allegations of the petition and praying that the action be dismissed.

Prior to trial it was stipulated and agreed by the parties that the plaintiffs were residents of Omaha, Douglas County, Nebraska, and the owners of the mobile home as defined in section 60-1601.01, R. R. S. 1943, and described in the petition. It was further stipulated by the parties that the plaintiffs had standing to bring the action on behalf of themselves and all other taxpayers owning mobile homes similarly situated.

After trial the District Court entered its order upholding the constitutionality of taxing mobile homes as motor vehicles under the provisions of sections 77-1239 to 77-1241, R. R. S. 1943, and dismissed plaintiffs' petition. Plaintiffs perfected their appeal to this court setting forth a number of assignments of error, including a claim that taxing mobile homes as motor vehicles under the provisions of sections 77-1239 to 77-1241, R. R. S. 1943, was in violation of Article VIII, section 1, of the Constitution of the State of Nebraska. We agree with the plaintiffs' contention in that regard and find that a mobile home is not a

motor vehicle within the exception provided in Article VIII, section 1, of the Constitution of the State of Nebraska. Therefore, such structure may not be taxed as a motor vehicle due to the fact that such method of taxation results in the mobile home being taxed nonuniformly and disproportionately to all other personal property. Because of that determination, we need not consider other assignments of error raised by the plaintiffs.

While the problem involved in this appeal is of extreme importance, the resolution of the question is not necessarily complicated. Unless we can find and declare that a "mobile home" is in fact a "motor vehicle," the Legislature is prohibited from taxing a mobile home in the same manner as a motor vehicle and different than all other personal property. Merely including a mobile home within the definition of motor vehicle is insufficient. An examination of Article VIII, section 1, of the Constitution of the State of Nebraska, makes such a conclusion apparent and mandatory. Article VIII, section 1, of the Constitution of the State of Nebraska, provides, in part, as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide a different method of taxing motor vehicles * * *."

Prior to 1952, Article VIII, section 1, of the Constitution of the State of Nebraska, contained no exceptions, and provided as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon

all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature."

The language of Article VIII, section 1, of the Constitution of the State of Nebraska, has oftentimes been reviewed by this court. In each instance, we have clearly and unequivocally found that the provisions of Article VIII, section 1, require not only that the valuation of property for taxation be uniform, but the rate as well. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. In that case we said: "In every instance where this court has spoken upon the subject, it has been determined that the legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, but that the constitutional rule of uniformity requires all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law. This doctrine is entirely sound, and the language of the constitutional provision we have been considering will not authorize or permit any other or different interpretation." To the same effect, see, State v. Savage, 65 Neb. 714, 91 N. W. 716; High School District v. Lancaster County, 60 Neb. 147, 82 N. W. 380.

It is therefore clear that under the provisions of Article VIII, section 1, of the Constitution of the State of Nebraska, as it existed prior to 1952, *all* tangible personal property, including motor vehicles, was required to be valued and taxed uniformly and proportionately.

In 1952, the people of the State of Nebraska amended Article VIII, section 1, of the Constitution of the State of Nebraska, by providing the exception with regard to motor vehicles, and authorizing the Legislature to provide for a different method of taxing motor vehicles.

It was this basic amendment made in 1952 which

has resulted in motor vehicles being assessed and taxed in a different manner from other personal property as now prescribed in sections 77-1238 through 77-1242.02, R. R. S. 1943, as amended.

The differences between the taxation of motor vehicles and all other personal property are significant. All personal property subject to taxation other than motor vehicles and those items of personal property further specifically exempted under subsequent amendments to Article VIII, section 1, is valued for purposes of taxation as of January 1 of each year, section 77-1201, R. R. S. 1943, and shall be valued at its actual value which shall then be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. On or before September 1 of each year, the county board of equalization then levies the necessary taxes for the current year, which taxes then become due and owing on December 1 of the assessment year. § 77-1601, R. R. S. 1943.

Motor vehicles on the other hand are assessed on the basis of a schedule of actual values prepared by the Tax Commissioner. § 77-1239, R. S. Supp., 1978. Taxes are assessed and collected at the time the motor vehicle is registered based upon a tax equal to the ad valorem rate for all purposes for the *preceding* year in the several taxing units of the state in which the motor vehicle has tax situs. § 77-1240.01, R. R. S. 1943. Moreover, upon the transfer of ownership of any motor vehicle, the transferor shall be credited with the number of unexpired months remaining in the registration period and shall receive a refund back for such unused tax. § 77-1240.03, R. R. S. 1943. No similar provision is made with regard to other personal property.

It is therefore clear that the method of taxation and perhaps even the manner of assessment between motor vehicles and all other personal property is different and is not uniform. But for the exemptions specifically provided for in Article VIII,

section 1, of the Constitution of the State of Nebraska, for motor vehicles, such procedure would be totally invalid in that taxes on all tangible personal property are to be levied by valuation uniformly and proportionately except as otherwise specifically exempted. See, Grainger Brothers Co. v. Board of Equalization, 180 Neb. 571, 144 N. W. 2d 161; Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650; H/K Company v. Board of Equalization, 175 Neb. 268, 121 N. W. 2d 382; State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N. W. 2d 596. The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Article VIII, section 1, of the Constitution of the State of Nebraska. First Nat. Bank & Trust Co. v. County of Lancaster, 177 Neb. 390, 128 N. W. 2d 820; State ex rel. Meyer v. McNeil, *supra.*

The State argues that the purpose of amending Article VIII, section 1, of the Constitution of the State of Nebraska, was to grant the Legislature wide discretion in both defining motor vehicles and in determining what items of personal property may be included as a motor vehicle and thus taxed differently from other personal property.

Both a reading of the legislative history preceding the amendment in 1952 to Article VIII, section 1, of the Constitution, and a plain reading of the words "motor vehicles" makes it manifestly clear that the people of the State of Nebraska, in amending Article VIII, section 1, did not intend to include mobile homes as a motor vehicle. The legislative history discloses that the purpose of the amendment was to permit the state to design a taxing method for motor vehicles which would prevent losses from nomad or transient owners. It was also stated that under the law as it existed prior to the amendment, it was possible for the owners of motor vehicles to own the vehicles for up to 21 months without the payment

of any tax. Nothing was said about mobile homes.

The evidence in this case discloses that the mobile homes in question resemble in all respects a residence. A double-wide inevitably consists of a unit which is basically two pieces that fit together and form a mobile home approximately 24 feet wide.

While it is true that single-wides and double-wides may contain axles and tires that allow them to be towed, usually by special vehicles, to the place where they are located, once they are placed upon their permanent pads the axles and wheels are usually removed and the mobile home becomes immobile. It is likewise true, with regard to the double-wides, that when being towed they are separated and open to the elements on one side except for perhaps a plastic cover. Each half is separately transported and could not in any manner be used while being conveyed as a motor vehicle or trailer. Likewise, single-wides, when being transferred, are not at all self-contained units, and could not be operated or used as a trailer.

At their location they are removed from the axles and wheels and placed on concrete pads and piers each about 6 to 7 feet apart. In addition, with units constructed during the last 3 years, hurricane bands built into the walls of the units are anchored with bolts augered 3 to 4 feet into the ground.

Until they are put in place and made immobile, there are no utilities which operate, and once put in place and made immobile, they are often skirted around their bases. According to the plaintiffs' witness, between 75 and 80 percent of mobile homes once located are never moved. When they are moved, it takes approximately 3 days to dismantle the mobile home and set it up for moving, and several more days to replace it in its new location. At present prices moving expenses will range from $500 for a single-wide, to $1,000 for a double-wide.

The evidence in this record further discloses that

the interiors of these mobile homes resemble a residence in every respect, and one looking at the exhibits disclosing the interior of these mobile homes, if not advised that in fact they were mobile homes, would not be able to distinguish them from any other residence. They are not in any stretch of the imagination a motor vehicle.

Courts which have been called upon to examine the meaning of the word "motor vehicle" have likewise, almost without exception, concluded that a motor vehicle is a self-propelled vehicle designed for, intended to be used for, or actually used to transport persons and property over roads and highways. See, International Ins. Co. in N. Y. v. Hensley Steel Co., Inc., 497 S. W. 2d 64 (Tex. Civ. App., 1973); Travelers Insurance Company v. Elkins, 468 S. W. 2d 487 (Tex. Civ. App., 1971).

Black's Law Dictionary, (4th Ed., 1968), defines a motor vehicle as "[A]ny self-propelled 'vehicle,' defined as including every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human or muscular power or used exclusively upon stationary rails or tracks." Almost without exception the plain meaning of the word "motor vehicle" implies that the device in some manner be a self-propelled wheeled conveyance. See, Webster's Third International Dictionary, p. 1476 (1968); American Heritage Dictionary, p. 857 (1969).

Furthermore, it appears that notwithstanding the Legislature's attempt to prescribe a particular method of taxing mobile homes as motor vehicles, the Legislature has nonetheless recognized that mobile homes are in fact residences and not motor vehicles. Article VIII, section 2, of the Constitution, provides: "The Legislature may by general law provide that a portion of the value of any residence actually occupied as a homestead by any classification of owners as determined by the Legislature

shall be exempt from taxation." Pursuant to that authority, the Legislature has adopted section 77-202.12, R. S. Supp., 1978, defining homestead to mean: "* * * either (a) a residence *or mobile home,* and the land surrounding it, not exceeding one acre, in this state actually occupied as such by a natural person * * *, or (b) a residence *or mobile home* located on land leased by the owner of the residence or mobile home, which is located within this state, and is actually occupied by the person * * *." (Emphasis supplied.) The owner of a mobile home is thus granted a homestead exemption in the same manner as the owner of a home. How can it be suggested for a moment that the owner of a motor vehicle is entitled to a homestead exemption?

No one can seriously contend that these mobile homes are anything other than a residence, and if placed on one's own land as opposed to leased land, would be considered as real estate. § 60-1601.01, R. R. S. 1943. The conclusion that the Legislature exceeded its authority in defining a mobile home as a motor vehicle is inescapable. Having reached that conclusion, we must further determine that mobile homes must be assessed and taxed uniformly and proportionately with all other personal property and may not therefore be taxed in the manner prescribed by sections 77-1238 to 77-1242.02, R. R. S. 1943, as amended. For that reason we must find and determine that the provisions of sections 77-1238 through 77-1242.02, insofar as they include mobile homes within the definition of motor vehicles, are void and unenforceable.

Two other somewhat related matters are raised in this appeal which deserve comment.

The State on the one hand argues that a mobile home is a motor vehicle because it is initially titled through a manufacturer's certificate of title and ultimately registered to the owner through a certificate of title, much like a motor vehicle. The manner in

which evidence of ownership is established cannot alter the Constitution of this state.

The Legislature may in the exercise of its police power prescribe reasonable regulations for the ownership of personal property, including the manner in which it is titled. Taylor v. Karrer, 196 Neb. 581, 244 N. W. 2d 201; State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N. W. 2d 726. The manner in which proof of ownership is established, however, does not permit the Legislature to make any item of personal property what it is not, and thereby avoid the requirements of Article VIII, section 1, of the Constitution of the State of Nebraska, with regard to uniformity. The simple permitted act of requiring a boat, for instance, to have a certificate of title would not make the boat a motor vehicle. Likewise, permitting ownership of a mobile home to be established by a certificate of title does not make it a motor vehicle.

The plaintiffs on the other hand argue that imposing a requirement that an owner of a mobile home pay a fee of $2.50 to obtain a permit for a mobile home also violates Article VIII, section 1, and Article III, section 18, of the Constitution of the State of Nebraska. We think not.

Under the provisions of Article VIII, section 2, of the Constitution of the State of Nebraska, the Legislature may establish reasonable classes of personal property. Putting all mobile homes in a separate class of personal property appears to us to be reasonable. Taylor v. Karrer, *supra*; State ex rel. Rogers v. Swanson, *supra*. We believe that the trial court correctly found that the requirement of obtaining a permit for a mobile home was an exercise of the police power and not the taxing power of the state. Often items of personal property are required to be registered. One such class which quickly comes to mind is boats. The purpose of requiring registration, however, is not for the purpose of rais-

ing revenue, but rather for the purpose of fulfilling the lawful authority of the state with regard to the public health, safety, and welfare. We find nothing wrong with the state requiring the registration of mobile homes and the assessing of a reasonable fee to defray the costs of registration and inspection, if any. State v. Phillips, 133 Neb. 209, 274 N. W. 459; Littlefield v. State, 42 Neb. 223, 60 N. W. 724.

The judgment of the trial court, therefore, is reversed and the cause remanded with directions to enter a judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. MAYHEW PRODUCTS CORPORATION, APPELLANT.

281 N. W. 2d 783

Filed July 31, 1979. No. 42392.

Statutes: Highways: Police Power. Sections 39-1320 to 39-1320.11, R. R. S. 1943, making it unlawful to erect or maintain certain advertising signs along the Interstate and other highways, constitute a reasonable and valid exercise of the police power which bears a substantial relation to the public health, safety, and general welfare, and those statutes are constitutional.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

R. Steven Geshell of Robak and Geshell, for appellant.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr. and Randall E. Sims, for appellee.

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

MCCOWN, J.

The plaintiff, State of Nebraska, Department of Roads, brought this action against the defendant for

a mandatory injunction requiring defendant to remove an outdoor advertising sign located within 660 feet of the right-of-way of an interstate highway. The District Court found generally in favor of the plaintiff, granted the injunction, and ordered the defendant to remove the sign. The defendant has appealed.

This proceeding was filed July 18, 1972. The case was tried to the District Court in 1978 on a stipulation of facts. On July 15, 1970, Elizabeth Opp, the owner of the land upon which the sign was located, executed a written agreement granting the defendant the right to erect and maintain advertising signs upon the land for a period of 5 years. On January 25, 1972, defendant entered into a contract with Masten's Campers Haven to prepare and erect an outdoor advertising display on the site. Construction of the sign began on February 2, 1972, and actual installation on the site began on March 21, 1972. As of March 27, 1972, the four support poles and two crossbars had been erected and installed. No facing, trim, ornamentation, or lighting had been attached to the poles as of that date. By April 20, 1972, the Masten sign was in place and completed except for lighting. The sign is within 660 feet of the right-of-way of Interstate Highway No. 80, and the sign has been maintained there since its erection.

L.B. 1181, Laws of 1972, now section 39-1320 et seq., R. R. S. 1943, became effective March 27, 1972, and, among other things, made it unlawful to place advertising signs along any interstate highway without a written permit from the Department of Roads. Violation of any of the provisions of the act is a misdemeanor. The act also contained exceptions for advertising signs lawfully erected or in existence prior to March 27, 1972, and authorized the Department of Roads to acquire or condemn interests in real or personal property necessary to exercise the power granted to it under L.B. 1181.

No permit for the erection of the sign involved here has been requested or acquired by the defendant from the department, and notice to remove the sign was given to the defendant on April 27, 1972. The Department of Roads has not instituted any condemnation action against the defendant, Mayhew Products Corp., or Opp, or Masten's Campers Haven.

On May 3, 1978, the District Court found generally in favor of the plaintiff, granted an injunction "until such time as defendant complies with L.B. 1181," and ordered the defendant to remove the sign within 30 days.

Defendant contends that sections 39-1320 to 39-1320.11, R. R. S. 1943, inclusive, are unconstitutional as applied to the defendant. Defendant asserts that the statutes constitute a taking of property without just compensation, deprive defendant of property without due process of law, impair the obligation of contracts, and impose retroactive provisions constituting ex post facto laws. We disagree.

The statutes involved here were adopted by the State of Nebraska to obtain the financial incentives provided by the federal Highway Beautification Act of 1965, as amended. 23 U. S. C., § 131. Virtually all judicial opinions passing upon the constitutionality of legislative restrictions on highway advertising structures enacted to comply with the federal statutes have held that such statutes constitute a reasonable and valid exercise of the police power which bears a substantial relation to the public health, safety, and general welfare. The constitutionality of such statutes has been maintained as against all of the contentions raised by the defendant here. See Annotation, Validity and Construction of State or Local Regulation Prohibiting the Erection or Maintenance of Advertising Structures Within a Specified Distance of Street or Highway, 81 A. L. R. 3d 564. See, also, Yarbrough v. Ark. State Hwy. Comm'n., 260 Ark. 161, 539 S. W. 2d 419 (1976); Mississippi State

Highway Com'n. v. Roberts Ent., Inc., 304 So. 2d 637 (Miss., 1974); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P. 2d 248 (1968). The latter case points out that the exercise of reasonable restrictions under the police power does not constitutionally require the payment of compensation and that almost half of the states which have enacted legislation under the federal authorization have made no provision for payment of compensation under their statutes.

Section 39-1320.01, R. R. S. 1943, authorizes condemnation and requires payment of just compensation for the removal of outdoor advertising signs, displays, and devices "lawfully erected or in existence prior to March 27, 1972, and not conforming to the provisions of this act except as otherwise authorized by this act; * * *."

In the present case a major issue was whether the particular sign involved here was "lawfully erected or in existence prior to March 27, 1972." The District Court found generally for the plaintiff, but made no specific finding on the factual issue of whether the sign was in existence prior to March 27, 1972. If it was, compensation would be due under the statute upon any taking or damaging; otherwise it would not.

The Nebraska act states that it is intended to comply with the provisions of 23 United States Code 131, as amended. Title 23, U. S. C., section 131 (e), provides: "Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming." The 5-year period was intended as an amortization provision. It should be

noted in the case now before us that the sign involved, even if lawfully erected, has now been maintained in place as a nonconforming sign for a period of more than 7 years. At the latest, the sign involved here became nonconforming in April 1972, when its erection was complete, regardless of whether its erection was lawful or unlawful at the time.

We hold that the provisions of sections 39-1320 to 39-1320.11, R. R. S. 1943, constitute a reasonable and valid exercise of the police power which bears a substantial relation to the public health, safety, and general welfare, and that the statutes are constitutional.

L.B. 40 of the 1977 legislative session, operative January 1, 1979, added the following language to the provisions of section 39-1320.10, R. R. S. 1943: "In addition to any other available remedies, the Director-State Engineer, for the department and in the name of the State of Nebraska, may apply to the district court having jurisdiction for an injunction to force compliance with any of the provisions of this act or rules and regulations promulgated thereunder. When any person, firm, company, or corporation deems its property rights have been adversely affected by the application of the provisions of this act, such person, firm, company, or corporation shall have the right to have damages ascertained and determined pursuant to the provisions of Chapter 76, article 7." "[T]his act" refers to the statutes under challenge here, and Chapter 76, article 7, contains the statutes relative to eminent domain.

Section 76-705, R. R. S. 1943, provides: "If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages

ascertained and determined." Obviously, there has been no taking or damaging of defendant's property as yet, and there will be none until the injunctive relief granted by the District Court is carried out. It is also clear, under the present provisions of section 39-1320.10, that an injunction may properly be entered to require compliance with the act prior to the determination of whether any person has, or does not have, a right to damages resulting from the application of the provisions of the act.

For purposes of the eminent domain provisions, the effective date of the injunction must be regarded as the date of any taking or damaging, if there is any right to compensation for any such taking or damaging. In this case the effective date of the injunction granted will now be the date of issuance of the mandate of this court.

Except for such modification in date, the order of the District Court is affirmed. If the defendant can establish that the sign here was lawfully erected or in existence prior to March 27, 1972, the remedy of inverse condemnation is available.

AFFIRMED.

CARLETON PETTIJOHN, JR., APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT AND CROSS-APPELLEE.

281 N. W. 2d 901

Filed August 7, 1979. No. 41977.

1. **Public Lands: Trusts.** The Board of Educational Lands and Funds, as a trustee, acts in a representative capacity and persons dealing with it are bound to be cognizant of its powers.
2. **Public Lands: Words and Phrases.** The value to the land means that amount of money that the improvement enhances, contributes, increases, or adds to the value of the land.
3. _____: _____. In arriving at the value to the land of an improve-

ment, consideration should be given to its functional use, location on the land, utility, obsolescence, overbuilding or want of use, state of repair, cost to the lessee less depreciation, adaptability, and all other facts and circumstances shown by the evidence that are not speculative that relate to any purpose for which the improvement is reasonably useful to the unimproved land at the time of determination, or which will become so useful in the near future.

4. **Public Lands: Leases: Words and Phrases.** The measure of lessee's compensable interest in the improvements should be determined as follows: First, determine the fair market value of the school land with only the improvements whose values are disputed. Then, determine the fair market value of the school land without any improvements owned by the lessee. The difference (remainder) between these two values is the value to the land of the lessee's compensable interest in the disputed improvements. Insofar as this rule is contrary to State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769, that case is overruled.
5. **Public Lands: Statutes: Attorney's Fees.** In proceedings under section 72-240.02 et seq., R. R. S. 1943, the trial court is without authority to fix appraiser fees and attorney's fees to be taxed against the Board of Educational Lands and Funds.

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

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

Forrest F. Peetz of Magnuson, Magnuson & Peetz, for appellee.

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

PER CURIAM.

Defendant, State of Nebraska Board of Educational Lands and Funds (Board), appeals from a jury verdict in the District Court for Brown County, Nebraska, determining $14,700 as the value of permitted improvements owned by lessee-plaintiff, Carleton Pettijohn, Jr., as located on leased school lands being sold by the Board. Defendant claims as error: (1) The admission of evidence of a value of improvements other than the contributory value of

the improvements to the land; (2) refusal, as evidence of impeachment, of plaintiff's personal property tax schedule; (3) refusal of defendant's tendered instructions; and (4) awarding attorney's fees and appraiser fees. Plaintiff cross-appeals claiming the court erred in striking certain improvements as not compensable.

Plaintiff is the county assessor of Brown County, Nebraska, and holder of a school land lease of 76.90 acres of pastureland adjacent to a railroad right-of-way near Long Pine, Brown County, Nebraska.

The annual rental is $112.80. Some of the improvements were built as a stockyard loading facility prior to 1934 when plaintiff's father purchased them for an unknown consideration; he died in 1958. In 1964, plaintiff and his mother became the lessees as joint tenants under the present lease, expiring December 31, 1975; she died in 1968. There is evidence of overbuilding and improvement for the special use and benefit of the plaintiff in that he uses the land as improved as headquarters for his cattle ranching operation, which includes 1,850 acres of adjoining pastureland that he owns and other leased land.

This proceeding has origin in sections 72-240.07 to 72-240.24, inclusive, R. R. S. 1943. Pursuant to section 72-240.11, R. R. S. 1943, the Board prepared a list of permitted improvements as agreed by the parties, including a house, garage, bunkhouse, barn, stock well, jet pump, automatic waterer, U. G. Pipe, fencing - 400 rods, corrals, pipe gates, and chute. The parties were unable to agree as to values and defendant applied to the county court to determine their value. § 72-240.13, R. R. S. 1943. The appraisers found the improvements had a value of $17,250. Defendant appealed to the District Court where the jury returned a $15,700 verdict on December 3, 1977, assigning separate values for each improvement. At the beginning of the trial, defendant

moved to strike the stock well, jet pump, automatic waterer, and U. G. pipe as being nonpermitted improvements; the motion was granted after the jury verdict; and the jury verdict was reduced by $1,000, which was the assigned value for those four improvements. The trial court awarded plaintiff attorney's fees of $2,750 and $150 each for two appraisers.

The origin, history, and development of the law in school land cases has been reviewed many times. See State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2d 520 (1951); Banks v. State, 181 Neb. 106, 147 N. W. 2d 132 (1966); State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769 (1972).

Structural improvements erected by a lessee on school lands (now permitted improvements) are the property of the lessee with the right of removal. § 72-240.07, R. R. S. 1943. Prior to 1965, at the termination of the lease, the lessee had the option to remove the improvements or sell them to the new lessee. In 1965, section 72-257, R. R. S. 1943, gave authority to the Board to sell school lands. The lessee now has the right to either remove or to sell the improvements to the buyer of the land. In the latter event, the lessee's interest is described as a compensable interest to be determined by statutory procedures as it has value to the land. See Banks v. State, *supra*.

The main question here is the proper measure of lessee's compensable interest in permitted improvements. Plaintiff contends section 72-240.18 (1), R. R. S. 1943, as given by the court in instruction No. 3, set out below, properly states the rule. We think this contention is met by Friehe v. State, 199 Neb. 504, 259 N. W. 2d 925 (1977), interpreting section 72-240.18 (2), R. R. S. 1943, in which we held that cost was only one factor in determining the value of crops and that the appraisers should consider all factors which would normally enter into the determination of

value. Defendant contends that cost means the lessee's actual cost, claiming as authority State v. Rosenberger, *supra*.

"The public school lands of the state are trust property and the state is required to administer them as such for the benefit of the common schools of the state. * * * The power to lease the public school lands of the state rests with the Board of Educational Lands and Funds in the manner provided by the Legislature. * * * A trustee acts in a representative capacity and persons dealing with him are bound to be cognizant of his powers. * * *." State ex rel. Ebke v. Board of Educational Lands and Funds, *supra*.

As will be noted later, parts of the concurring opinion of Carter, J., in Banks bear special attention: "The interest of the lessee is therefore a limited title or, what would probably be more accurate, a compensable interest in the improvements on the leased lands. * * * The Legislature is authorized to provide by statute the terms upon which the public school lands of the state may be sold, but such terms must be consonant with the duties and functions of a trustee acting in a fiduciary capacity. It is the duty and function of a trustee to avoid unnecessary risks of loss and at the same time to obtain a maximum return to the trust estate consistent with the avoidance of such risks. * * * The more important issue is the determination of the compensable interest of the lessee and the type of evidence required to support a judgment.

"I am of the opinion that the cost of the improvements to the occupying lessee is generally of little evidentiary value, although it may constitute a maximum that may be recovered. The determination of the value of improvements on a cost basis overlooks depreciation, obsolescence, overimprovement, and a possible want of benefit to the land. Some of the improvements listed by the statute may be paid for in

whole or in part by the government as a matter of public policy, and should not accrue to the benefit of the occupying lessee. Certainly any value added to the land itself, as distinguished from the actual value of the improvements, is the property of the trustee. The compensable interest of the lessee should not be permitted to exceed the value of the improvements to the land at the time of the termination of the occupying tenant's lease. Compensation for improvements must be consistent with the overall purpose, spirit, and public policy involved. Any judgment which in effect invades the trust res cannot be sustained."

L. B. 704 (1967) was the Legislature's direct response to State v. Banks, *supra*, amending applicable statutes to provide guidelines for the Board and the lessees of school lands to arrive at the value of the lessee's compensable interest in their improvements on the school land which throughout the statute is described as "the value to the land of permitted improvements and growing crops * * *." § 72-240.10, R. R. S. 1943. The legislative history refers to Judge Carter's concurring opinion, and shows an effort was made by that body to meet the Banks' decision and the request of the Board of Educational Lands and Funds for procedural guidelines. Senator Ramey Whitney, cointroducer of the bill, said: "The purpose of LB 704 is to set up guidelines for the appraisal of the improvements on state school lands when the land is sold or leased. The appraisal methods are in accord with the recent decisions of the Nebraska Supreme Court, which will protect the value of the trust. * * * The appraised values are intended not to exceed the value which the improvements add to the value of the land. * * * But in determining value of all improvements, including growing crops, *the appraisers may consider any evidence given them as to value in determining the actual value of improvements.* However, the actual

value of improvements shall be determined by considering the improvements in question as a part of the school land unit and not as if severed from the realty." (Emphasis supplied.)

"Where an occupying claimant is allowed [to recover] for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same. * * * The report before us plainly indicates that the appraisers were attempting to fix the actual cost of the improvements placed on the land, and this, standing alone, is not sufficient evidence on which to make a finding as to the enhancement of the value of the land by reason of the improvements." Gombert v. Lyon, 72 Neb. 319, 100 N. W. 414. See, also, Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138.

"As a general rule, the cost of an improvement is a proper factor for consideration in determining its value to the property. But ordinarily a finding of value cannot be sustained on evidence of cost alone." 41 Am. Jur. 2d, Improvements, § 30, p. 500; 24 A. L. R. 2d 11, at p. 37.

Since many of the improvements in this case were old and there was no available proof of cost either by lessee or other source, both parties used the reproduction cost less depreciation method of establishing value. Plaintiff's experts used that amount as the market value of the improvement which they then testified as being its value to the land. Defendant did not object. But the market value of an improvement standing alone is not its value to the land.

The court gave instruction No. 3: "The jury shall determine the value to the land of the permitted improvement, to-wit: 1. House. 2. Garage. 3. Bunk house. 4. Barn. 5. Stock well. 6. Jet pump. 7. Automatic waterer. 8. U. G. pipe. 9. Fence - 400 rods. 10. Corrals. 11. Pipe gates. 12. Chute,

as of the date of expiration of the lease on the land, namely, on December 31, 1975.

"In determining the value of said permitted improvement, the jury shall consider the cost of the permitted improvements less any depreciation, obsolescence and any want of benefit to the land, and fix an amount in money of such value."

At the instruction conference, defendant tendered the following instruction which was refused: "You are instructed that in determining the value of plaintiff's improvements to the 76.90 acres of defendant's land you should consider the fair market value of the land on December 31, 1975, as if the improvements were not on the land. The fair market value of the 76.90 acres with the improvements should then be determined as of the same date. The value which you may return is limited to the value of the improvements so determined, or the actual cost of the improvements furnished and paid for by the plaintiff, whichever is less." This tendered instruction is taken directly from State v. Rosenberger, *supra*.

The first paragraph of instruction No. 3 as given by the court is a general statement of the law as to the measure of plaintiff's compensable interest in the improvements. While the second paragraph of that instruction is taken directly from section 72-240.18 (1), R. R. S. 1943, we believe it could mislead the jury into making cost of the improvement the determinative factor.

The last sentence in defendant's tendered instruction suggests that the value of the improvement might be limited to: "* * * the actual cost of the improvement furnished and paid for by the tenant." Such a limitation could work a hardship on the lessee by limiting proof or even preventing proof of value in many instances because of long lapse of time, lost and destroyed records, and unavailable witnesses. The Board now includes in its application form the lessee's estimate of cost. This proce-

dure improves credibility; however, that alone cannot determine the value to the land of the improvement.

The value to the land means that amount of money that the improvement enhances, contributes, increases, or adds to the value of the land. In arriving at the value to the land of an improvement, consideration should be given to its functional use, location on the land, utility, obsolescence, overbuilding or want of use, state of repair, cost to the lessee less depreciation, adaptability, and all other facts and circumstances shown by the evidence that are not speculative that relate to any purpose for which the improvement is reasonably useful to the unimproved land at the time of the determination, or which will become so useful in the near future. Consideration should not be given to the usefulness of that improvement either (1) with other land; or (2) for a special use or purpose other than as it may be naturally and reasonably adapted to the land; or (3) with other disputed and undisputed improvements on the land and those the lessee intends to remove. In other words, the measure of value here is unlike the unit rule in eminent domain proceedings and concerns the separate value to the land of each disputed permitted improvement.

Section 72-240.17, R. R. S. 1943, requires the appraisers to make a valuation for each improvement, and the trial court here so provided for the jury to do the same in instruction No. 3. This was proper where there was more than one disputed improvement since the statutory procedure is to determine the value to the land of each improvement that is disputed. The procedure does not change the right of the lessee to remove the improvement during the term of the lease; however, we do not reach the issue of any limitation of that right in terms of time. The statutes encourage the Board and the lessee to agree and compromise on values during the pro-

ceedings, and section 72-240.22, R. R. S. 1943, provides: "The permitted improvements * * * shall be deemed to be separate permitted improvements and if the board and the lessee agree as to the value of some permitted improvements but disagree as to the value of others, only those on which they do not agree need be appraised * * *."

The measure of lessee's compensable interest in the improvements should be determined as follows: First, determine the fair market value of the school land with only the improvements whose values are disputed. Then, determine the fair market value of the school land without any improvements owned by the lessee. The difference (remainder) between these two values is the value to the land of the lessee's compensable interest in the disputed improvements. Insofar as this rule is contrary to State v. Rosenberger, *supra*, that case is overruled.

Where there is more than one disputed permitted improvement, the jury should assign a separate value to the land for each improvement and caution be given that the aggregate of those values must not total more than the value to the land determined by the foregoing general measure of compensatory interest.

On direct examination, plaintiff was allowed to testify, over defendant's objection, as to the value of the 12 separate improvements without the qualification of their value to the land, which is fundamental to this issue. The objection should have been sustained.

During defendant's cross-examination of plaintiff, a copy of his 1976 personal property tax schedule was offered for impeachment purposes as it included the item "Improvements on school lands, $3,685.00." Plaintiff's objection was sustained. Before ruling, the court was informed that the lessee was required to file such a return, section 77-1209, R. R. S. 1943, and the value included on the form was

the same figure as used in the county assessor's records as prepared by a commercial appraisal company. The evidence was relevant and should have been admitted.

Defendant objects to the court allowing plaintiff's attorney a fee of $2,750 and a fee of $150 for each of plaintiff's two expert witnesses, claiming that such allowances are contrary to State ex rel. Ebke v. Board of Educational Lands and Funds, 159 Neb. 79, 65 N. W. 2d 392 (1954): "It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery." The answer is that there is statutory authority in section 72-240.19 (1), R. R. S. 1943.

Some history is helpful. Prior to 1963, section 72-240.06, R. R. S. 1943, related to the appeal procedure in controversies between old and new lessees which was adversary in nature providing for appeal in the same manner as in eminent domain cases under sections 76-716 to 76-720, R. R. S. 1943. At that time section 76-720, R. R. S. 1943, only related to the question of which party was to pay the court costs. In 1963, section 76-720, R. R. S. 1943, was amended, granting the court discretion to allow attorney's fees and appraiser fees. In 1967, section 72-240.06, R. R. S. 1943, was repealed and now appears as section 72-240.19, R. R. S. 1943: "(1) Appeals from the valuation set by the board of appraisers may be made by either party *in the same manner as appeals from the award of a board of appraisers in condemnation proceedings as governed* by sections 76-715 to 76-721. Those provisions shall apply as if the board is the condemner and the lessee is the condemnee." (Emphasis supplied.)

The question is whether by the adoption of section 72-240.19, R. R. S. 1943, the Legislature intended to adopt the provisions of section 76-720, R. R. S. 1943,

relating to allowance of attorney's fees and appraiser fees. We have uniformly held that attorney's fees will not be allowed except where specifically authorized by statute or by uniform course of procedure. State ex rel. Ebke v. Board of Educational Lands and Funds, *supra*.

In reviewing the legislative history, the subject of attorney's fees was not discussed before the Education Committee but the subject of appraiser fees was discussed by Senator Ramey Whitney, one of the proponents of the bill. Senator Whitney: "* * * Because you see you can't charge the state for the cost of the appraisal of the improvements because the improvements do not belong to the state. You would hurt the fund if you did. Therefore, you have to charge the cost of the appraisal up to the person who owns the improvements, namely, the lessee."

It is obvious that the Legislature did not intend to charge the State with appraiser fees. The same reasoning applies to attorney's fees. There has been no statute authorizing the allowance. The trial court was without authority to require the State to pay either attorney's fees or appraiser fees.

Whether a statute which would allow such fees would pass constitutional muster is not before us, and is not decided.

On cross-appeal plaintiff claimed error by the court striking four improvements, a stock well, jet pump, automatic waterer, and U. G. pipe, claiming that they were included in the original list of improvements confirmed by the agreement of the parties more than 2 years before trial. The evidence was that in June 1967 plaintiff by letter and application requested authority from defendant to improve the land by drilling a new well and installing a pump, casing, underground pipes, and septic tank at the estimated cost of $744.38, and that this application was approved by defendant "with the understanding that the cost [of the well, casing, and un-

derground pipe] be depreciated over the balance of the term of the present lease and that the pressure pump and other items of equipment are to be considered personal property of the lessee, noncompensable and subject to removal upon expiration or termination of the present lease." Defendant's original inclusion of these items in the list of permitted improvements is not explained. The preparation of the statutory list is a ministerial act of the Board. It would be contrary to public policy to deny the Board the right to amend the list to reflect the facts and the status of each improvement. Both parties are now returned to their original position of either agreeing on the list or to a determination by declaratory judgment.

Plaintiff also claims that the Board's conditional approval of plaintiff's 1967 application for a watering system as "noncompensable" is unlawful for the reason that under section 72-240.07, R. R. S. 1943, the Board only has authority to identify an improvement as either "permitted" or "nonpermitted" and there is no authority to give permission for an improvement on a conditional basis. In addition to its statutory powers and duties, the Board, as trustee, has inherent powers to supervise and manage the school lands which include those special conditions and limitations here which we deem reasonable and necessary.

For the reasons stated, this cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., concurs in the result.

KRIVOSHA, C. J., concurring in part, and dissenting in part.

In the most part, I wholeheartedly join with the court in the adoption of their opinion in this case. I believe that the rules with regard to the measure of lessee's compensable interests in the improvements

should be determined exactly as set out in the majority opinion, and enthusiastically concur in overruling State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769.

I find fault, however, with the last paragraph of the majority opinion, insofar as it seems to imply that notwithstanding the provisions of section 72-240.07, R. R. S. 1943, the Board has inherent powers which include the right to impose special conditions and limitations on lessee's improvements and thereby deny lessee the right to receive compensation for such improvements. I do not believe that any such authority does exist, and that section 72-240.07, R. R. S. 1943, specifically compels a contrary conclusion.

Section 72-240.07, R. R. S. 1943, clearly and unequivocally provides as follows: "*Before* any buildings, wells, irrigation improvements, dams, or drainage ditches are placed upon school lands by a lessee, written *approval must* be obtained from the Board of Educational Lands and Funds, * * * and such improvements where approval is secured *shall* be called 'permitted improvements' and belong to the lessee and the lessee has the right to be paid a sum of money equal to the value which the improvements add to the value of the land by the buyer of the land or the new lessee in accordance with procedures as given in sections 72-240.11 to 72-240.24 and 72-258." (Emphasis supplied.)

It occurs to me that the statute in this regard is absolute and clear. No improvement may be placed upon the school lands unless and until written approval is obtained. Once that written approval is obtained, the improvement "shall be called" a permitted improvement and the lessee is entitled to receive compensation. Nowhere in the act does it indicate that the trustee has authority to grant approval for an improvement and call it a "nonpermitted improvement."

There is no dispute that the parties can *agree* that

the permitted improvement shall have no value for which the lessee shall later be paid. That is not the same, however, as implying, as I believe the majority has, that the Board has inherent powers to grant approval of an improvement and still call it a "nonpermitted improvement" for which compensation may not be sought. I would have decided that matter contrary to the majority. In all other respects, however, I would wholeheartedly concur and join with the majority.

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

I dissent for the reasons more fully set out in my dissent in Kelly v. State, *post* p. 286, 281 N. W. 2d 909.

Where a tenant of state school lands acquires a compensable interest in an "improvement" to the extent of the reasonable value of labor, supplies, and money expended or contributed by him for a permitted "improvement" to the land, or its cost if purchased from a former tenant, and he has had the exclusive use and benefit of the lands and the "improvement" for the term of his lease, to permit him to have a greater compensable interest at the termination of his lease than he had to begin with is clearly a violation of the basic principles of trust law. The holding in State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769, prevents such a violation and should be followed. To the extent that the majority opinion here overrules State v. Rosenberger, *supra*, it violates the terms of the state school land trust set out in the Enabling Act and the Constitution of Nebraska.

CLINTON, J., joins in this concurrence and dissent.

FLOYD KELLY ET AL., APPELLEES, V. STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT.

281 N. W. 2d 909

Filed August 7, 1979. No. 41925.

Appeal from the District Court for Boyd County: HENRY F. REIMER, Judge. Reversed and remanded for a new trial.

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

Edward E. Hannon of Cronin & Hannon, for appellees.

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

PER CURIAM.

This is an appeal by the State of Nebraska Board of Educational Lands and Funds, defendant, from a jury verdict in the District Court for Boyd County, Nebraska, awarding $2,900 to Floyd Kelly and Rose Kelly, plaintiffs, as compensation for improvements to school lands being sold by the Board.

Plaintiffs are the lessees of 80 acres of school land in Boyd County, Nebraska, expiring December 31, 1976. Lessees improved the land by a 300-foot earthen dam constructed by them in 1953 or 1954 and installation of 320 rods of fencing. The parties could not agree on the value of the improvements; plaintiffs filed their petition for an appointment of appraisers in the county court. The parties apparently reached an agreement concerning the 320 rods of fence. The appraisers awarded plaintiffs $2,500 for the dam. On appeal to the District Court the jury verdict was $2,900. Defendant appeals assigning as error: (1) The court's refusal to give defendant's tendered instruction on the measure of plaintiffs' interest; (2) excluding evidence of the United States

government's partial payment of the original damsite construction costs; and (3) awarding attorney's fees and appraiser fees.

Plaintiffs' expert witness testified that the fair and reasonable value of the dam was $2,700 using reproduction cost less depreciation as the basis for his opinion.

Floyd Kelly testified concerning the construction, maintenance, usefulness, condition, and present cost of materials used in constructing a similar dam. He testified the original cost of the dam, not including his labor, was $1,200. He stated the dam had a value to the land of $4,000. There was no objection to this testimony. On cross-examination an attempt was made to elicit information that the federal government contributed money toward the original cost. Plaintiffs' objection was sustained. This was relevant and proper cross-examination; it was not error, however, since that evidence was later included in the record as a part of an exhibit showing the United States Department of Agriculture contributed $212.50 toward the cost.

Our decision in Pettijohn v. State, *ante* p. 271, 281 N. W. 2d 901, announced today, controls our decision in this case. Here, both instruction No. 3, given by the court, and defendant's tendered instruction addressed the issue of the measure of lessee's compensable interest, and were the same as in Pettijohn. The issue of the allowance of attorney's fees and appraiser fees is also the same. The court's instruction No. 3 was in error in that it did not state the proper measure of plaintiffs' compensatory interest.

REVERSED AND REMANDED FOR A NEW TRIAL.

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

The legislative definitions of "improvements" on school lands have had little regard for the technical

niceties of the common law or its definitions. The Legislature has made no distinctions between "crops," for example, and "land leveling," nor between "improvements" which are severable from the land and those which become or are an actual part of the land itself and could never be severed. Obviously, the Legislature has treated "improvements" in a wide-ranging variety of contexts. Black's Law Dictionary (5th Ed., 1979) defines "improvement" as: "A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally, buildings, but may also include any permanent structure or other development, * * *."

At least since Banks v. State, 181 Neb. 106, 147 N. W. 2d 132, this court has consistently held, and the Legislature has now provided, that the lessee of school lands has a "compensable interest" in permitted "improvements" to school lands which cannot exceed the value of the "improvements" to the land at the time of the termination of the lease. That limitation is required by the fact that title to the state school lands is vested in the state under an express trust for the support of common schools, and the state, in dealing with the school lands, is subject to the same standards as any other trustee and has no right or power to dispose of or alienate the school lands or any part thereof except as allowed by the Enabling Act and the Constitution. See, Propst v. Board of Educational Lands and Funds, 156 Neb. 226, 55 N. W. 2d 653; State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2d 520.

Following the Banks case, the Legislature enacted the statutes involved here, and established the procedures for determining the compensable interest of

a lessee in "improvements" at the time of the termination of the tenant's lease.

To permit a tenant to have a compensable interest in the school lands in excess of the value of the "improvements" to the land at the time of the termination of the tenant's lease would be a direct violation of the fiduciary duty of the trustee, no matter how much more than that had been originally invested by the tenant in the "improvement." The courts and the Legislature have accepted that fact.

It is an even more obvious violation of fiduciary duty to permit a tenant to acquire a compensable interest in the land in excess of the total cost of labor and capital invested in or contributed to the "improvements" by the tenant at the time the "improvements" were originally placed on the land.

The concurring opinion in Banks, which is extensively quoted in the majority opinion in Pettijohn v. State, *ante* p. 271, 281 N. W. 2d 901, reflected the traditional assumption that the value of "improvements" to the school lands at the time of termination of the lease would be less than the original cost of the "improvements." Obviously that assumption is not always valid. The Banks opinion acknowledged that fact and said that while the cost of "improvements" to the lessee was generally of little evidentiary value, "it may constitute a maximum that may be recovered." The concurring opinion also said: "Certainly any value added to the land itself, as distinguished from the actual value of the improvements, is the property of the trustee."

Reflecting the double limitations on the compensable interest of the tenant in the "improvements," State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769, adopted the rule that the compensable interest of the tenant in "improvements" "is limited to the value of the 'improvements' " to the land at the time of the termination of the lease "or the actual cost of the 'improvements' furnished and

paid for by the tenant, whichever is less."

Technically speaking, the "compensable interest" of a tenant in permitted "improvements" to school lands is actually a limited right to reimbursement for the reasonable value of labor, materials, and capital (the cost), invested or contributed by the tenant in the "improvement" at the time it is placed on the land, not to exceed the value of the "improvement" to the land at the time of the termination of the lease.

The case now before us vividly illustrates the effect of modifying or partially overruling Rosenberger. The evidence in this case established that the tenants improved the school land by constructing an earthen dam out of the land itself in 1953 or 1954. The total cost of the earthen dam at the time it was originally constructed was $1,200, but the United States Department of Agriculture contributed $212.50 of that amount so that the tenants' total investment in the "improvement" was $987.50. The appraisers determined that the compensable interest of the tenants at the time of termination of the lease was $2,500, and the jury in the District Court determined that it was $2,900. The dam was always a part of the land itself, could never be severed from the land, and any appreciation in value was an appreciation in the value of the land itself. The tenants had the use and benefit of the dam and the land for over 25 years and, now that the land is being sold, the tenants will receive more than three times their total investment in the school lands, while the beneficiaries of the school land trust will have been deprived of a substantial interest in the school lands.

The only exception this court has previously made to the double limitation rule of Rosenberger is in the case of Friehe v. State, 199 Neb. 504, 259 N. W. 2d 925, in which we held that a tenant was not limited to the original cost of putting in a crop and fertilizing it. Under school land leases and by statute (§ 72-

240.13, R. R. S. 1943), crops are the property of tenants and the tenant is and should be entitled to any appreciation over the cost of planting and fertilizing the crop. Crops are only "improvements" in the sense that they have been included in the improvement sections of the statutes dealing with school land leases. The fact that a tenant is entitled to any appreciation in the value of growing crops does not mean that he is entitled to all the appreciation in the value of the school land resulting after an "improvement" has been added to the land.

The two-pronged limitation of State v. Rosenberger, *supra*, appropriately protects the interests of the beneficiaries of the school land trust. I find no reasonable justification in trust law or otherwise for allowing a tenant to recover the full present value of an "improvement" to school land without even establishing what he paid for or contributed to produce that value. Neither do I find any justification in trust law or otherwise for holding that a tenant has any right to reimbursement without proving what value he advanced. In any case, it is clear that a tenant of school lands cannot acquire an interest in the school land itself as distinguished from an interest in the "improvements."

Where a tenant of state school lands acquires a compensable interest in an "improvement" to the extent of the reasonable value of labor, supplies, and money expended or contributed by him for a permitted "improvement" to the land, or its cost if purchased from a former tenant, and he has had the exclusive use and benefit of the lands and the "improvement" for the term of his lease, to permit him to have a greater compensable interest at the termination of his lease than he had to begin with is clearly a violation of the basic principles of trust law. The holding in State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769, prevents such a violation and should be followed. To the extent that the majority

opinion here overrules State v. Rosenberger, *supra*, it violates the terms of the state school land trust set out in the Enabling Act and the Constitution of Nebraska.

CLINTON, J., joins in this concurrence and dissent.

LUTHERAN MEDICAL CENTER OF OMAHA, NEBRASKA, A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION AND CITY OF THE METROPOLITAN CLASS, APPELLANT.

281 N. W. 2d 786

Filed August 7, 1979. No. 42193.

1. **Prisoners: Medical Services: Municipal Corporations.** A city of the metropolitan class is liable for the emergency medical treatment required by a criminal suspect in police custody who is wounded by the police in the process of apprehension.
2. **Prisoners: Constitutional Law: Medical Services.** Intentional indifference to the medical needs of a prisoner is proscribed by the Eighth Amendment to the United States Constitution as being cruel and unusual punishment.
3. **Judgments: Appeal and Error.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong.

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

Herbert M. Fitle and Richard A. Cerveny, for appellant.

Andrew E. Grimm and John H. Cotton of Gaines Otis Mullen & Carta, for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and HASTINGS, JJ., and FAHRNBRUCH, District Judge.

FAHRNBRUCH, District Judge.

Plaintiff, the Lutheran Medical Center of Omaha, a Nebraska nonprofit corporation, brought this ac-

tion against the defendant, the City of Omaha, a municipal corporation and city of the metropolitan class, for money due by reason of medical services rendered to (a) a city jail prisoner; and (b) a suspect in an armed robbery who was shot by an officer of the Omaha police division. The trial court entered judgment for the plaintiff and the defendant appeals. We affirm.

The case was tried to the trial court upon a stipulation of facts and the pleadings.

The city jail prisoner was stricken with severe chest pains while in jail and was taken by defendant's employee to plaintiff's hospital. The prisoner's condition was diagnosed as unstable angina requiring emergency medical treatment, and the prisoner was placed in the intensive care unit. He was dismissed from the hospital after approximately a week, but due to an intervening escape was not returned to jail.

In the case of the suspect, he was delivered to plaintiff's hospital for emergency treatment by defendant's employee. He had been shot by an officer of the Omaha police division while allegedly fleeing from the scene of an armed robbery. Dr. Richard B. Svehla treated the suspect for shock and performed exploratory abdominal surgery as the result of a gunshot wound to the lower back, closed three wounds of the jejunum, and removed the bullet causing the injury. The suspect was placed in intensive care, thereafter in a regular hospital room, and subsequently lodged in jail.

Dr. Svehla duly assigned his claim to plaintiff for services rendered. Proper claims were presented to the defendant and were rejected. Appeal was timely taken to the District Court for Douglas County, which reversed the decision of the city council and entered judgment for the plaintiff.

The parties stipulated that the medical services were necessary and that the charges were fair and

reasonable. Stipulated evidence established that the medical services rendered were of an emergency nature in each case.

Defendant claims it is not liable because (1) contracts entirely outside the powers delegated to a municipal corporation are void; (2) the mode of executing a contract with the defendant is a mandatory requirement which was not followed in either case; (3) the sole authority for binding the defendant is a contract by defendant's city council and mayor, which was not done in these cases; (4) where the services are not requested by the proper authority there can be no implied contract; (5) in the absence of some express provision of the law, the public is not liable to a physician or surgeon for services rendered prisoners, even though they are insolvent and unable to pay for such services themselves; and (6) liability, if any, upon the defendant for medical or surgical aid can be imposed only for those services rendered to a prisoner who is actually confined in jail at the time the services are rendered.

It appears that this is a case of first impression in this court in regard to liability for emergency medical services to prisoners. Counsel have cited no cases in this jurisdiction, and we find none that have dealt directly with the issues here raised. Cases in some jurisdictions tend to support defendant's position. Trinity Hospital Association v. City of Minot, 76 N. W. 2d 916 (N. D., 1956); King Cy. v. Seattle, 70 Wash. 2d 988, 425 P. 2d 887; Windham Community Memorial Hospital v. Willimantic, 166 Conn. 113, 348 A. 2d 651. Those cases rested on lack of express or implied contract and upon the lack of a statutorily imposed obligation on imprisoning authorities to provide medical attention to prisoners. Other jurisdictions have held the imprisoning governmental subdivisions liable. City of Tulsa v. Sisler, 285 P. 2d 422 (Okla., 1955); Spicer v. Williamson, 191 N. C. 487, 132 S. E. 291; Lamar v. The Board of

Commissioners of Pike County, 4 Ind. App. 191, 30 N. E. 912. Those cases rested upon the statutory obligation of the imprisoning authority to supply medical needs to prisoners. In the Spicer and Lamar cases, the formalities of governing body approval prior to rendering emergency medical treatment were not required.

The concept that an imprisoning authority has a legal obligation to supply medical services to prisoners is not of recent origin, nor was it originally based on statutes. At common law, it was stated: "The rule that where a person requests the performance of a service, and the request is complied with, and the service performed, there is an implied promise to pay for the services, does not apply where a person requests a physician to perform services for a patient, *unless the relation of that person to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services*, or the circumstances are such as to show an intention on his part to pay for the services * * *." (Emphasis supplied.) Spicer v. Williamson, *supra*; 30 Cyc. 1597. This rule has been interpreted to apply to authorities operating jail facilities since they have the *legal obligation* to their prisoners to supply the prisoners' medical needs. Citing the common law, the Supreme Court of the United States has said: "* * * 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.' " Estelle v. Gamble, 429 U. S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251. In a forerunner to that case, a federal district court in an addendum held: "The following principles apply to convicted prisoners (and also to unconvicted prisoners, who generally have greater rights than convicted prisoners):

"(1) * * * Having custody of the prisoner's body and control of the prisoner's access to medical treatment, the prison authorities have a duty to provide

needed medical attention. * * * there is a *constitutional duty* to provide needed medical treatment to a prisoner * * *." (Emphasis supplied.) Ramsey v. Ciccone, 310 F. Supp. 600 (W. D. Mo., 1970).

The United States Supreme Court has held that intentional indifference to the medical needs of a prisoner is proscribed by the Eighth Amendment to the United States Constitution as being cruel and unusual punishment. Estelle v. Gamble, *supra*. While these two cases applied to prisoners in penitentiaries, there is no rational basis why the same principles should not apply to jail prisoners. Applying those principles, it can only be concluded that under the Eighth and Fourteenth Amendments to the United States Constitution, state governmental subdivisions operating jails have the legal obligation to supply needed medical treatment. In the cases cited by the defendant, courts considered only statutorily imposed duties or the lack thereof and did not consider the constitutional dimensions of the issue.

In Lamar v. The Board of Commissioners of Pike County, *supra*, the board of county commissioners was held liable for services rendered by a physician, at the request of a jailer, to a prisoner who suddenly became sick, notwithstanding a statute under which the board had elected a health officer whose duty it was to care for prisoners in the county jail. The court found that an emergency existed and the health officer was not readily available.

In Spicer v. Williamson, *supra*, the board of county commissioners contended it was not liable, for the reasons that it had not authorized the sheriff to request a hospital and a physician to perform medical services or incur the expenses for a prisoner, and that it was liable for medical services rendered only to prisoners confined in jail and not liable for such services to one who is in the custody of the sheriff, following an arrest, and who has not been committed to jail after a preliminary trial or upon con-

viction. In that case, the patient was shot by a deputy sheriff immediately before his arrest. When the patient came into the custody of the sheriff, his condition resulting from the wound required immediate medical and surgical treatment. The North Carolina Supreme Court held the county board of commissioners liable under those circumstances for the medical services rendered, stating: "In an emergency, however, he [the sheriff] may without previous authority from the board, procure necessary attention for his prisoner, and the board of commissioners will be liable for the reasonable charge for such services as may be rendered to the prisoner at the request of the sheriff." Admittedly, the court was relying upon the statutory duty or legal obligation of the board to supply medical attention to prisoners. In the case at bar, that legal obligation is supplied by the Eighth and Fourteenth Amendments to the United States Constitution. Estelle v. Gamble, 429 U. S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251.

In each of the two situations at bar (the prisoner in jail and the suspect who was shot), immediate emergency medical attention was required. Defendant's employees each acted responsibly in executing their respective duties to procure needed medical services. Had they not done so under all of the circumstances, the defendant and each employee could have been liable for intentionally denying or delaying access to medical care or deliberate indifference to serious medical needs of prisoners. Estelle v. Gamble, *supra*; Ramsey v. Ciccone, 310 F. Supp. 600 (W. D. Mo., 1970).

It matters not that the suspect was not in jail when he required emergency medical attention, particularly under the facts of this case. Inherent in the trial court's judgment was a finding that when he needed emergency medical attention the suspect was in police custody. Where the trial court is sit-

ting as trier of both the law and the facts and decides facts which are inherent in the judgment, such judgment has the effect of a jury verdict, and it will not be set aside on appeal unless clearly wrong. Hudson Foods, Inc. v. L & B Corp. & Estate of Clark, 202 Neb. 291, 275 N. W. 2d 70; Ineba Ranch v. Cockerill, 201 Neb. 592, 271 N. W. 2d 44. Here, it was the policeman's shot that felled the defendant. Two affidavits received in evidence by stipulation, with all objections waived, state that once the suspect was apprehended by officers of the Omaha police division, the suspect became a prisoner. The suspect was delivered to plaintiff by defendant's employee. After the suspect's injuries were treated, he was taken to jail. Under these circumstances a trier of fact could reasonably infer and conclude that a suspect was in the custody of the police at the time he needed medical attention. We cannot say that the trial court was clearly wrong.

The judgment of the trial court is affirmed.

AFFIRMED.

BELVA THOMAS AND MARIE THOMAS, APPELLANTS, V. MAX WELLER, APPELLEE.

281 N. W. 2d 790

Filed August 7, 1979. No. 42233.

1. **Res Judicata: Judgments.** It is a fundamental principle of jurisprudence that material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.
2. _____: _____. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

3. **Easements.** If an easement, however it may have been created, is specific in its terms, it is decisive of the limits of the easement. If an easement is not specifically defined, the rule is that the easement is such as is reasonably necessary and convenient for the purpose for which it was created.
4. **Trespass: Property: Injunctions.** Concerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions.

Jacobsen, Orr & Nelson, for appellants.

Richard J. Hove, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and COADY and NORTON, District Judges.

COADY, District Judge.

This is an action brought by plaintiffs, as landowners of a fee interest, to enjoin the defendant, as owner of a hunting easement, from coming upon that portion of plaintiffs' land which they claim is not subject to the defendant's easement. After trial to the District Court, the trial judge held for the defendant and dismissed plaintiffs' petition. The plaintiffs appeal and we reverse the judgment of the trial court.

Since 1968 at least, the plaintiffs have owned that portion of the Platte River which lies below or south to southeast of their farm property through increase or extension of their boundaries by action of natural forces. Such accretion land claimed by the plaintiffs has never been surveyed, is not suitable for farming, is used only for hunting, and, hereinafter, will be referred to as the river bottom.

The river bottom is bounded on the north by the north bank of the Platte River and runs about 1,650

feet to what the plaintiffs describe as the center of the main channel of the river. The east and west boundaries claimed are formed by imaginary lines extending at right angles from the north bank at the intersection of plaintiffs' upland farm boundaries with the same north bank. This river bottom is made up of many islands with and without vegetation, many towheads, and large and small channels with varying amounts of running water at various times.

The defendant has been hunting ducks on the plaintiffs' river bottom for about 40 years. Sometime prior to May 1, 1975, the parties began to disagree about their rights in regard thereto and the plaintiffs sued to quiet title in themselves. On May 1, 1975, after trial, the District Court for Buffalo County decreed that the defendant had an easement to hunt on a 2.077-acre, triangular shaped portion of the river bottom together with a right-of-way from the county road near the north bank to the triangle. The decree incorporates a 1974 survey describing the triangle and right-of-way by metes and bounds. The survey did not include or describe the boundaries of the plaintiffs' entire river bottom. The court did describe plaintiffs' land, did quiet their title therein subject to defendant's described easement, and did enjoin defendant from interfering therewith. Neither party appealed that decree.

On October 11, 1977, the defendant, together with a third-party operator, took a bulldozer down his right-of-way and onto his triangle. As all hunters probably do to prepare for the hunting season on constantly changing premises, the defendant cut a ditch to bring water near his duckblind and erected a small dam to insure that it flowed by the blind.

The plaintiffs sued and asked that the defendant be enjoined from trespassing. At trial, one of the plaintiffs testified that the defendant dug the ditch, or a portion thereof, and erected the dam outside the

triangle and on the plaintiffs' land. The defendant testified that the ditch was on the defendant's triangle and that the dam was outside the triangle but on a third party's land.

The trial court on June 2, 1978, found that the defendant "entered upon the river property surrounding the easement hunting area and did there move the sand under the surface of the water for the purpose of deepening a narrow channel and erecting a sand barrier to improve the temporary flow of surface waters of the river next to and abutting the easement area." The trial court then decided that the May 1, 1975, District Court decree did not limit defendant's hunting rights to the 2.077-acre tract described therein because such limitation would defeat the defendant's right to hunt, and dismissed the plaintiffs' cause of action.

The briefs, in substance, discuss two pertinent issues. First, assuming that the defendant could not hunt on a mere 2.077 acres, does the description in the 1975 decree control this case? Second, even if the 1975 description controls, can the defendant be enjoined if his actions have not damaged the plaintiffs or affected their enjoyment of their property?

It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action. Blum v. Truelsen, 139 Neb. 282, 297 N. W. 136 (1941); Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551 (1959). The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have

brought forward at the time. Wischmann v. Raikes, *supra*. There are settled rules in regard to interpreting the 1975 decree. If an easement, however it may have been created, is specific in its terms, it is decisive of the limits of the easement. If an easement is not specifically defined, the rule is that the easement is such as is reasonably necessary and convenient for the purpose for which it was created. Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb. 668, 64 N. W. 2d 333 (1954); County of Johnson v. Weber, 160 Neb. 432, 70 N. W. 2d 440 (1955); Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661 (1956); County of Sarpy v. Iske, 189 Neb. 621, 204 N. W. 2d 146 (1973).

With these rules in mind we must inspect the pertinent portions of the May 1, 1975, decree which follow: "Now on this first day of May, 1975, this matter came on for decision by the Court.

"The Court finds from the evidence that the Defendant Max Weller is entitled on his cross-petition to have an easement for hunting purposes to the 2.077 acre tract of land as more particularly described in Exhibit #6, a copy of which is hereby attached and made a part of this decree by reference.

"The Court further finds that defendant Max Weller is also entitled to the right of way from the present county road to the said 2.077 acre tract for the purposes of duck hunting only.

"The Court further finds that all the rest, residue and remainder of the lands described as Plot 3, and which are the accretion grounds abutting on Lots 9 and 12 in Section 32, Township 9 North, Range 13 West and all that Part of Lot 1 in Section 5, Township 8 North, Range 13 West lying directly south of said Lot 12, is quieted and confirmed in the Plaintiffs, and that Defendant is enjoined from in any way interfering with any use that Plaintiffs wish to make of said lands." The decree is signed by S. S. Sidner, District Judge.

The defendant's brief admits that the hunting easement set forth in the decree is described by metes and bounds but argues that the "easement was given for 'hunting purposes' which would by implication include the immediately adjacent flowing portions of the Platte River." He offers no authority on that point and we see no such implication at all. If that were true, there would be no need for the 1974 survey because the whole of plaintiffs' land gained by accretion would be subject to defendant's easement. We see no ambiguity in the language. The decree is specific in its terms and became decisive herein when the parties chose not to appeal its terms.

The defendant argues that an injunction should not be issued if the right thereto is unclear or the damage complained of nonexistent, and cites Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781 (1960). We agree that the case properly cites the law but point out that the requested injunction was granted in that case. An injunction was not granted in at least three other cases and the facts therein must be distinguished. See, State v. Merritt Brothers Sand & Gravel Co., 180 Neb. 660, 144 N. W. 2d 180 (1966); Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73 (1969); Arkfeld v. Volk, 198 Neb. 77, 251 N. W. 2d 720 (1977). The fact situations therein did not constitute evidence of a taking by adverse possession or prescription. Adverse possession and prescription cannot be had against the state. The last two cited cases concerned the trespass of water in such small amounts, if any at all, that no adverse or prescriptive taking could be defined or measured.

We find no evidence in the bill of exceptions that the plaintiffs have been or will be damaged in the ordinary sense, or that what was done is irreparable. If the defendant is allowed to continue to go beyond the described triangle, move sand, and erect

barriers, without doubt he will have an extended easement by prescription in 10 years and might establish adverse possession. He admits in the evidence and in his brief that he will continue to do so unless restrained. See 32 A. L. R. 492.

Concerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. Sillasen v. Winterer, 76 Neb. 52, 107 N. W. 124 (1906). We must admit that the writer has been unable to find a case wherein the facts complained of caused an injunction to be issued and were as simple as moving sand every year. Nevertheless, we now decide that the record herein satisfies all the various requirements for the issuance of an injunction.

The judgment is reversed and the cause remanded to the District Court which is directed to enjoin the defendant from trespassing upon the property of the plaintiffs for the purpose of digging ditches or erecting barriers upon plaintiffs' property not subject to the defendant's hunting easement specifically described in the 1975 decree.

REVERSED AND REMANDED WITH DIRECTIONS.

MARCIA CATANIA, APPELLEE, V. THE UNIVERSITY OF NEBRASKA, A CORPORATE GOVERNMENTAL BODY, APPELLANT.

282 N. W. 2d 27

Filed August 7, 1979. No. 42248.

1. **Board of Regents: Statutes: Torts.** The Board of Regents of the University of Nebraska is a "state agency" within the meaning of section 81-8,209 et seq., R. R. S. 1943, and tort claims against it must be brought under the authority of the Tort Claims Act.

2. **Venue: Statutes: Torts.** The requirements of section 81-8,214, R. R. S. 1943, prescribe the venue for suits brought under the state Tort Claims Act without modification or liberalization occasioned by the general venue statutes.
3. **Legislature: Statutes: Intent.** Statutes in derogation of sovereignty should be strictly construed in favor of the state, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed.
4. **Statutes.** Where the statutes provide an exclusive remedy against the state and a particular forum for judicial trial, these requirements must be followed.
5. **Torts: Governmental Subdivisions: Jurisdiction.** In order to sue the State of Nebraska or one of its agencies under the Tort Claims Act, the petition must be filed in the District Court for the county in which the alleged wrongful act or omission took place, and in the absence of specific legislative authority, that jurisdictional requirement may not be waived.
6. **Jurisdiction.** Want of jurisdiction of the subject matter of an action requires the court to proceed by dismissal or other appropriate action.

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

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

Martin A. Cannon of Matthews & Cannon, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and HASTINGS, JJ., and FAHRNBRUCH, District Judge.

HASTINGS, J.

This is an action brought by the plaintiff for personal injuries resulting from the alleged negligence of the defendant, The University of Nebraska, a corporate governmental body, more accurately described as the Board of Regents of the University of Nebraska. Plaintiff was a student at the University and suffered injury and permanent disability when struck in the right eye by a plastic practice golf ball during a physical education class session held on the

Lincoln campus. The case was tried before a judge of the District Court for Douglas County, and resulted in a judgment in favor of the plaintiff in the amount of $60,000. The University has appealed, setting forth as errors improper venue, failure of the evidence to support the judgment, and excessive damages.

In her original petition filed on March 21, 1977, plaintiff alleged the facts of the accident as briefly outlined above, after claiming the action was brought pursuant to the Political Subdivisions Tort Claims Act, section 23-2401 et seq., R. R. S. 1943, and that she had filed a claim with the secretary of the Board of Regents more than 6 months prior to the filing of the petition. The University filed an answer generally admitting the allegations of the petition except negligence on its part. Thereafter, the plaintiff apparently had second thoughts about having followed the proper procedure, so she filed a claim with the secretary of the State Claims Board under the provisions of the Tort Claims Act, section 81-8,209 et seq., R. R. S. 1943. The University then filed a motion to dismiss the petition as premature and for improper venue, which was overruled. An amended answer, repeating the objections of the motion and denials of the first answer, was filed on October 11, 1977. Finally, on March 29, 1978, plaintiff filed an amended petition setting forth the filing of claims with the secretary of the Board of Regents on July 27, 1976, and with the State Claims Board on July 12, 1977, neither of which was acted upon. For its answer to the amended petition the University again denied the claim on its merits, but also objected to the jurisdiction of the court because the action should have been filed in Lancaster County. In the final analysis, plaintiff was attempting to proceed simultaneously under both the Political Subdivisions Tort Claims Act and the Tort Claims Act, so it is necessary to examine each of them in some detail.

The Political Subdivisions Tort Claims Act declares that no political subdivision of the State of Nebraska shall be liable for any torts and no suit may be maintained except to the extent provided by that act. Section 23-2402, R. R. S. 1943, requires that a political subdivision shall include "villages, cities of all classes, counties, school districts, public power districts, and all other units of local government." Claims "shall be filed with the clerk, secretary, or other official * * * of the political subdivision, * * *." § 23-2404, R. R. S. 1943. "No suit shall be permitted" until after final disposition of the claim by the governing body or the expiration of 6 months after filing. § 23-2405, R. R. S. 1943. "Jurisdiction, venue, procedure, and rights of appeal * * * shall be determined in the same manner as if the suits involved private individuals, * * *." § 23-2406, R. R. S. 1943. This would indicate that venue would be governed by the general venue statute as applied to suits against residents, section 25-409, R. R. S. 1943, which permits a suit to "be brought in the county where the * * * plaintiff resides and the defendant * * * may be summoned." In this case, the plaintiff was a resident of Douglas County and apparently, there being no objection or showing to the contrary, the University was properly summoned. In addition, that statute provides: "[W]hen an action has been commenced in a county other than as specified herein, the court in which the action has been commenced shall have jurisdiction over such action, but upon timely motion by a defendant the court shall transfer the action to the proper court in the county in which the action should or might have been commenced as herein provided."

On the other hand, the Tort Claims Act, section 81-8,209 et seq., R. R. S. 1943, prohibits suits against the state or any state agency except as provided in that act. Section 81-8,210, R. R. S. 1943, requires that a state agency shall "include all departments, agen-

cies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska * * *." Claims under that act must be filed with the State Claims Board and no suit may be brought until final disposition or the expiration of 6 months after the claim is made. § 81-8,213, R. R. S. 1943. Suits shall be brought in the District Court of the county where the act or omission complained of occurred. § 81-8,214, R. R. S. 1943.

From a reading of the foregoing two acts, it becomes readily apparent that it is essential in this case to decide whether the University is a political subdivision or a state agency. Article VII, section 10, Constitution of Nebraska, provides: "The general government of the University of Nebraska shall, *under the direction of the Legislature*, be vested in a board * * * to be designated the Board of Regents of the University of Nebraska, * * *." (Emphasis supplied.) The implementing legislation, section 85-105, R. R. S. 1943, provides: "The Board of Regents shall have full power to appoint its own presiding officer and secretary. It shall constitute a body corporate, to be known as the Board of Regents of the University of Nebraska, and as such may sue and be sued, and may make and use a common seal and alter the same at pleasure." The University shares similar statutory language with the various cities and villages, counties, airport authorities, drainage districts, and the like. However, the common thread weaving the fabric of the latter together, which is absent in the University, is fixed geographic boundaries and the authority to levy taxes. "* * * political subdivision * * * contemplates geographical area and boundaries, public elections, * * * taxing power and a general purpose or benefit." Bolen v. Board of Firemen, Etc., 308 S. W. 2d 904 (Tex. Civ. App., 1957). The University is state-

wide in its service, has no geographical limitations in the boundary sense of the word, and has no power to levy taxes. It is completely dependent, initially at least, on the appropriations made by the Legislature, as are all state agencies.

Additionally, state agencies are thought of as the alter egos of the state itself, viz., "departments, agencies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska * * *." § 81-8,210, R. R. S. 1943. It is obvious from the constitutional provisions that the general government of the University shall be under the direction of the Legislature to provide means for the higher education of all the citizens of the entire state.

While the court, in Board of Regents of University of Nebraska v. Dawes, 370 F. Supp. 1190 (D. Neb., 1974), initially refers to "[t]he plaintiff, a political subdivision of Nebraska," it appears from the discussion that this was simply a rather loose use of language, and that it considered the Regents a state agency as the term is applied in the current matter. The Regents were seeking a declaratory judgment as to whether salaries of women employees violated the Fair Labor Standards Act, and the defendants counterclaimed for unpaid wages and liquidated damages. The Regents asserted the counterclaim was barred by the Eleventh Amendment of the United States Constitution. The court held that the Regents do not consent to a waiver of immunity from suit by counterclaim when they file a declaratory judgment action. "The Ford Motor Co. case makes it clear that officers of a state cannot waive a state's immunity unless the state by constitution or statute has waived or given an official authority to waive immunity from suit in a federal court, and the issue of whether such authority has been given is a matter of state law." The application of the Elev-

enth Amendment to the Regents makes it clear that the court regarded the Regents as a state agency for purposes of shield of the Eleventh Amendment.

Board of Regents v. Exon, 199 Neb. 146, 256 N. W. 2d 330 (1977), made it clear that "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*." (Emphasis supplied.) However, we agreed "that the Legislature has complete control of the money which is to be *appropriated to the University from the general revenue of the state*." (Emphasis supplied.) Generally speaking, state agencies receive all or a major portion of their budgetary needs by legislative appropriations from the general revenue whereas political subdivisions fulfill most, if not all, of their financial requirements by direct tax levy within their respective boundaries.

Stadler v. Curtis Gas, Inc., 182 Neb. 6, 151 N. W. 2d 915 (1967), although not determinative of this point, certainly gives comfort to the position of finding the University to be a state agency. "The Board of Regents contends that it is an agency of the state and as such is immune from liability. * * * Although there is some conflict in the authorities, this court has recognized the doctrine that the state and its agencies may engage in proprietary activites and thereby incur liabilities from which they would otherwise be immune." In his dissent, White, C. J., stated: "It cannot be questioned that the Board of Regents is a direct agency of the state and is cloaked with the same immunity."

The state of Idaho has a statute dealing with county and municipal indebtedness which enumerates "county, city, town, township, board of education, or school district, or other subdivision of the state" much the same as Nebraska's Political Subdivisions

Tort Claims Act. In analyzing why the regents of the university were not governed by this section of the constitution, the court noted: "Had it been intended by the framers of the Constitution to place the same limitations and restrictions on 'the Regents of the University of Idaho' as a corporation that were placed on counties, cities, towns, and other municipal corporations by sec. 3, art. 8, they would have undoubtedly incorporated in this section * * * the name of the Regents of the University, and placed the Board of Regents among the inhibited classes specified.

"There is another reason why it is evident to us that it was not intended for this section (3 of art. 8) to include the Regents of the University, and that is: The Regents have not and never had any taxing power; they could not levy or collect taxes of any kind and were not and are not representatives of any municipality, territory, subdivision, or taxing unit of the state in any respect. They are merely the managers and corporate representative of an educational institution which is dependent wholly on state and federal appropriations and donations for its finances and operating expenses. The Regents so recognized by the Constitution as a corporate entity were acting and were intended to act as an instrumentality of the state for the purpose of advancing the education of the youth of the state." State v. State Board of Education, 56 Idaho 210, 52 P. 2d 141 (1935).

There is authority to the contrary, notably Gordenstein v. University of Delaware, 381 F. Supp. 718 (D. Del., 1974), but considering our own statutes and constitutional provisions as well as our own case law, we believe and hold that the Board of Regents of the University of Nebraska is an agency of the state. Therefore, this claim should have been brought under the provisions of section 81-8,209 et seq., R. R. S. 1943, and the suit filed in the District Court for Lancaster County, Nebraska.

However, plaintiff argues that section 25-409, R. R. S. 1943, deals not with jurisdiction but with venue, and, with the 1971 amendment, the statute now reads that even if the action is brought in the wrong county, the court shall have jurisdiction and only shall transfer the action to the proper county on timely application. One of the obvious fallacies in this reasoning is that the above-cited statute is a general venue statute which does apply to actions brought under section 23-2401 et seq., R. R. S. 1943, but an action against the state or state agency is governed by section 81-8,214, R. R. S. 1943, only. As stated in Stewart v. Carr, 218 So. 2d 525 (Fla. Dist. Ct. App., 1969): "This venue statute controls all actions brought under the common law or under statutes not containing a specific provision respecting venue. * * * But it is not necessarily all-inclusive as to venue. Such statute, prescribing venue generally as aforesaid, may be limited by other statutes providing civil relief under varying circumstances. * * * Thus if a suit is brought under a specific State statute and that statute provides its own individual venue, then such specifically prescribed venue governs." The requirements of section 81-8,214, R. R. S. 1943, prescribe the venue for suits brought under the state Tort Claims Act without modification or liberalization occasioned by the general venue statute.

It is also contended by the plaintiff that the University had waived venue by filing answers to both the petition and amended petition. It is true that in O'Hara v. Davis, 109 Neb. 615, 192 N. W. 215 (1923), we said: "The right to defend in the particular district is not a matter of jurisdiction, but of venue only, and the privilege may be waived." However, it is not necessary to become embroiled in the quagmire of confusion created by the original filing under the wrong statute and the University's general appearance followed by the second petition and an

objection by answer rather than special appearance. Without section 81-8,209, R. R. S. 1943, and Article V, section 22, Constitution of Nebraska, which permitted its passage, there is no question but what the University, engaged in strictly a governmental function rather than one of a proprietary nature, would have been immune from liability here. The general rule is stated in 82 C. J. S., Statutes, § 391, p. 936: "Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed." The Supreme Court of Iowa cited this same quotation with approval in Montandon v. Hargrave Construction Co., 256 Iowa 1297, 130 N. W. 2d 659 (1964). To the same effect see 62 A. L. R. 2d 1235 and cases cited therein: "It is generally recognized that consent statutes must be strictly construed against the person seeking to subject the highway department to suit or liability and that they will not be extended beyond their express terms."

Although this court apparently has never been called upon to pass directly on the question of construction of a statute in derogation of sovereignty, as early as 1878 in The State v. Stout, 7 Neb. 89, we held that a statute which provided that the several District Courts of the state should have jurisdiction to hear claims filed against the state, which claims had previously been presented to the auditor of public accounts, must be followed, and where suit was filed directly in the District Court, it had no jurisdiction over the subject matter. Following the precedent of Stout, this court in The State v. Lancaster County Bank, 8 Neb. 218 (1879), said: "The claims upon which this suit is brought have not been presented to the auditor for adjustment. The case, therefore,

comes within the rule laid down in The State v. Stout, 7 Neb. 89, and no action can be maintained thereon. The judgment *derives no additional force from the assent of the attorney general.*" (Emphasis supplied.)

In McNeel v. State, 120 Neb. 674, 234 N. W. 786 (1931), plaintiff filed suit for breach of contract, bringing the action in the District Court for Lincoln County pursuant to a resolution adopted by the house of representatives of the Nebraska Legislature. Upon judgment, the State appealed, arguing that plaintiff's only remedy was an appeal from a decision of the auditor of public accounts to the District Court for Lancaster County. Plaintiff relied on a statute containing the following language: " 'When the legislature permits a suit to be brought against the state * * * [t]he several district courts of the judicial districts of the state * * * shall have jurisdiction to hear and determine * * * [a]ll claims against the state filed therein which have previously been presented to the auditor of public accounts, and have been * * * disallowed.' * * * Comp. St. 1929, sec. 27-319." However, this court went on to say: "The latter or 'second' clause quoted must be considered with what precedes it and with the following constitutional and statutory provisions: 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought.' Const. art. V, sec. 22. 'The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant for the amount allowed shall be drawn. Provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court.' Const. art. VIII, sec. 9. 'The state may be sued in the district court of the county wherein the capital is situate, in any matter founded upon or growing out of a contract, expressed or im-

plied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state.' Comp. St. 1929, sec. 27-324. * * * Where the statutes provide an exclusive remedy against the state and a particular forum for judicial trial, one branch of the legislature alone cannot extend jurisdiction to another forum. * * * The *state's immunity* from suit in the district court for Lincoln county *was not waived by the appearance of the attorney general therein.* * * * The conclusion is that the action is based on contract and that the district court for Lincoln county did not have jurisdiction to entertain or determine the cause." (Emphasis supplied.)

In final answer to the claim that the University waived objections to venue, and for that matter, subject matter jurisdiction, perhaps paraphrasing McNeel will be helpful. "The state's immunity from suit in the district court for * * * [Douglas] county was not waived by the appearance of the * * * [attorneys for the University]. * * * The conclusion is that the action is * * * [permitted in derogation of sovereign immunity as provided by statute, which requires that it be filed in the District Court of the county where the accident occurred], and that the district court for * * * [Douglas] county did not have jurisdiction to entertain or determine the cause."

In order to sue the State of Nebraska or one of its agencies under the Tort Claims Act, the requirements of the act must be followed strictly and the petition filed in the District Court for the county in which the alleged wrongful act or omission took place. In the absence of specific legislative authority, neither the state nor one of its agencies may waive those jurisdictional requirements.

It is fundamental that want of jurisdiction of the subject matter of the action is a defect which requires the court to proceed by dismissal of the case

or other suitable action. Lippincott v. Wolski, 147 Neb. 930, 25 N. W. 2d 747 (1947). The trial court should have sustained the University's motion to dismiss.

Accordingly, the judgment of the trial court is reversed and the cause remanded with directions to vacate the judgment in favor of the plaintiff and to dismiss the action without prejudice.

REVERSED AND REMANDED WITH DIRECTIONS.

DAVIS MANAGEMENT, INC., A CORPORATION, AND SANITARY AND IMPROVEMENT DISTRICT NO. 171 OF DOUGLAS COUNTY, NEBRASKA, APPELLEES, V. SANITARY AND IMPROVEMENT DISTRICT NO. 276 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT, IMPLEADED WITH NATIONAL TRAVELERS LIFE COMPANY, INC., A CORPORATION, AND HOMESTEADERS LIFE COMPANY, A CORPORATION, ET AL., APPELLEES.

282 N. W. 2d 576

Filed August 14, 1979. No. 42199.

1. **Summary Judgments.** Before a motion for summary judgment can be granted, two requirements must be met: (1) There must be no genuine issue as to any material fact; and (2) the moving party must be entitled to judgment as a matter of law.
2. **Municipal Corporations.** Before two municipal corporations occupying the same boundaries are incompatible, it must be established that the powers and privileges conferred on the separate governmental agencies are substantially coextensive in scope and objective.
3. **Municipal Corporations: Legislature.** In the absence of constitutional restrictions, the Legislature may authorize the formation of two municipal corporations in the same territory at the same time for different purposes, and municipal corporations organized for different purposes may include the same territory. The identity of the territorial limits of separate public corporations is immaterial if such entities have separate and distinct governmental purposes.
4. **Judgments: Statutes.** A judgment which is not void may only

be set aside after the term at which it was entered as authorized in section 25-2001, R. R. S. 1943.

5. **Judgments: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
6. **Courts: Judgments.** A District Court has no power to vacate or modify its judgment after term on the ground that an error of law had been committed by it in rendering such judgment.
7. **Judgments: Collateral Attack.** A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded.

Warren S. Zweiback of Zweiback, Brady, Kasher, Festersen & Pavel, P.C., for appellant.

Bren L. Buckley of Cline, Williams, Wright, Johnson & Oldfather, for amicus curiae, The Nebraska Securities Industry Association.

August Ross of Ross & Mason, for appellees Davis Management, Inc., National Travelers Life Company, Inc., and Homesteaders Life Company. Ralph W. Hetzner of Bradford & Coenen, for appellee SID No. 171.

Heard before KRIVOSHA, C. J., CLINTON, and WHITE, JJ., and STANLEY and GITNICK, District Judges.

KRIVOSHA, C. J.

This is an appeal from a decree of the District Court for Douglas County, Nebraska, sustaining the motion for summary judgment filed by the appellees, Davis Management, Inc., a corporation (Davis), National Travelers Life Company, Inc., a corporation, and Homesteaders Life Company, a corporation, against Sanitary and Improvement District No. 276 of Douglas County, Nebraska (SID 276).

Both of the plaintiffs own some part of Lot 325, Parkside Addition, Douglas County, Nebraska (SID 276 Property), although neither owned any part of SID 276 Property at the time SID 276 was created.

By its motion for summary judgment, the plaintiffs requested the trial court to find and determine that SID 276 was without any authority to exercise the jurisdiction of a sanitary and improvement district over real estate described as Lot 325, Parkside Addition, Douglas County, Nebraska, and that SID 276 was void ab initio. The crux of the plaintiffs' claim is set out in the amended petition filed by Davis wherein it is alleged that SID 276 is contained entirely within the boundaries of Sanitary and Improvement District No. 171 (SID 171), a much larger SID, thereby making SID 276 void ab initio. Davis' theory is that two SIDs cannot occupy the same territory at the same time. Davis' amended petition further alleged that SID 171 had constructed all public improvements and SID 276 had made none. That fact was denied by the answer of SID 276.

The pleadings further disclose that on April 25, 1974, the District Court for Douglas County, Nebraska, entered its decree finding that SID 276 was duly organized according to law and was declared to be a public corporation under sections 31-727 to 31-769, R. R. S. 1943. No appeal was taken from that decree and it was and remains a final and binding order.

The trial court sustained the plaintiffs' motion for summary judgment and in so doing made certain findings of fact, including a finding that at the time of the purported creation of SID 276 all public street improvements adjoining the SID 276 Property had been made by SID 171 and special assessments for the improvements had been duly levied against the property. The court also found in its decree that all of the expenditures made by SID 276 consisted of paving, utilities, and electrical distribution systems, all situated on private property of the developers. The court further found that SID 276 was totally included within the territory of SID 171 and that "two distinct Sanitary and Improvement Districts cannot, within the same territory, co-exist; that the pur-

ported creation of Sanitary and Improvement District No. 276 was void ab initio and all powers, jurisdiction and privileges sought to be exercised by said Sanitary and Improvement District No. 276 are null and void." The court in effect dissolved SID 276.

SID 276 assigns as errors: (1) That the trial court erred in holding SID 276 to be void ab initio merely because its geographic boundaries fall within the boundaries of another sanitary and improvement district; and (2) that the trial court erred in granting a motion for summary judgment in that there existed genuine issues of fact. We have reviewed the record in this case and believe the trial court was indeed in error in granting the motion for summary judgment. We therefore reverse the judgment of the trial court and remand the cause.

Before a motion for summary judgment can be granted, two requirements must be met: (1) There must be no genuine issue as to any material fact; and (2) the moving party must be entitled to judgment as a matter of law. Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc., 199 Neb. 555, 260 N. W. 2d 310 (1977). Therefore, in order for the judgment of the trial court in this case to be correct, we must find: (1) That there were no genuine issues as to any material facts; and (2) that Davis and the other appellees were entitled to judgment as a matter of law.

An examination of the affidavits, counteraffidavits, interrogatories, answers to interrogatories, several exhibits, and a stipulation made at trial to the effect that the improvements were not made on dedicated streets, but rather on public streets or easements, does little to resolve the several questions of fact raised by the pleadings. The record does not even clearly set out what the improvements were, although a resolution offered in evidence describes the various improvements as public improvements. We have no way of determining that fact. Other than

the unsupported statement of counsel for Davis made at the time of argument to the trial court to the effect that the improvements consisted of a private parking lot and interior utility connections, we find no evidence on this issue. We do not question the integrity of counsel. We merely point out that before one can sustain a motion for summary judgment all genuine questions of all material facts necessary for the determination must be resolved. The questions concerning the nature and type of improvements were not so resolved.

It would appear that the motion for summary judgment could only be sustained in this case if, as a matter of law, the creation of one SID within the boundaries of another SID automatically rendered the second SID void ab initio as contended for by plaintiffs. We do not believe that to be the law. Sanitary and improvement districts are purely creatures of statute and were first created in 1947. See §§ 31-701 to 31-726, R. R. S. 1943. In 1949, the Legislature enacted sections 31-727 to 31-762 entitled "DISTRICTS FORMED UNDER ACT OF 1949." For a review of Nebraska sanitary and improvement district legislation, see 5 Creighton L. Rev. 269, Nebraska Sanitary and Improvement District Legislation.

In support of their position, appellees cite 2 McQuillan, Municipal Corporations (3d Ed.), § 7.08, p. 298, and our decision in City of Bellevue v. Eastern Sarpy County S. F. P. Dist., 180 Neb. 340, 143 N. W. 2d 62 (1966). The citation in McQuillan, however, makes it clear that before two municipal corporations occupying the same boundaries are incompatible, it must be established that the powers and privileges conferred on the separate governmental agencies are substantially coextensive in scope and objective. The author further points out that, in the absence of constitutional restrictions, the Legislature may authorize the formation of two municipal corporations in the same territory at the same time

for different purposes, and municipal corporations organized for different purposes may include the same territory. The identity of the territorial limits of separate public corporations is immaterial if such entities have separate and distinct governmental purposes.

In order for us to determine if the purposes of each of the SIDs are so identical as to be incompatible, we need to examine the articles of association of the two SIDs. The articles of association for SID 276 are in evidence. The articles of association for SID 171 are not. The fact that SID 171 maintains it is performing all the powers and duties authorized to it by statute does not answer the question.

Section 31-727, R. R. S. 1943, sets out the purposes for which an SID may be created. However, in order to exercise that authority the articles of association must set out in detail the purposes of the SID. An SID may be created for some or all of the purposes set out in section 31-727, R. R. S. 1943. This fact is made abundantly clear by the provision of section 31-727 (3), R. R. S. 1943, which reads in part: "* * * No corporation formed or hereafter formed shall perform any new functions, other than those for which the corporation was formed, without amending its articles of association to include the new function or functions." One SID here may be for one purpose and the other for something else.

If, in fact, SID 171 was created and authorized to perform the functions performed by SID 276, evidence to that effect must be offered and cannot be left to conjecture. Even that fact, however, might not justify dissolving SID 276 ab initio. In any event, the mere coexistence of the two SIDs is not sufficient to justify the trial court's order in this case.

City of Bellevue v. Eastern Sarpy County S. F. P. Dist., *supra,* is likewise of little aid or assistance in support of the claim that two SIDs may not coextensively exist for different purposes. The City of Belle-

vue case was brought pursuant to the provisions of section 31-766, R. R. S. 1943, which specifically provided that a municipality had the right to annex a portion of a district and when doing so adjustments are to be made with regard to the ownership of assets and the payment of liabilities. The decision certainly did not establish that two SIDs may not occupy the same territory.

It appears to us the act further contemplates that there may be occasions where the creation of an SID may be coextensive with all or part of another district. Section 31-728, R. R. S. 1943, specifically requires that immediately after the petition and articles of association have been filed, the clerk of the District Court shall issue a summons directed to the several owners of the real estate in the proposed district. Those individuals then have a right under section 31-729, R. R. S. 1943, to object to the creation of the district, in part, on the basis that their land will not be benefited by the installation of the various improvements. The District Court is then permitted to create such a district but exclude certain property which the court finds will not be benefited thereby. The act specifically provides: "No lands included within any municipal corporation shall be included in any sanitary and improvement district * * *." See § 31-730, R. R. S. 1943. If, in fact, it were true that at common law two municipalities could not coexist, then it would appear there was little need to specifically exempt land within a municipal corporation from being included within a sanitary and improvement district.

The statutes authorizing the creation of SIDs contemplate that before an SID may come into being a petition must be filed with the District Court of the county in which the principal part of the land will lie, and a decree must be entered by that court finding and determining that the SID was indeed lawfully and validly created. See § 31-727 et seq., R. R. S.

1943. The evidence in this case discloses that, in fact, SID 276 did file such an application in the District Court for Douglas County, Nebraska. On April 25, 1974, SID 276 was declared by the District Court for Douglas County, Nebraska, to be duly organized according to law and was in that decree declared to be a public corporation of the State of Nebraska under sections 31-727 to 31-769, R. R. S. 1943, as amended. We have difficulty understanding how the District Court for Douglas County, Nebraska, can at one moment enter a decree which becomes final and binding directing that a sanitary and improvement district has been duly organized and created and thereafter enter a subsequent decree which in effect collaterally attacks its own judgment and declares its own act void ab initio.

The decree of the District Court for Douglas County, Nebraska, entered on April 25, 1974, was a final judgment. It could not be set aside except as specifically authorized by statute. A judgment which is not void may only be set aside after the term at which it was entered as authorized in section 25-2001, R. R. S. 1943. Gant v. City of Lincoln, 193 Neb. 108, 225 N. W. 2d 549 (1975). Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. State ex rel. Southeast Rural Fire P. Dist. v. Grossman, 188 Neb. 424, 197 N. W. 2d 398 (1972). A District Court has no power to vacate or modify its judgment after term on the ground that an error of law had been committed by it in rendering such judgment. Paine v. United States Nat. Bank of Omaha, 199 Neb. 248, 257 N. W. 2d 826 (1977). Not even a statute which is declared unconstitutional is void ab initio insofar as a previous judgment based upon the statute is concerned. In Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119 (1970), we said: " 'The general rule is said to be that a statute declared unconstitutional is void ab initio. However,

this is subject to the exception that the finality of a judgment cannot be affected thereby.' " A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies. Calkins v. Witt, 183 Neb. 178, 159 N. W. 2d 199 (1968). Clearly, the plaintiffs herein are in privity with the parties to the District Court's order of April 25, 1974. How can they now attack the existence of SID 276? Certainly, if grounds do in fact exist to disregard the previous judgment, they have not been established by the motion for summary judgment. The judgment of the trial court must be reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

CLINTON, J., concurring.

I concur in the opinion of the court except that part contained in the last paragraph which discusses and determines that the previous judgment of the court rendered under sections 31-727 to 31-769, R. R. S. 1943, as amended, is res judicata and determinative of this case. That paragraph of the opinion raises an issue not raised by the parties nor discussed in the briefs, is totally unnecessary to the decisions in this case, and purports to decide an issue not even raised by the pleadings. Res judicata is a defensive matter which ought to be raised by pleadings as well as by proof.

STANDARD MEAT COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. LLOYD FEERHUSEN AND LARRY FEERHUSEN, APPELLANTS.

282 N. W. 2d 34

Filed August 14, 1979. No. 42227.

1. **Contracts: Intent.** An interpretation of a written instrument should be made which will effect the true intention of the parties as expressed in the writing.
2. _____: _____. Where a contract is ambiguous, the court must determine the intention of the parties and the ambiguity must be resolved so as to give effect to that intent.
3. _____: _____. Canons of construction are useful only insofar as they are an aid in determining the intentions of the parties to the contract.
4. **Contracts: Notice: Equity.** Contractual promises with respect to the use of land, which under the rules of equity are specifically enforceable against the promisor, are effective against the successors in title or possession if the successor has actual or constructive notice of the promise. Under such circumstances, the promise subjects the land to an equitable servitude.

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

Rollin R. Bailey of Bailey, Polsky, Huff, Cada & Todd and Ted L. Schafer, for appellants.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and BURKE and WHITEHEAD, District Judges.

CLINTON, J.

Plaintiff, Standard Meat Company, a corporation, brought this action in equity to enjoin the defendants, Lloyd Feerhusen and Larry Feerhusen, father and son respectively, from conducting the business of selling meats and other food products to the "food service industry" in competition with the plaintiff and from using a certain improved piece of real estate in the city of Lincoln, formerly owned by Lloyd Feerhusen (hereinafter Feerhusen) and sold by him

to Larry, for that purpose. It was alleged the conduct threatened by the defendants was in violation of the provisions of a certain contract previously entered into between the plaintiff and Feerhusen, of which provisions Larry had both actual and constructive notice. The trial court granted the injunctive relief prayed for. Both defendants appeal to this court. The issue on appeal, as it was in the trial court, is the proper construction of the contract. We affirm.

The precise question in this case is whether a provision in the contract, prohibiting for a period of 15 years the use and occupancy of the building on the real estate in question for the purpose of supplying the "food service industry" in competition with Standard, applies in the event of sale of the premises by Feerhusen.

It is necessary to recite some of the undisputed background facts and to summarize or quote provisions of the contract pertinent to the issue. The contract was entered into on November 2, 1968. At that time Feerhusen was doing business in the building in question under the trade name of "Del Gould Meats" and was engaged in selling meats and other food products to the "food service industry," hereafter FSI. The contract defined FSI as including: ". . . all eating-away-from-home establishments, such as hotels, restaurants, clubs, institutions, both private and governmental, schools, . . . [certain other specifically described businesses or entities] and all other 'away from home' feeding establishments." Feerhusen desired to sell that portion of his business to Standard, while continuing to conduct a business known in meat purveyor's parlance as "fabrication," "breaking," and "jobbing." Standard desired to acquire certain assets belonging to Feerhusen pertaining to FSI and to acquire and serve Feerhusen's customers.

At the time the contract was entered into, Standard

was expanding its facilities in Lincoln to accommodate the increased business anticipated from acquiring Feerhusen's FSI customers. The contract closing was to occur immediately following completion of Standard's facilities, but not later than January 1, 1970. All of the above is shown by evidence or recitals in the contract.

The contract provided that Standard would purchase the assets of Feerhusen previously mentioned and pay for them the sum of $30,000. The contract contained promises by Feerhusen as follows: "(b) He will not engage, directly or indirectly, by ownership or investment, as an individual, member of a partnership, or stockholder of a corporation, in his own name or in the name of any member of his family for and on his behalf, directly or indirectly, in the business of supplying meat or other food products to the food service industry as defined herein, within the State of Nebraska for a period of 15 years from and after the date of the closing of this agreement as provided herein, and the bill of sale shall contain a similar restrictive covenant. . . .

"(c) The building presently occupied by Feerhusen, located upon the real estate described in Exhibit 'C', and used by him to conduct his business now known as 'Del Gould Meats' shall not directly or indirectly be leased by Feerhusen, or be permitted to be occupied or used by any person, firm or corporation in the business of supplying meat or other food products to the food service industry as defined herein, for a period of 15 years from and after the date of closing of this agreement as provided herein, except that Feerhusen may use all of the above-described premises in his contemplated business described above," i.e., fabrication, breaking, and jobbing.

Feerhusen also agreed to furnish customer lists and certain information concerning customers to Standard and to solicit these customers on behalf of

Standard. Standard agreed to employ Feerhusen as a consultant and public relations man for a period of 10 years at a salary of $1,100 per month and to pay him $5,000 per year thereafter for an additional 5-year period without any obligation on Feerhusen's part to perform any services during the 5-year period. Feerhusen agreed that during the 15-year period he would act in Standard's best interest and not compete in any way in serving the FSI. The sums to be paid to Feerhusen during the 15-year period were payable to his designated beneficiaries if he died during the period.

Paragraph 7 of the contract contained provisions pertaining to the purchase of the real estate in which Feerhusen conducted his business and this is the provision upon which Feerhusen primarily relies to support his position. Paragraph 7 provided: "In addition to agreeing not to lease Feerhusen's present building, directly or indirectly, to any person, firm or corporation supplying meat or other food products to persons engaged in the food service industry in the State of Nebraska for a period of 15 years from and after the closing of this agreement Feerhusen further agrees that Standard shall have the first option to purchase said building, ..." It also contained provisions regulating the exercise of the option. It further provided: "If no agreement can be reached within 90 days after Standard has advised Feerhusen of its intention to exercise said option, as provided hereinafter, then in that event Feerhusen shall be relieved of the obligation to sell said building to Standard and Feerhusen shall be free to sell said building to any other person, firm or corporation." This paragraph also contained the provision that the option would continue during the 15-year period even though Feerhusen should die during that time and gave to Standard the option to meet any bona fide offer which Feerhusen might receive for the purchase of the building.

The contract contained a provision in which Feerhusen agreed that Standard: ". . . may file with the appropriate public office or offices such affidavits or documents as may be necessary to afford public notice of the nature of this transaction and all of the terms thereof," and provided: "This contract shall, upon its execution, become binding and effective upon each of the parties hereto and their respective heirs, administrators, executors, successors and assigns."

After the contract was closed, the affidavit above contemplated was filed in the office of the recorder of deeds on August 18, 1971.

It is not disputed that Larry had actual and constructive notice of the restrictive provisions of the contract relative to the use and occupancy of the building. Larry owned 50 percent of the shares of stock of the corporation which carried on the "fabrication," "breaking," and "jobbing" business on the real estate involved. Feerhusen and his wife owned the other 50 percent of the shares.

In 1977, Feerhusen agreed to sell the building to Larry and invited Standard to exercise its option. Standard declined to do so. The Feerhusens gave notice to Standard that Larry intended to go into the business and use the building which he proposed to purchase for serving FSI customers. Standard protested and claimed that such use and occupation would constitute a violation of the agreement. This action resulted.

Reduced to its essence, the contention of the Feerhusens is that the promise restricting the use of the building applied only during such time as Feerhusen continued to own the building and that, upon the failure of Standard to exercise its option to purchase, Feerhusen was free to sell the building to anyone without restriction as to use even though the purchaser might have notice of Feerhusen's promise. The argument is based primarily upon this introduc-

tory language from paragraph 7: "In addition to agreeing *not to lease* Feerhusen's present building, directly or indirectly, to any person, . . . supplying . . . persons engaged in the food service industry in the State of Nebraska for a period of 15 years from and after the closing of this agreement. . . ." (Emphasis supplied.) Feerhusens contrast this language with the broader scope of Feerhusen's promises in paragraph 5 (c) restricting use of the building as follows: ". . . shall not directly or indirectly be leased by Feerhusen, or be permitted to be occupied or used by any person, firm or corporation in the business of supplying meat or other food products to the food service industry as defined herein, for a period of 15 years from and after the date of closing of this agreement," and argue that the omission of the more restrictive language from paragraph 7 which pertains to the purchase of the building is significant and must mean that, in the event of sale to a third party, the use of the building is to be unrestricted.

The Feerhusens cite and rely upon various canons pertaining to the construction of contracts. However, we find it necessary to cite only these principles. An interpretation of a written instrument should be made which will effect the true intention of the parties as expressed in the writing. Younker Brothers, Inc. v. Westroads, Inc., 196 Neb. 168, 241 N. W. 2d 679. Where a contract is ambiguous, the court must determine the intention of the parties and the ambiguity must be resolved so as to give effect to that intent. Frank McGill, Inc. v. Nucor Corp., 195 Neb. 448, 238 N. W. 2d 894. Just as in the case of interpreting ambiguous statutes, we believe that canons of construction are useful only insofar as they are an aid in determining intention. See Equal Opportunity Commission v. Weyerhaeuser Co., 198 Neb. 104, 251 N. W. 2d 730.

An examination of the entire contract leads us to the inescapable conclusion that the parties thereto

intended to restrict the use of the Feerhusen real estate during the entire 15-year period of noncompetition and not merely while Feerhusen continued to own the building. Several provisions of the contract to which we have already drawn attention are pertinent. The promise of Feerhusen in paragraph 5 (c) is not only not to lease, but also that he will not permit the building to "be occupied or used by any person," etc., in the business of supplying FSI. The contract provides that it shall bind not only the parties, but their successors and assigns. In paragraph 5 (i), Feerhusen specifically agrees that Standard may file in the appropriate public office affidavits or documents "as may be necessary to afford public notice of the nature of this transaction and all of the terms thereof." The principal and perhaps only conceivable reason for such a provision would seem to be to give notice under the recording statutes to persons who might purchase the real estate, if Standard did not. In addition, it appears Standard would not have expanded its own facilities, paid Feerhusen $30,000 for business assets, and in addition agreed to pay him the total sum of $157,000 over a 15-year period without assurance of freedom from such competition as Feerhusen could legally agree to. The evidence shows without contradiction that the personal services performed by Feerhusen under the contract continued only for a brief period of time and the inference is that such was the contemplation of the parties. Paragraph 7 might well have been more precisely drawn. However, we have no doubt, just as the trial court did not, that Feerhusen understood the building's use was to be restricted in the hands of his successors.

Contractual promises with respect to the use of land, which under the rules of equity are specifically enforceable against the promisor, are effective against the successors in title or possession if the successor has actual or constructive notice of the

promise. Under such circumstances, the promise subjects the land to an equitable servitude. Restatement, Property, Servitudes, § 539, p. 3226; Gillen-Crow Pharmacies, Inc. v. Mandzak, 5 Ohio St. 2d 201, 215 N. E. 2d 377; Sun Oil Co. v. Trent Auto Wash, 379 Mich. 182, 150 N. W. 2d 818. See, also, Restatement, Property, Servitudes, Part III, Promises Respecting the Use of Land, p. 3147.

Agreements not to compete which are reasonable in scope accompanying agreements for sale of a business are enforceable in equity, at least in the absence of an adequate legal remedy. D. W. Trowbridge Ford, Inc. v. Galyen, 200 Neb. 103, 262 N. W. 2d 442; Antrim v. Pittman, 189 Neb. 474, 203 N. W. 2d 510. In the case before us, no attack is made upon the reasonableness of the agreement.

AFFIRMED.

FRED CONKLIN AND HELEN W. CONKLIN, APPELLANTS AND CROSS-APPELLEES, V. VERNON S. RANDOLPH AND CAROL W. RANDOLPH, HUSBAND AND WIFE, ET AL., APPELLEES AND CROSS-APPELLANTS.

281 N. W. 2d 913

Filed August 14, 1979. No. 42234.

1. **Partnerships: Contracts.** Subject to any agreement between the partners, the rights and duties of the partners in relation to the partnership are governed by the provisions of the Uniform Partnership Act.
2. _____: _____. Under the Uniform Partnership Act, a partnership may be dissolved by the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking, without violating the agreement between them.
3. **Partnerships: Liability.** Subject to any agreement to the contrary between the partners, under the Uniform Partnership Act, in settling accounts between the partners after dissolution, the liabilities of the partnership shall rank in order of payment as follows:

(I) Those owing to creditors other than partners, (II) Those owing to partners other than for capital and profit, (III) Those owing to partners in respect of capital, and (IV) Those owing to partners in respect of profits.

4. **Partnerships: Contracts: Interest.** Under the Uniform Partnership Act, and subject to any agreement between the partners, a partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.
5. **Partnerships: Contracts: Rent.** It is the general rule that a partner who carries on business in his own name for his own benefit and who uses partnership property therefor is chargeable on an accounting with reasonable rent for the use of the partnership property for the time during which he used it as his own, unless a contrary agreement existed between the partners.
6. **Partnerships: Contracts: Liability.** Under the Uniform Partnership Act, and subject to any agreement between the partners, the partners must contribute toward the losses of the partnership, whether of capital or otherwise, sustained by the partnership according to their respective shares in the profits.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions.

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

Dennis M. Coll of Raymond, Olsen & Coll and Rick L. Ediger, for appellees.

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

BRODKEY, J.

This action originated in the District Court for Scotts Bluff County as an action for an accounting between Fred Conklin and Vernon S. Randolph as partners in an oral partnership known as R & F Land Co., and also as a partition proceeding with reference to certain real estate owned by the partnership. A hearing on a motion for summary judgment for the partition of the real estate was held on January 30, 1976, and on February 9, 1976, the court entered its order finding and decreeing that an un-

divided one-half interest in the real estate in question was owned by Fred Conklin and an undivided one-half interest by Vernon S. Randolph. The court also ordered the appointment of a referee to make the partition and retained jurisdiction for all other matters involved in the action. Thereafter, the referee filed his report finding that in his opinion the property should be sold and the proceeds thereof divided, as it was not practical to physically divide the premises without prejudice to the owners thereof. No sale of the premises, however, was ever held; and the entire case came on for trial on December 1 and December 13, 1977, upon a stipulation of facts between the parties and the testimony of witnesses.

The court entered its decree on May 3, 1978, making certain findings of fact with reference to disputed issues in the accounting action, and also finding that, upon the partition sale of the partnership real estate, certain debts and court costs should be paid and the proceeds divided between the parties, awarding 12.5 percent thereof to Fred Conklin and Helen W. Conklin, and 87.5 percent to Vernon S. Randolph and Carol W. Randolph, and further reciting that the distribution should be a full and complete settlement for all claims, properties, monies, and accounts between the parties arising out of the partnership of R & F Land Co. Plaintiffs, Fred Conklin and Helen W. Conklin, have appealed to this court from that decree, and the defendants, Vernon S. Randolph and Carol W. Randolph, have also cross-appealed therefrom. The first two assignments of error in the briefs of the respective parties are identical, and they are as follows: "(1) The trial court erred in departing from the stipulated and determined equal ownership of the partnership real estate; and (2) the trial court erred in ordering partition proceedings of equally owned partnership real estate to be distributed 12 1/2% and 87 1/2%." In

effect, therefore, both parties agree that the division of the real estate ordered by the trial court is in error and that the matter should be reversed.

By way of background, it appears that the parties have been acquainted with each other for many years. Randolph had operated a Chevron gas station in Scottsbluff and was acquainted with Conklin, who from 1951 to 1973 was engaged as a commission sales agent for Continental Oil Company (hereinafter referred to as Conoco), his territory being the western half of Scotts Bluff and Morrill Counties. In 1966, Conklin approached Randolph and discussed the possibility of forming a partnership to construct a Conoco gas station at a different location in Scottsbluff. It appears Conklin had purchased a prebuilt packaged Conoco gas station which he desired to erect on a lot to be purchased by the proposed partnership. It was agreed the partnership would be formed, although no written agreement was ever entered into between them and their specific understanding of the details at the time was somewhat vague. They did, however, apply for financing to the Scottsbluff National Bank and Trust Company, and consulted with Robert Finke, a vice president, with regard to the details of the loan required. In any event, the building was thereafter erected on a lot purchased by the partnership, as well as a carwash operation, and the station opened for business during the last week of November 1969. Although the partners anticipated obtaining a 10-year loan from the Scottsbluff National Bank and Trust Company (hereinafter referred to as the Bank), the Bank was unwilling to give a 10-year loan on the carwash equipment, but instead made a 10-year loan on the real estate in the amount of $37,500, payable monthly at the rate of $435.43; and a 5-year loan on the equipment in the amount of $25,000, payable monthly at the rate of $610.40, or a total monthly payment of $1,045.83, instead of the approximately $600 per

month originally anticipated by the partners. The partnership also obtained a franchise for the sale of certain carwash machinery and equipment, but the franchise was taken in the name of Conklin alone. The record reveals that Randolph operated three independent businesses from the premises in question, which businesses were owned by him and not by the partnership. These were the operation of the service station, the sale of carwash services to the public, and also the sale of campers and travel trailers. By agreement, Randolph's accountant, Lee Daley, served as accountant for the partnership and prepared the partnership records and tax returns. Carol Randolph, wife of Vernon, acted as bookkeeper for the partnership. There is no question or dispute that Randolph did not pay any rent to the partnership for the use of the premises in conducting his individual businesses, his reason for his failure to pay being a matter of dispute between the parties.

It is clear from the record that after the construction of the station, Conoco leased the station from the partnership for a rental of 1 dollar per month plus 2 cents for every gallon of gas delivered to the station, and there is in the evidence a written lease between the parties to that effect. Conoco then leased the station back to the partnership for the sum of 1 dollar a month, and there is likewise a lease evidencing this transaction in the record. The original lease to Conoco was for a period of 5 years commencing on April 1, 1969, and ending on April 1, 1974, with an option to renew for an additional 5 years, which Conoco exercised on February 28, 1974. The renewed lease expired on April 1, 1979.

Randolph testified that Conklin had promised to pay him 1 cent on every gallon of gas delivered by Conoco to the station, and the trial judge in his order found that Conklin, as part of the partnership agreement, was to pay to Randolph, and not to the partnership, from his own funds, 1 cent per gallon for

each gallon of gas delivered by Conoco to the service station. Conklin admitted in his testimony that he had promised to contribute to the partnership from his commission 1 cent on every gallon of gas delivered to the station, but also claimed that one-half of his 1-cent commission actually had been included in the 2 cents a gallon which Conoco paid to the partnership under its written lease. There is no evidence in the record, however, that Randolph knew of or agreed to this arrangement. In any event, Conklin paid the other one-half cent of his commission directly to the partnership. It appears from the record that both Randolph and Conklin agreed Randolph was to apply the income from the Conoco rent and from Conklin's commission payments to pay the monthly loan payments due the Bank, and if there was insufficient income for that purpose Randolph was to make up the difference. The profits from the sale of the carwash operations were to be used to pay the other expenses of the partnership's business. The District Court, however, found that Randolph was to make the payments on the real estate mortgage to the Bank in the amount of $435.43, and that the payments on the equipment and carwash would come primarily from proceeds from the sale of carwashes by the parties.

In the beginning, substantial profits from the sale of carwash equipment and operations were deposited to the partnership bank account. The records reveal, however, that the last carwash operation was sold in 1973. During the period commencing in October 1975 and extending to May 1977, Conklin refused to endorse the rent checks received from Conoco which were made payable to both Conklin and Randolph. These checks total $6,996.88 and have been deposited with the District Court awaiting further disposition. In June 1977, Conoco sold its entire western Nebraska operation to a successor company known as Copsey Basin and Oil Co. (herein-

after referred to as Copsey, Inc.), which company continued to supply the partnership station and continued to pay the partnership the rent of 2 cents for every gallon of gas delivered to the station. As of December 1, 1977, six checks had been received by the partnership from Copsey, Inc., totaling $1,977, and were apparently deposited in Randolph's bank account in order to make the monthly loan payments to the Bank.

It also appears from the record that from time to time Randolph loaned the partnership money for the purpose of paying its real estate taxes, special assessments, life insurance premiums on the lives of the partners as security for the mortgage, and also the cost of installing a lead-free gas tank that the station was required to do by federal law. It appears that Randolph, on advancing the funds in question, executed a series of notes, payable to himself, signed R & F Land Co. by V. S. Randolph. One note was dated November 30, 1974, in the sum of $3,499.93; the second was dated October 31, 1975, in the amount of $5,288.32; the third was dated October 31, 1976, in the amount of $4,511; and the fourth was dated August 31, 1977, in the amount of $3,695.18. All of these notes bore interest at the rate of 6 percent per annum.

As previously stated, Conklins filed their petition against the defendants in this action on November 26, 1975, requesting the partition of the property and an accounting of the partnership's money and property. The defendants Randolph filed their answer on December 30, 1975, also requesting that the partnership be dissolved and that an accounting be made of the monies and properties of the partnership. The District Court heard testimony and entered its decree on May 3, 1978. We have previously indicated in this opinion some of the findings of the court contained in that decree, and we shall discuss other findings contained therein hereinafter in this opinion.

We have reviewed the record before us and have concluded that the matter must be reversed and remanded to the District Court for further proceedings in light of our findings and directions as hereinafter set out. The Uniform Partnership Act was adopted in Nebraska in 1943 and appears as sections 67-301 to 67-343, R. R. S. 1943. Section 67-318 of that act reads, in pertinent part, as follows: "The rights and duties of the partners in relation to the partnership shall be determined, *subject to any agreement between them,* by the following rules: (a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits. (b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property. (c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance. (d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made. (e) All partners have equal rights in the management and conduct of the partnership business. * * *." (Emphasis supplied.)

We find that the provisions of the Uniform Partnership Act control in the instant case, except where a different agreement exists between the parties.

Although the trial court in its decree did not find when the partnership in question was dissolved, it is clear that the plaintiffs expressed their intention to dissolve the partnership in their petition filed herein,

and the defendants Randolph also expressed their intention to dissolve the partnership in the answer they filed to plaintiffs' petition. We believe the matter is specifically covered by section 67-331, R. R. S. 1943, of the Uniform Partnership Act, which provides as follows: "Dissolution is caused: (1) Without violation of the agreement between the partners, * * * (c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking, * * *." Thus, absent an allegation and evidence of acts indicating an earlier dissolution, we find that the partnership was dissolved by the express will of the partners on December 30, 1975, the date the defendants filed their answer in District Court. Since that date, the partnership has been engaged in the winding up of the partnership business. Another pertinent provision of the Uniform Partnership Act, controlling in this appeal, is section 67-340, R. R. S. 1943, which provides as follows: "In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary: * * * (b) The liabilities of the partnership shall rank in order of payment as follows: (I) Those owing to creditors other than partners, (II) Those owing to partners other than for capital and profits, (III) Those owing to partners in respect of capital, (IV) Those owing to partners in respect of profits. * * *." It is clear from the above statute that after all the creditors of the partnership are repaid, the partners are to be repaid the amounts owing to them other than for capital and profits, and also the amounts owing them in respect to capital contributed before the profit, if any, is divided between them according to their agreement. In this case, we conclude that the agreement between the parties was to divide the profits and indebtedness, if any, on a fifty-fifty basis.

We might also add that the income tax returns filed for the partnership by their accountant for the years 1970-1974 also indicate it was a fifty-fifty partnership. See, also, § 67-318 (a), R. R. S. 1943.

In the final accounting between the parties, Conklin is entitled to be credited for the amount he invested for the prebuilt packaged service station. In the stipulation entered into between the parties in lieu of a pretrial hearing, the parties agreed that the partnership had discharged $3,840.96 of the indebtedness remaining on the service station, plus interest. We believe Conklin should be given the opportunity to establish the amount he personally invested in the service station, and should be credited with this amount without interest thereon. It is our finding that, as part of the partnership agreement, Conklin agreed to contribute the service station to the partnership, and hence, under section 67-318 (c), R. R. S. 1943, he is not entitled to be paid any interest thereon.

Randolph has contended Conklin agreed to pay him personally, and not the partnership, 1 cent on every gallon of gas delivered to the station, in addition to the 2 cents per gallon of gas received from Conoco. Conklin contends his agreement was to pay 1 cent per gallon of gas delivered to the station to the partnership, and that, in fact, he did so by paying one-half cent per gallon personally, and the other half cent was deducted by Conoco from his commission and included in the 2 cents that Conoco paid the partnership. The record reveals that Conoco paid the 2 cents per gallon of gas by checks payable to both parties, and continued to pay the 2 cents per gallon even after Conklin's employment with Conoco ended. Furthermore, the lease was renewed for an additional 5 years, with the rent remaining at 2 cents per gallon of gas delivered to the station. Randolph testified that he told Robert G. Finke, the vice president of the Bank, during the negotiations of financing for the new station, in Conklin's presence, that

the loan was to be repaid from the 2 cents a gallon paid by Conoco, "and that Mr. Conklin was going to pay one cent a gallon and that I would be responsible for making the payments on the note." It was Randolph's testimony that he did not know the 1 cent per gallon of gas, promised by Conklin, was to come from and was to be conditioned upon Conklin's receiving commissions from Conoco, until Conklin informed him of that fact after the business had commenced.

Although the evidence upon the point is conflicting, we find that Conklin agreed to contribute to the partnership, and not to Randolph personally, 1 cent for every gallon of gas delivered to the station. The trial court in its decree, however, found to the contrary. We believe that the 1-cent per gallon contribution by Conklin to the partnership should have continued until the dissolution of the partnership by the filing of this action on December 30, 1975, as previously discussed. It is clear that Conklin did contribute one-half cent per gallon of gas delivered to the station until his employment with Conoco terminated in December 1973. Conklin is entitled to be credited with all of the money he contributed to the partnership without interest thereon. Since Randolph either made the loan payments to the Bank directly or deposited the equivalent amount in the R & F Land Co. bank account and then issued a check for the payment to the Bank, it seems clear that he paid amounts, included therein, which Conklin had agreed to pay, but did not pay. Had Conklin contributed to the partnership 1 cent for every gallon of gas delivered to the station, Randolph's required contribution would have been reduced. Accordingly, we find that Randolph is entitled to be credited with interest on the amount Conklin should have paid but did not pay to the partnership, under the provisions of the Uniform Partnership Act. Interest on the amount not paid by Conklin should be calculated

from the date Conoco paid its monthly rent, based upon the gas delivered to the station, until Randolph is repaid the excess amounts he was required to contribute, as provided by section 67-318 (c), R. R. S. 1943. In other words, all amounts which Randolph was required to pay to make up the difference between the Bank loan payments and the income earned by the partnership (excluding, however, profit earned on the sale of carwash equipment which, by agreement, was to be used to pay other partnership expenses), are to be credited to Randolph without any interest except for that portion which Conklin agreed to contribute, but did not, as noted above. Any difference between the loan payments and income earned by the partnership which has been paid by Randolph personally since the dissolution of the partnership, however, shall earn interest until the partnership is terminated.

The record also reveals that, as previously stated, Randolph loaned money to the partnership to pay the real estate taxes, special assessments, the cost of installing a lead-free gas tank, and for life insurance premiums on the lives of the partners to secure the debt owed to the Bank; and Randolph received notes from the partnership for such advances providing for 6 percent interest thereon. In the accounting, Randolph is entitled to be credited with interest at the rate of 6 percent on the notes in question. Other than the above, all other interest to be paid in this accounting procedure shall be calculated at the statutory rate of 8 percent per annum, under section 45-103, R. R. S. 1943.

One major point of contention between the parties involves the issue of whether, in the accounting, Randolph should be charged a reasonable rental for his use of the partnership premises in connection with his individual businesses of operating the service station, selling carwash services (as distinguished from carwash equipment and operations), and the

sale of travel trailers and campers. Conklin contends Randolph should be charged a reasonable rental value for the premises owned by the partnership while, on the other hand, Randolph contends their agreement was to the contrary. It is the general rule that a reasonable rental should be charged to the partner using the partnership property for his own gain, unless a contrary agreement between the parties is established. In its decree, the District Court found that Randolph was to make the payments to the Bank but no rent was to be charged to the defendants Randolph for the use of the service station building. We conclude that the District Court was correct in its finding. As revealed by the record, Conklin testified with regard to the partnership agreement as follows: "A. But there was no taxes paid and all of the money that went into this R & F Land Company account was put in by me through checks of sales, and so forth, *other than what Mr. Randolph paid in the amount of two notes that we owed at the bank in lieu of rent.* Q. What do you mean 'in lieu of rent'? There was no agreement, was there? A. No, but he didn't want to pay rent and then things had to be paid the same as the taxes but —." (Emphasis supplied.) We find there was in fact an agreement that Randolph could use the premises for his personal business rent free in exchange for his making up the difference between the partnership income and his monthly loan payments.

There are four specific transactions relating to the sale of carwash equipment and operations which were decided against the plaintiffs in the decree of the District Court and are assigned as error in the plaintiffs' brief. These items will be discussed below.

The District Court found that Conklin had not accounted for the sum of $1,567.40 involved in the "Cross Car Wash" transaction. In his evidence

adduced, in explanation of this transaction, Conklin introduced bills totaling $567.40, as representing his expenses in selling a carwash to John Budd Cross in Powell, Wyoming. Conklin further testified that he had refunded $1,000 to Cross because he was not able to deliver the particular model of carwash that Cross had ordered and was forced to substitute a less expensive model. Our review of the record convinces us that Conklin did account for the $1,567.40 involved in that transaction and should not be charged for this amount in the accounting.

The second item involved a so-called "finder's fee" which Conklin paid to his son, Clark Conklin, in connection with the Martha Nielsen carwash transaction. The evidence is conflicting as to who, in fact, made the first contact with Martha Nielsen with reference to the sale of the carwash. Randolph testified that Martha Nielsen had contacted him at the service station about a carwash operation after she had first contacted the manufacturing company who referred her to the service station. He further testified, however, that Clark Conklin, the son of Fred Conklin, was the first person who actually called on Martha Nielsen at Hot Springs, South Dakota, because his father, Fred Conklin, was too busy to do so at the time. Randolph further testified that both he and Fred Conklin had made several visits to Martha Nielsen before they sold her the carwash operation. We believe the evidence supports the finding of the District Court that the plaintiffs in the accounting should be charged with the $1,000 paid to their son as a finder's fee. We also find that, under the terms of the Uniform Partnership Act, they should be charged with interest thereon from the date the partnership paid Clark Conklin money.

The third item involved a finder's fee in the amount of $1,000 which Conklin paid to his son-in-law, Jerry Becking, for the sale of a carwash to Gwyns' Distributors, located in Silver City, New

Mexico. Conklin testified that his son-in-law found the buyer and thus was entitled to a finder's fee. Conklin also testified that he had made two trips to New Mexico at the partnership's expense and the partnership had paid for the expenses of the vice president of the Gwyn company to fly to Nebraska in order to look at one of the carwashes in operation. In its decree, the District Court found: "* * * that the Plaintiff wrongfully paid a commission of $1,000 to his son-in-law, Jerry Becking, as commission on the Gwyn transaction in that the down payment was not made to the R & F Land Company partnership or credit given therefore [sic]." It appears from the evidence, which consisted of Conklin's testimony and certain exhibits introduced into evidence, that a cashier's check for $2,500 was purchased and forwarded to the manufacturer of the carwashes, that a $1,000 partnership loan was repaid, and, presumably, a $1,000 finder's fee was paid to Conklin's son-in-law. However, we are unable to determine with any certainty as to whether or not the $4,450 down-payment from the Gwyn company is accounted for. Upon remand of this case to the District Court for further proceedings, the plaintiffs should be permitted to produce further evidence with regard to this transaction so that the District Court can definitely determine whether or not Conklin, in the accounting, should be charged with this amount, and whether interest should be charged thereon.

The fourth item involved a check for $2,087 paid by R & F Land Co. on May 19, 1972, to a partnership referred to as "Conklin-Flammang." Conklin-Flammang was a partnership between the plaintiff, Fred Conklin, and Alfred Flammang, which partnership was also later known and referred to as Mick's Car Wash, located in Gering, Nebraska. In its judgment the District Court found that the "[p]laintiff was not entitled to withdraw $2,087 from the Flamming [sic] transaction and that said

withdrawal was improper under the circumstances." The $2,087 check in question was signed by Fred Conklin and issued on the R & F Land Co. account, allegedly as a refund on a defective carwash operation which the manufacturer, American Car Wash Mfg., Inc., sold to Mick's Car Wash through R & F Land Co. The bank statement of R & F Land Co., introduced into evidence, shows that a $4,000 deposit was made to R & F Land Co.'s account on December 10, 1971, and also that a $4,000 check was issued on the account and paid on December 13, 1971. Also in evidence is a Scottsbluff National Bank deposit slip, dated December 10, 1971, showing that a $5,000 check from Mick's Car Wash was deposited on that date, less $1,000 paid back before the deposit was made and identified on the deposit slip with the words "Bill Lyons." Other evidence established that Bill Lyons was an employee and the firm may have owed him a commission for the sale of two carwashes. Also in evidence is the actual check in the amount of $4,000, written on R & F Land Co.'s account and made payable to American Car Wash. It further appears that on January 24, 1972, a $3,995 check from Mick's Car Wash was issued, payable to R & F Land Co., with the notation thereon that $2,995 was for American Car Wash, and $1,000 for a carwash wand. The R & F Land Co.'s bank statement, for the period 12-31-71 to 1-31-72, shows that the sum of $2,995 was deposited to its account on January 24, 1972, which was the date of the $3,995 check issued by Mick's Car Wash, referred to above. The check in question was paid by the Gering National Bank on January 25, 1972. It would appear that the $5,000 paid by Mick's Car Wash to R & F Land Co. on December 10, 1971, when added to the $2,995 which Mick's Car Wash paid to R & F Land Co. on January 24, 1972, would amount to a total sum of $7,995 paid by Mick's Car Wash to R & F Land Co. for the carwash manufactured by American Car Wash. In his

testimony, Conklin testified that R & F Land Co. paid only the initial $4,000 to American Car Wash, and nothing more, because the carwash sold to Mick's Car Wash was defective; and, as previously stated, on May 19, 1972, Conklin wrote the check for $2,087 on the R & F Land Co.'s account, payable to Conklin-Flammang as a refund on the defective carwash purchased by Mick's Car Wash. The $2,087 check referred to was the amount still owed to American Car Wash which had never been paid by R & F Land Co. because the carwash sold to Mick's Car Wash was defective. It would thus appear that R & F Land Co. paid out $6,087 but received $7,995 from Mick's Car Wash, or a difference of $1,908. Of the latter amount, $1,000 was apparently paid to Bill Lyons as a commission, leaving a net gain or profit to R & F Land Co. of $908. There is testimony in the record that R & F Land Co.'s profit on the transaction was $908. We conclude that, in the accounting, Conklin should not be charged for the $2,087 he refunded to Mick's Car Wash.

Although the record reflects that both partners had originally invested $500 each in the formation of the partnership, the testimony is uncontradicted that both partners were subsequently reimbursed for their respective payments, and the final accounting should reflect this fact.

There also appears to be some testimony in the record with reference to possible income derived from the sale of carwash services at the service station. However, in the final argument before this court on appeal, plaintiffs' counsel expressly disclaimed any income therefrom, as the carwash services were not included in the partnership business. We shall therefore not consider this issue.

Finally, counsel for plaintiffs, in his reply brief filed on appeal, argues that the court should make an order concerning the distribution of $35,782.32 in checks from Conoco made payable to both parties

and endorsed to the partnership, but placed in Randolph's own bank account, which he states the trial court inadvertently omitted in its order. Although it appears Randolph did originally deposit these checks in his own bank account, the evidence reveals he used those funds in making payments upon the bank loan to the Bank, and these sums will be recovered and accounted for by the partnership upon the sale of the partnership real estate in this case. The payments received from Copsey, Inc., will likewise be accounted for by the partnership upon the sale of the real estate.

The counsel for both parties in effect argue that there has not been an actual accounting in this case, and that there cannot be until it is known what the sale price of the partnership property is after a sale. Plaintiffs also argue that there is actually no judgment at the present time in this matter for the reason that there is no specification in the decree of the trial court as to any dollars and cents amount owed by one or both of the partners to the other. In this connection we note with interest that in Black's Law Dictionary (5th Ed., 1979), the term "accounting" is defined as follows: "* * * Rendition of an account, either voluntarily or by order of a court. In the latter case, it imports a rendition of a judgment for the balance ascertained to be due. * * *" Whether or not this is the correct and generally followed definition of the term "accounting" is unimportant in the disposition of this case. However, we are in agreement that before a fair and accurate accounting between the partners in this case can finally be accomplished, it is necessary that the partnership property be sold, as originally ordered by the court, and that a further and final accounting be made by the District Court in accordance with the provisions of the Uniform Partnership Act and the specific findings of this opinion, with due consideration to any further change in circumstances which may have

occurred since this matter was appealed. Also, we note that evidence has been adduced with reference to certain uncashed checks from Conoco which were deposited in the District Court pending the outcome of this appeal. Those checks should also be included in the total proceeds of the partnership to be dealt with upon the final accounting. All costs will be paid from the proceeds of the sale before the final division of profits, if any. In the event the proceeds are insufficient to pay the creditors, and to reimburse the partners for their respective contributions, the partners, as required by the provisions of the Uniform Partnership Act, will be required to contribute equally to the partnership to satisfy the partnership's obligations. See § 67-318 (a), R. R. S. 1943.

We therefore reverse the judgment and decree of the trial court, and remand the matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 222 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

281 N. W. 2d 922

Filed August 14, 1979. No. 42265.

1. **Special Assessments: Streets and Alleys: Sanitary and Improvement Districts.** In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement.
2. **Equity: Evidence: Appeal and Error.** On an appeal from an equity trial, in determining the weight to be given the evidence, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying.
3. **Mortgages: Streets and Alleys.** A mortgagor cannot, without the consent of the mortgagee, make a dedication of the mortgaged premises so as to adversely affect the interest of the mortgagee.

4. **Estoppel.** Before a person can sustain the plea of estoppel against another, he must have relied upon and been injured by the facts as pleaded.

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

Walsh, Walentine & Miles, for appellants.

John Barton of Crossman, Barton & Norris and August Ross of Ross & Mason, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

WHITE, J.

This is an appeal from an action filed in the District Court for Douglas County by the appellee, hereafter Metropolitan, to have certain special assessments levied by the appellant, hereafter SID, declared null and void for the reason that the improvements necessitating the assessments were constructed on private, rather than public property.

A recitation of the historical relationship between Metropolitan and SID is necessary for an understanding of this case. In 1970, Edward E. Wilczewski and Sterling R. Flott approached the predecessor company of Banco Mortgage Company, hereafter Banco, concerning the financing of a project subsequently known as August Moon Apartments. Banco was correspondent for a number of life insurance companies, including Metropolitan, to whom it submitted a "mortgage loan submission" for August Moon on forms provided by Metropolitan. Ultimately, this led to a "mortgage loan commitment" by Metropolitan to Banco for $2,050,000 on Phase I of the project. Flott and Wilczewski purchased the Phase I land on December 10, 1970, and apparently assigned their interest to August Development Company. On January 7, 1971, August Development Company executed a mortgage on the property in favor of Banco. In

May 1971, August Development Company became the owner of the real property which subsequently became Phase II of the project. On July 27, 1971, Banco submitted to Metropolitan a mortgage loan submission on Phase II, a revised submission for Phase I, and a combined submission for Phases I and II. Metropolitan, on August 24, 1971, issued to Banco a mortgage loan commitment for both Phase I and II of $5,600,000. On September 8, 1971, Banco accepted the commitment. On October 4, 1971, a mortgage on both Phase I and Phase II and a mortgage note payable to Banco in the amount of $5,600,000 was executed by August Development Company, the earlier mortgage on Phase I, only, having been released.

Interim, or construction, financing was by United States National Bank of Omaha. Metropolitan funded the project, that is to say, purchased the mortgages from Banco, only when the project was complete. This funding took place in July 1972 for Phase I and in July 1973 for Phase II.

During the same period of time in which the financing negotiations detailed above were taking place, the developers, Flott and Wilczewski, also took the necessary steps to form SID 222 for the purpose of financing and constructing certain improvements, namely water systems, paving, and sewer sections. Pursuant to section 31-727 et seq., R. R. S. 1943, the developers executed the articles of association for the District on December 31, 1970. The petition for the formation of the District was filed with the clerk of the District Court for Douglas County on January 15, 1971, and a decree was entered by the court on the same day declaring the SID to be duly formed. That decree is not contested in this appeal. The District boundaries included all of the August Moon development. Its purpose, as stated in the articles of association, was: "* * * installing electric service lines and conduits, installing a sewer system,

installing a water system, and a system of sidewalks, public roads, streets, and highways; * * *." The board of trustees of SID 222 consisted of Flott, Wilczewski, their wives, and one Gerald Keating. In March 1971, the board passed resolutions of necessity to construct the streets, sewers, and water lines in Phase I. Bids were let, the improvements constructed, and payment made to the contractors with public funds raised by the sale of warrants to Dain, Kalman & Quail, Inc. The same procedure was followed in September and October 1971 for the improvements in Phase II.

Eventually, the August Moon project met with financial difficulties. Metropolitan filed a foreclosure proceeding in the District Court for Douglas County on March 5, 1975, and a sheriff's deed was issued to Metropolitan on August 28, 1977.

On January 27, 1975, the board of SID 222 passed a bond resolution for the issuance of $2,250,000 in bonds.

On August 25, 1975, the board levied the special assessments challenged here totaling $1,603,686.53 against the August Moon property for sewer, water, and concrete paving. The validity of the bonds is not contested. Metropolitan concedes that the bonds shall remain an obligation of the District, and the question is, then, whether they shall be repaid by special assessment or by general levy as provided in section 31-755, R. R. S. 1943.

Prior to 1961, the lien arising from a special assessment was, unlike general taxes, inferior to the lien of a prior first mortgage. See City of Lincoln v. Lincoln St. R. Co., 67 Neb. 469, 93 N. W. 766. But in 1961, the Legislature decreed that special assessment liens would henceforth be inferior only to general taxes. § 77-1917.01, R. R. S. 1943. There is no question, then, that the assessments challenged here, if validly levied, are as effective against the mortgage following foreclosure as they would have

been against the mortgagor. But Metropolitan contends that the assessments are not valid because the improvements were actually constructed on the private property of the developers.

It is beyond question that in order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396. See, also, 14 McQuillan, Municipal Corporations (3d Ed.), § 38.179, p. 448.

The trial court found that written easements were given for sewers within the District. It held that the assessments for sewers and water systems were valid. The court further found that there were no written dedications of streets within the District and there was insufficient proof of intent on the part of the developers to dedicate that property, and rejected the SID's contention that the streets had been the subject of a valid "common law" dedication. Intent to dedicate, along with acceptance of the dedication by the proper public authorities or by general public use, are the essential elements of a valid common law dedication. 11 McQuillan, Municipal Corporations (3d Ed.), § 33.03, p. 634, at p. 635.

On an appeal from an equity trial, in determining the weight to be given the evidence, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying. Sinnett v. Hie Food Products, Inc., 185 Neb. 221, 174 N. W. 2d 720. The evidence fully supports the judgment of the District Court as to the *intent* of the developers to dedicate the property; however, we think it necessary to decide initially whether they had the authority to do so.

"Fundamental to the law of real property is the rule that one may not convey or alienate a greater interest in land than he owns, and, consistently with this axiomatic principle, it is firmly established that

a mortgagor cannot, without the consent of the mortgagee, make a dedication of the mortgaged premises so as to adversely affect the interest of the mortgagee." Annotation, 63 A. L. R. 2d 1160. See, also, Morning v. City of Lincoln, 93 Neb. 364, 140 N. W. 638. The rule is controlling unless, as the SID argues, Metropolitan is for some reason estopped from denying a dedication. For purposes of our examination, we accept that Banco was acting as an agent for Metropolitan. The existence of an agency relationship is a fact question. The evidence presented by the SID on that issue was similar to and as strong as the evidence reviewed in Jensen v. Lewis Investment Co., 39 Neb. 371, 58 N. W. 100, where we held that a mortgage lender's correspondent was an agent for the lender, despite disclaimers to the contrary. Yet, having established the existence of the agency relationship, SID must still prove the existence of facts authorizing a finding of estoppel. On this account, the SID claims that David Beal, vice president of Banco, "solicited and induced" the developers to create the SID for the purpose of making the improvements, and that the improvements were made in good faith in reliance on Beal's representations. The trial court found otherwise. Beal did not testify. While it is probably true that he, or others at Banco, knew of the formation of the SID, there is no support for the "solicitation and inducement" theory. As far as the "reliance" argument, it appears that the developers formed the SID only after consultation with their own attorney. Before a person can sustain the plea of estoppel against another, he must have relied upon and been injured by the facts as pleaded. First Nat. Bank v. First Nat. Bank, 111 Neb. 441, 196 N. W. 691.

The courts are in agreement that in the absence of an estoppel, or the consent of the mortgagee to a dedication, a foreclosure sale revokes and nullifies an attempted dedication by a mortgagor. Metro-

politan has, for whatever reason, conceded the validity of the special assessment in the amount of $33,637.17 for the paving of a portion of 99th Street. All remaining special assessments are void.

Metropolitan is, by virtue of the foreclosure, the owner of the property particularly benefited by the improvements, and will be responsible for the discharge of the bonds by ad valorem taxes, instead of special assessments. Apparently other lawsuits are pending which seek to transfer the burden of these taxes to others. We specifically do not rule on the propriety of those actions.

The order of the District Court is affirmed in part and reversed in part.

AFFIRMED IN PART, AND IN PART REVERSED.

FIRST WEST SIDE BANK, A CORPORATION, APPELLANT, V. DAVID L. HERZOG, CARL I. KLEKERS, NORMAN CAIN, AND JAMES F. WINDORSKI, APPELLEES.

282 N. W. 2d 38

Filed August 14, 1979. No. 42273.

1. **Bills and Notes: Contracts: Negotiable Instruments.** The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt unless there is a specific agreement between the parties that the new note shall extinguish the original debt.
2. **Bills and Notes: Novation.** In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place.
3. **Guarantor-Guarantee.** Under an absolute guarantee of payment there is no condition as to demand and notice of default.
4. **Contracts.** A written agreement will be strictly construed against the party preparing the same to resolve any doubt in its meaning.

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

James E. Lang of Marer, Venteicher, Strasheim, Seidler, Laughlin & Murray, P.C., for appellant.

J. William Gallup, for appellee Klekers.

Harold W. Kauffman and Larry E. Welch of Gross, Welch, Vinardi, Kauffman, Day & Langdon, for appellees Herzog, Cain and Windorski.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and COADY and NORTON, District Judges.

NORTON, District Judge.

This is an appeal from the judgment of the District Court for Douglas County, Nebraska, finding generally for the defendants-appellees and against the plaintiff-appellant, and dismissing plaintiff's petition.

The facts are as follows: During the year 1970 the defendants-appellees, David L. Herzog, Carl I. Klekers, Norman Cain, and James F. Windorski, hereinafter referred to as defendants, formed a corporation under the laws of Nebraska named Kurland, Inc., hereinafter referred to as Kurland, for the purpose of constructing condominium-type structures. In early 1972 the corporation, by and through its agent and officers, contacted representatives of the plaintiff-appellant, First West Side Bank, hereinafter referred to as plaintiff, for the purpose of securing financing for the construction of eight 4-unit condominiums in Douglas County, Nebraska. On March 20, 1972, the plaintiff issued a letter of commitment to the agent of Kurland in the amount of $70,000 for the construction by Kurland of one unit, the funds to be distributed upon certain conditions, one being that all the defendants execute a personal guarantee for funds loaned to the corporation. On or about March 27, 1972, the defendants executed an instrument running to the plaintiff wherein they jointly and severally guaranteed payment for "all moneys which shall at any time in any manner be due to it from" Kurland, and further agreed "to make good and pay to said First West Side Bank, Omaha any and all debts or obligations of said debtor however

or whenever, heretofore or hereafter, contracted or incurred or however evidenced." The guarantee further provided that the plaintiff could deal with defendants Herzog and Klekers, who were acting as president and secretary of Kurland, respectively, in the loaning of money and other transactions involving Kurland. The guarantee was to be continuous until revoked "by each of us in writing."

Thereafter, on April 3, 1972, the defendants Herzog and Klekers, on behalf of Kurland, executed and delivered to the plaintiff a first mortgage note in the principal amount of $70,000 payable September 30, 1973, with interest at the rate of 8¼ percent.

On July 14, 1972, the plaintiff issued a second letter of commitment to the president of Kurland in the amount of $70,000 for the construction by Kurland of a second unit in Douglas County, Nebraska. On August 10, 1972, the defendants Herzog and Klekers, in their official capacities as president and secretary of Kurland, executed and delivered to the plaintiff a second first mortgage note in the principal amount of $70,000 payable August 10, 1973, with interest at the rate of 8¼ percent.

In both instances, real estate mortgages were made and delivered to the plaintiff, loan funds were disbursed by the plaintiff to Kurland, and the buildings contemplated were built.

When the two notes referred to above came due, Kurland defaulted in the payment of both principal and interest. Efforts were made by the plaintiff to secure payment of the amounts then due, and when these did not succeed, a third note in the amount of $157,000, executed by Kurland on February 1, 1974, was accepted by the plaintiff. This note was a consolidation of the then existing indebtedness under the prior notes, which were thereafter canceled. The new note called for monthly payments of $1,540 commencing March 1, 1974, and continuing through September 1, 1974, when the entire balance of princi-

pal and interest would be due. The note carried interest at the rate of 11 percent per annum. Kurland failed to pay the first and succeeding installments and defaulted in the payoff in September 1974.

In the late summer or fall of 1974, the plaintiff and Kurland entered into an agreement for the rental of the condominium properties through a professional manager, with provision that the excess of rentals above expenses was to be applied to the indebtedness of Kurland. These excesses did not pay the accruing interest. On January 3, 1975, following discussions between certain of the defendants and the plaintiff, Kurland, the defendants, and the plaintiff entered into a written agreement providing for what the parties hoped would be a resolution of the unpaid obligation of Kurland. In substance, this agreement, after acknowledging the indebtedness of Kurland, the personal guarantees of the defendants, the desire of Kurland and the individual defendants to avoid a foreclosure and other legal action, and the willingness of the plaintiff to forego the same upon certain conditions, provided that "legal" title to the properties would be transferred to two trustees for purposes of private sale during "stated" periods; prior to sale, rentals would be applied to the indebtedness; after the expiration of the stated period, or any extension thereof, if the properties remained unsold the trustees would have the right to sell the properties at public auction; and if the properties were not sold by the trustees at public auction the plaintiff would then have the right to demand "fee simple" transfer of title to it for sale purposes, with any deficiency to be paid by Kurland and the defendants. The agreement also contained a provision entitled "Intentions of the Parties Hereto" which at paragraph VI C. set forth the following language: "It is the further express intention of all parties hereto that this Agreement and execution thereof shall in no way constitute a relief of Guarantors of

their Guaranty of Payment of the indebtedness of Kurland, nor shall it constitute a waiver by First West Side of its right to enforce said Guaranty in any manner provided by law."

The record is clear that "legal" title was never transferred to the cotrustees. As a result, no private sales were ever effected during any "stated" periods of time, nor was there any public auction by the trustees. At no point in time did the plaintiff ever demand transfer of fee simple title to it. The record does support the conclusion that title difficulties had developed early in the transaction which created a question in the minds of the parties that title could be effectively transferred as contemplated by the agreement. The record also indicates rentals were collected and applied to interest, and to a reserve fund for delinquent taxes, but the principal obligation remained unsatisfied. On February 20, 1976, the plaintiff made formal demand upon the defendants for payment of this obligation in full under their personal guarantee. Payment was not made and this suit resulted.

Several issues are raised by the parties on this appeal, but for our purposes it is necessary to deal only with the issues of novation in the execution of the note for $157,000, and thereby the extinguishment of the guarantee given March 27, 1972, and the correctness of the order entered by the District Court for Douglas County.

The defendants contend that the execution of the note dated February 1, 1974, constituted a novation in the original financial agreements between the parties, and resulted in the extinguishment of the defendants' personal guarantee dated March 27, 1972. An examination of the evidence will not support this contention. It is obvious that the note given on February 1, 1974, was simply a renewal of existing obligations of Kurland. We have previously held that: "The taking of a new note for an existing note is a

renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt." Department of Banking v. Keeley, 182 Neb. 645, 156 N. W. 2d 803. In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place. See, Sheridan v. Dudden Implement, Inc., 174 Neb. 578, 119 N. W. 2d 64; Thomas v. George, 105 Neb. 44, 178 N. W. 922. The evidence in this case simply does not indicate an intent on the part of the parties to extinguish the original debt and substitute a new agreement in the place of the old. If such an intent could be gleaned from the record prior to January 3, 1975, it completely disappeared at the time of the execution of the agreement bearing that date.

There being no novation in this matter, the guarantee previously given by the defendants remained in full force and effect. There is some evidence in the record that the defendant Klekers may have attempted to limit his responsibility under this guarantee, but his subsequent actions in executing the agreement of January 3, 1975, reestablished his personal liability, if in fact it had ever been changed. An examination of the guarantee shows beyond a doubt that it was initially intended to be nothing more than an absolute personal guarantee by the defendants to guarantee the indebtedness of Kurland. In that form it was enforceable against them jointly and severally at any time without demand and notice after default by the maker. See Home Savings Bank v. Shallenberger, 95 Neb. 593, 146 N. W. 993. However, an absolute guarantee can be modified and become a conditional guarantee, through the subsequent acts of the parties and where there is an intent on the part of the party benefiting from the guarantee to impose conditions which were not previously applicable. In this instance, it is obvious that prior to January 3, 1975, the plaintiff, upon de-

fault by Kurland, could have proceeded directly against the defendants jointly and severally for collection of the obligation involved, but in the execution of the agreement bearing that date, certain procedures and conditions for the collection of the money due from Kurland were agreed upon between the parties, indicating a willingness to limit the guarantee. This agreement was prepared by counsel for the plaintiff. As such, its terms will be strictly construed against the plaintiff in resolving doubts as to its meaning. See Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc., 195 Neb. 292, 237 N. W. 2d 645.

A full examination of the record discloses that the plaintiff has not exhausted all of the procedures and conditions intended by the agreement. It also discloses some frustration of performance, by virtue of the title problems heretofore mentioned, and it is obvious that this frustration did not arise solely by fault of the plaintiff. Nonetheless, the defendants are entitled to the benefits of the agreement prior to payment of the indebtedness of Kurland under their guarantee. One of these benefits is complete performance by the plaintiff, unless prevented therefrom by Kurland or the defendants. The record does not effectively disclose the latter.

Through all of this, we are led to the inescapable conclusion that this particular action was brought prematurely. The trial court dismissed the petition of the plaintiff without qualification. Generally, this court will not change an order of the trial court if there is sufficient evidence in the record to support that order. In this case, however, it appears that a dismissal of plaintiff's petition without any qualification thereto is not supported by the evidence, and the judgment of the trial court should be modified to show that the dismissal of plaintiff's petition, while proper in itself, should be without prejudice to plaintiff's rights, so that it can first pursue its remedies

against Kurland and thereafter against the defendants for any deficiencies arising herein.

The judgment of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

ADOLPH KUHN, JR., APPELLANT, V. LINDA KUHN, APPELLEE.

282 N. W. 2d 43

Filed August 14, 1979. No. 42291.

1. **Divorce: Custody: Minors: Parent and Child.** An application for modification of a dissolution decree with respect to the care, custody, and control of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree.
2. _____: _____: _____: _____. The paramount consideration for the court in a custody hearing is the welfare of the children based upon their best interests, general health, welfare, and social behavior.
3. _____: _____: _____: _____. The discretion of the trial court with respect to changing the custody of minor children of a broken marriage will not ordinarily be disturbed unless there is a clear abuse of judicial discretion or it is clearly against the weight of the evidence.
4. **Divorce: Custody: Minors: Parent and Child: Evidence: Time.** It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion.

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

Donald R. Hays, for appellant.

Robert G. Hays, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and HAMILTON and HENDRIX, District Judges.

Hamilton, District Judge.

This appeal arises from an action for modification of a decree of dissolution brought by the appellant, Adolph Kuhn Jr., requesting permanent custody of the minor child of the parties, and the cross-application of the appellee, Linda Kuhn, seeking permission of the court to remove the minor child of the parties to the state of California.

The court following a hearing on June 29, 1978, denied the appellant's request for modification of the decree and granted appellee's request for permission to remove the minor child to the state of California.

The record reflects that on the 31st of January 1977, the parties were before the court on an uncontested dissolution hearing. The parties at that time agreed that legal custody of the minor child, Dean Kuhn, was to be jointly held by the parties with physical custody in the mother, Linda. The agreement was approved by the court and incorporated in the decree of dissolution of February 25, 1977.

On May 3, 1977, Linda filed an application for permission to remove the child to Modesto, California. An extensive hearing was held on August 22, 1977, before Judge Herbert Ronin on the amended application to remove the child to Modesto, California. No ruling was entered as a result of this hearing because Linda moved to Palm Desert, California, while the case was under submission to the court, leaving the child with appellant. There is a dispute as to the circumstances surrounding the changing of physical custody at this time and the changing of physical custody back to the mother over the Christmas holidays of December 1977. The application for removal pending before Judge Ronin was dismissed at Linda's request. Ultimately the parties filed their respective applications which are now the subject matter of this appeal.

The appellant assigns error of the District Court in:

(1) Denying his request for permanent custody, (2) granting the mother's request for permission to remove the minor child to California, and (3) not considering evidence of predivorce activities of the parties which was unknown to the trial court at the time the original decree was entered.

In support of his application for permanent custody of the minor child, Adolph Kuhn, Jr., testified he has been employed by Cable Television for 13 years and earns a salary of $20,000 per year. He has not remarried and lives in what was the family home. Dean lived with him during June and July of 1977, during his summer visitation period, and continued to live with him until December of 1977, after Linda phoned him on or about August 27, 1977, informing him she was leaving for California and leaving Dean in his possession. He testified he did not hire anyone to supervise the boy, that a friend of Dean's, who was approximately 2 years older than Dean, was with him after school, and that Dean could reach him at work when necessary.

Appellant further testified that when Linda called before Christmas and wanted Dean during the holidays, he gave approval conditioned on her making the reservations. Linda paid for the flight to California and appellant paid for the return flight ticket for an arrival date of January 3, 1978, at which time he went to the airport and discovered Dean was not on the plane.

During the course of appellant's testimony he attempted to testify, over objection, with regard to predivorce activities of Linda. The objection was sustained by the court. The appellant's offer of proof indicated he intended to prove that while separated and before the dissolution Linda had committed acts of misconduct that would have an effect upon the court's determination as to her fitness to have care, custody, and control of the minor child.

The record reflects the minor child was called as a

witness by Linda. He testified he was 12 years old, in the seventh grade in school, and currently living with his mother in Palm Desert, California. He liked living in California and felt more secure there than with his father, because he had been left at home a lot by his father and felt afraid of the neighborhood. Dean indicated he was doing better in school in California and felt more secure with his mother.

The boy's testimony further showed that he visited with many of his relatives in California, that one of his aunts supervises him when necessary, and that his mother's parents have an 80-acre ranch in California on which he plans to spend some time. The record further reflects that appellant's parents live in California and have visited Dean on three or four occasions. Dean testified he would prefer to stay with his mother in the winter and his father in the summer.

Linda testified that she originally intended to move to Modesto, California, with Dean but changed her mind. The majority of Dean's relatives live in California and he has regular visits with most of the relatives. She moved to Palm Desert, California, where Dean was born and lived for 9 years before moving to Lincoln, Nebraska. Linda testified she has relatives in Palm Desert who assist her in watching Dean. She had worked in California as a cashier, secretary, and waitress. She expected to work as a billing clerk for an insurance company upon her return to California.

When Dean first went to California he was frightened, nervous, upset, and afraid to be alone. His school work suffered because of a lack of concentration caused by worry about the custody problem he was involved in. Linda testified she took Dean to a psychiatrist for evaluation and treatment of his problems, that he is now well adjusted, and he does not require more visits to the doctor or his staff.

The deposition of Doctor William Doust, introduced into evidence on behalf of Linda, verified he is a practicing psychiatrist specializing in child psychiatry. He examined Dean as a patient three times in February of 1978 for a diagnostic evaluation to determine his degree of emotional disturbance and the cause thereof.

The doctor testified that Dean is a very bright youngster who is very insightful. The interviews with Dean indicated he wanted to live with his mother during school periods and live with his father during vacation periods. The child indicated great love for both parents but felt caught between them because of the custody question. The doctor couldn't see anything undesirable about Dean living with his mother on a permanent basis and visiting his father during vacation periods. The doctor felt this arrangement was a reasonable one, but was unable and unwilling to give an opinion as to what custody arrangement was in the "best interests" of Dean since he interviewed only Dean and his mother. He felt the child needed some stability in his life from a responsible parent.

An application for modification of a dissolution decree with respect to the care, custody, and control of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Adamson v. Adamson, 190 Neb. 716, 211 N. W. 2d 895; Bartlett v. Bartlett, 193 Neb. 76, 225 N. W. 2d 413. The paramount consideration for the court in a custody hearing is the welfare of the children based upon their best interests, general health, welfare, and social behavior. Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89; Bauer v. Bauer, 184 Neb. 777, 172 N. W. 2d 231.

The discretion of the trial court with respect to changing the custody of minor children of a broken marriage will not ordinarily be disturbed unless there is a clear abuse of judicial discretion or it is

clearly against the weight of the evidence. Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667; Carper v. Rokus, 194 Neb. 113, 230 N. W. 2d 468.

This court in the past has permitted evidence of facts affecting the custody and best interests of children, existing at the time of the decree and not called to the attention of the court at the time the decree was entered, to be used in evidence at a subsequent modification of custody hearing. Fisher v. Fisher, *supra*; Bartlett v. Bartlett, *supra*; and most recently, Cline v. Cline, 200 Neb. 619, 264 N. W. 2d 680. These cases involved situations where either the facts were unknown at time of trial, custody was in the court, or the decree was obtained by fraud or misrepresentation.

This court approved the trial court's refusal to permit evidence of predissolution conduct in Youngberg v. Youngberg, 193 Neb. 394, 227 N. W. 2d 396, where the activities were known to the parties at the time of the decree, and again in Carper v. Rokus, 194 Neb. 113, 230 N. W. 2d 468, where the court pointed out that the principles of res judicata are to be relaxed to some degree in custody cases where the welfare of the child is concerned. The court will be cautious, and where the offer of proof lacks specificity the decision of the trial court in rejecting evidence will not be disturbed.

In the case before us the parties were fully aware of all the facts concerning fitness at the time of the original decree. The custody agreement was presented to the court and approved with both parties present and before the court. The appellant had full knowledge of all the facts and elected not to advise the court nor consider the facts to be of such importance that they would or should have an effect on the court's finding of fitness to have custody and possession of the minor child. There is no evidence of any fraud, misrepresentation, or duress that could have caused this silence.

It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion.

The trial court here had the benefit of an offer of proof that clearly detailed the proposed evidence and it determined, as the appellant did at the time of the decree, that the proposed evidence under the circumstances did not effect a substantial right of the parties or the best interests of Dean Kuhn.

In viewing the evidence on the whole it cannot be said the evidence does not support the findings of the trial court that there was a change in circumstances subsequent to the decree to warrant a change of custody. The evidence is most impressive that the child in question was experiencing emotional problems caused by the custodial uncertainties. The expert opinion confirms that the present relationship was an acceptable arrangement of custodial rights and in effect had removed some of the emotional problems facing the child. The desires of the child, now 13 years of age, showing his preference for the present custodial arrangement, should be taken into account although they are not binding on the court.

There is abundant evidence to show a change of circumstances and support the findings and judgment of the trial court. The judgment of the District Court is affirmed.

AFFIRMED.

WILLIAM E. NALLEY, APPELLEE AND CROSS-APPELLANT, V. CONSOLIDATED FREIGHTWAYS, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.

282 N. W. 2d 47

Filed August 14, 1979. No. 42295.

1. **Workmen's Compensation: Evidence.** In a workmen's compensation case, the burden of proof on the defense of intoxication is on the employer.
2. **Workmen's Compensation: Statutes: Evidence.** Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
3. **Workmen's Compensation: Evidence.** In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
4. _____: _____. When findings as to issues of causation are made by the Nebraska Workmen's Compensation Court on rehearing, the sufficiency of such findings are to be tested in the same manner as other fact determinations.

Appeal from the Nebraska Workmen's Compensation Court.

Robert F. Craig, William T. Oakes, and Steven F. Stratman of Kennedy, Holland, DeLacy & Svoboda, for appellant.

James E. Schneider and James R. Nisley, for appellee.

Heard before BOSLAUGH, WHITE, and HASTINGS, JJ., and GRANT and SPRAGUE, District Judges.

GRANT, District Judge.

This is an appeal from an order of the Nebraska Workmen's Compensation Court. The case was first tried before a single judge of that court, who determined that plaintiff was temporarily totally disabled from the date of the accident to the time of the hearing, would continue to be totally disabled for an indefinite time, and was entitled to benefits under the Nebraska Workmen's Compensation Law.

On appeal by defendant employer, the matter was reheard before three judges of the Nebraska Workmen's Compensation Court. That court generally affirmed the one-judge award and found that plaintiff was temporarily totally disabled and was entitled to temporary disability payments for so long a period as the total disability persisted. The court, on the rehearing, also ordered medical payments and an attorney's fee of $500. Defendant thereafter duly perfected its appeal to this court, assigning as error that the Workmen's Compensation Court erred in holding that defendant had failed to prove by a preponderance of the evidence that the accident occurred by reason of plaintiff's intoxication.

The record shows that on May 6, 1977, plaintiff Nalley was in the employ of defendant, Consolidated Freightways, Inc., working as an over-the-road truckdriver, and had been so employed for about 9 years, during which time he had driven approximately 800,000 to 1,000,000 miles.

On the evening of May 5, 1977, plaintiff testified that between about 8 p.m., and 12:45 a.m., he had approximately 10 drinks at a bar, and that he then went to a friend's house and had one more drink and some coffee. He went to bed about 1:30 a.m. On May 6, 1977, he had breakfast and went to a dental appointment at 9 a.m. No medication was administered during that appointment, which lasted until 10:45 a.m. Plaintiff further had two drinks downtown about 11 a.m., and then returned home where he had another drink. Plaintiff reported for work at defendant's place of business in North Platte at 4 p.m. Plaintiff went to the defendant's dispatcher and got his bills and papers showing he was to drive a White Freightliner diesel tractor, pulling two 29-foot long trailers, making a rig about 65 feet long. Plaintiff filled out his logbooks and finished his other paperwork, and then went to see and talk to defendant's terminal manager. At plaintiff's request, the

manager gave him the following Sunday off. Plaintiff then returned to his rig, put everything he was going to carry on the trip into the cab and secured those items, and then hooked up his C.B. radio. Plaintiff then visually checked his truck and rig and examined the "write-up cards" of the previous drivers of the truck. These cards showed an oil leak had been reported and plaintiff returned to the dispatcher and discussed that problem with him. Plaintiff was told to watch the leak and if it got bad to "call the Chicago shop." Plaintiff then left the terminal in the truck, drove ¼ mile to Interstate Highway No. 80, where he turned east. When the truck started east on interstate highway 80, plaintiff noticed that the truck wasn't handling right, but rather was "squirrelly" — that is, hard to handle. Plaintiff testified that the rig "wants to roadwalk, it wants to weave around." Plaintiff then stopped the truck at a scale 2 miles east of North Platte and again checked the truck over, but found nothing wrong. Plaintiff resumed his journey and proceeded another 11 miles when the accident occurred.

Plaintiff had no recollection of what happened immediately prior to the accident, but a westbound truckdriver saw the accident. That witness testified plaintiff was proceeding east in a normal manner in the middle of the right-hand lane of the interstate highway at about 55 miles per hour, when the truck suddenly made "a sharp right-hand turn" through the guardrail, and "went up underneath the overpass between the pillar and the embankment," eventually rolling over on the truck's top and down the ditch. This witness testified the truck did not drift over into the guardrail, but that "It swerved right into the guardrail. * * * like something grabbed that steering wheel and turned into the guardrail." Plaintiff was injured in the accident.

Plaintiff was taken to the Great Plains Medical Center at North Platte where he was hospitalized

until June 6, 1977, and where he underwent extensive treatment for his injuries. About 1½ or 2 hours after the accident a sample of plaintiff's blood was taken at the order of defendant company. This sample was analyzed and testimony adduced showed a .142 percent blood alcohol percentage.

Testimony produced by defendant from a qualified pathologist, on the basis of purely hypothetical questions (the witness had never seen plaintiff), indicated that an alcohol reading of .142 percent at 7 p.m., when the test was taken, would indicate a .170 percent blood alcohol at 5:30 p.m. — the approximate time of the accident. This level of alcohol in the blood would cause a severe effect on the central nervous system and would cause impaired vision, including a possible loss of peripheral vision; impaired visual acuity; impaired depth perception; double vision, resulting in great difficulty in determining which of two objects, seen when looking at one object, is the true object; impaired judgment; impaired judgmental control; and impaired muscle coordination. The witness testified that a person with .170 blood alcohol percentage would be intoxicated and his ability to drive would be impaired. The witness also testified that a person with such an alcohol content in the blood, when driving a car, would think he was driving in a straight line, when in actuality he would be weaving back and forth to get in a straight line.

Based on this testimony, the Workmen's Compensation Court found as follows: "The blood examination showing a .142% blood alcohol concentration is clear evidence that plaintiff was suffering a degree of alcohol intoxication. Further, the deposition testimony of Dr. Roffman indicated that the degree of intoxication shown was sufficient to cause substantial physical and mental impairment in any person so intoxicated. Nevertheless, the defendant has failed to prove by a preponderance of the evidence

that the accident occurred *by reason* of plaintiff's intoxication. Specifically, it has failed to show that plaintiff's presumably impaired vision and reflexes caused him to suddenly drive his truck off the road on I-80 at a point where the highway was straight and level and where visibility was apparently unrestricted. It is just as probable that the plaintiff fell asleep, or that a mechanical defect caused the sharp right hand turn described by eye-witness Kleier. To reach the conclusion urged by the defendant would require the Court to indulge in speculation, conjecture or surmise, which this Court declines to do, particularly in view of the Kleier testimony."

The legal boundaries of the review by this court concerning findings of fact made by the Nebraska Workmen's Compensation Court have been set out many times. In Newbanks v. Foursome Package & Bar, Inc., 201 Neb. 818, 272 N. W. 2d 372, we stated: "Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92."

It is also clearly established that "issues of causation are for determination of the fact finder." Newbanks v. Foursome Package & Bar, Inc., *supra*. See, also, Hyatt v. Kay Windsor, Inc., *supra*.

And finally, it is settled law that the burden of proof in a workmen's compensation case on the defense of intoxication is on the employer. Johnson v. Hahn Bros. Constr., Inc., 188 Neb. 252, 196 N. W. 2d 109.

After examination of the entire record, we determine that the findings of fact of the Workmen's Compensation Court must be affirmed. We note

that the compensation court found that "the blood examination showing a .142% blood alcohol concentration is clear evidence that plaintiff was suffering a degree of alcohol intoxication." Plaintiff himself testified that he had had 2 drinks at 11 a.m., and another later during the noon hour. Defendant's pathologist testified that even one drink will cause a degree of mental intoxication to the extent of the alcohol level of the one drink. Plaintiff was suffering a degree of alcohol intoxication. In our judgment, the remainder of the findings in this regard do not indicate that the court found the degree of intoxication shown was sufficient to cause substantial physical and mental impairment. The compensation court found that that conclusion was one *indicated* by defendant's pathologist. All findings of fact made must be considered on the issue of causation. In paragraph IX of its findings, the compensation court found, in part, that, "although there is evidence that plaintiff was negligent and was in a state of intoxication, the Court finds that defendant has failed to prove that the plaintiff's negligence or the state of his intoxication was the cause of the accident * * *." The court further found, in paragraph X: "There was no evidence of plaintiff's truck tractor unit weaving from side to side prior to running into the guardrail and although plaintiff talked to a dispatcher and at least one other employee of defendant prior to leaving the terminal, they did not testify that plaintiff was in the state of intoxication prior to starting on his unfortunate journey."

This court notes that one other employee of defendant who talked to plaintiff between 4 and 5 p.m., on May 6, 1977, was the manager of the terminal at North Platte. This manager testified at the trial, but no question on the matter of intoxication was directed to him. It is apparent the finder of fact herein considered that an experienced manager would notice the effects of the degree of intoxication

indicated by the blood test and testified to by defendant's pathologist, and that such an experienced manager would hardly permit a person, as intoxicated as the hypothetical person described by the pathologist, to take a 65-foot long truck on the highways of the state.

It is undisputed that plaintiff talked to at least two responsible employees of defendant at some length, and that plaintiff was at defendant's terminal for at least 45 minutes to 1 hour before leaving on the trip. The finder of fact would be fully justified in finding that those undisputed facts would conclusively prove that plaintiff could not have been as intoxicated as the hypothetical person described in the testimony of defendant's pathologist. The degree of intoxication and the effect of that degree of intoxication are fact questions to be determined by the factfinder in the light of all the evidence.

In this connection we further note the testimony of defendant's pathologist that a person suffering a .170 percent degree of alcohol would be weaving down the road and the testimony of the eyewitness that plaintiff's truck was not weaving. The finder of fact has found the truck was not weaving. There is evidence to support this finding. This leaves the inescapable conclusion that the finder of fact concluded plaintiff was not suffering a degree of intoxication of .170 percent.

Other evidence adduced on the issue of causation included testimony from the driver who had driven the same rig from Rawlins, Wyoming, to North Platte, and had turned it over to defendant on May 6, 1977, for the continuation of the trip to Cameron, Missouri. This driver testified he had noticed something unusual about the operation of the truck while he was operating it, in that the truck was "wild, squirrelly;" "that it did not operate normally;" and that "any unevenness, any variation in the height of the road, it would tend to dart right or left." The

witness, an experienced truckdriver who had been in the tire business, testified that he blamed the tires for the problems he experienced while driving. He testified he didn't feel it was right "that they would have radial tires on the powering equipment and not on the trailing equipment." Evidence showed that the tractor of the rig, which both plaintiff and this witness were driving on May 6, did have experimental radial tires on the tractor, or powering equipment, and fabric bias-ply tires on the trailing equipment.

In summation, we hold there is sufficient evidence for the finder of fact to determine that at the time of the accident plaintiff was suffering a degree of intoxication. We further find that, on the issue of causation, evidence was presented which, if believed by the factfinder, supports the conclusion that defendant has failed to prove by a preponderance of the evidence that the accident occurred because of plaintiff's degree of intoxication.

The findings of fact and causation of the Workmen's Compensation Court are not clearly wrong. Instead the evidence is sufficient to support the findings and action of the compensation court.

On his cross-appeal, plaintiff complains of the allowance of an attorney's fee in the amount of $500 on the rehearing before the compensation court. The gist of plaintiff's complaint is that an employee should be entitled to introduce evidence on the question of reasonable attorney's fees for the consideration of the Workmen's Compensation Court when an employer does not obtain a reduction in the award made by a single judge. In this case plaintiff offered no such evidence. The granting of an attorney's fee on rehearing, in a case such as this, is within the discretion of the Workmen's Compensation Court as set out in section 48-125, R. R. S. 1943.

The award of the Workmen's Compensation Court is correct and is affirmed in all respects. Plaintiff

is allowed the sum of $500 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NORMA DREIFURST AND HARRY LAUDENKLOS, APPELLANTS.
282 N. W. 2d 51

Filed August 14, 1979. No. 42363.

1. **Criminal Law: Indictments and Informations.** An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense and also be able to plead the judgment rendered as a bar to a later prosecution for the same offense.
2. **Criminal Law: Statutes: Words and Phrases.** The word "abuse" in section 28-729, R. R. S. 1943, may include verbal injury as well as physical.
3. _____: _____: _____. Verbal abuse under section 28-729, R. R. S. 1943, includes only "fighting words," namely, words which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace.
4. **Criminal Law: Words and Phrases.** Whether any particular use of abusive language constitutes "fighting words" depends not only upon the words used but also upon the circumstances in which they are used.

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

George H. Moyer, Jr. of Moyer, Moyer & Egley, for appellants.

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

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

MCCOWN, J.

The defendants, Norma Dreifurst and Harry Laudenklos, were found guilty by a jury in the county court of Platte County, Nebraska, of the offense of

abusing an officer in the performance of his duties, in violation of section 28-729, R. R. S. 1943. Each defendant was fined $100 and costs. On appeal to the District Court the convictions and sentences were affirmed and this appeal followed.

The complaint in county court charged that four defendants, Norma Dreifurst, Raymond Dreifurst, Sharon Laudenklos, and Harry Laudenklos, on February 19, 1977, in the village of Monroe, Platte County, Nebraska, verbally abused certain Platte County deputy sheriffs, including Officers Waddell and Brown, who were then acting in the execution of their office, in that the defendants, and each of them, shouted obscenities directed at the officers, including the terms "fucking pigs," "son-of-a-bitch," "bastard," and "fucking cops." Motions for separate trials were denied and trial was had to a jury in the county court.

The evidence for the State established that Platte County deputy sheriff LeRoy Waddell was on patrol duty on the evening of February 18, and early morning of February 19, 1977. At approximately 12:20 a.m., on February 19, 1977, as he arrived in Monroe, he noticed two cars stopped side by side in the street. Both cars drove off, one spinning its wheels and Waddell followed that car to give the driver a verbal warning. The car stopped in front of the Laudenklos' residence. Waddell used his flashlight and observed beer cans in the car. Upon request for identification, he determined that the occupants of the car were all minors. Waddell directed the boys to get out of their car and stand in front of it, and advised them they were under arrest for being minors in possession of alcohol. He told the boys that they could either follow him in their car or come in the police car.

At this point the defendants, Harry and Sharon Laudenklos, and Norma and Raymond Dreifurst, who were returning on foot from a bar where they

had spent a portion of the evening, arrived on the scene. Harry Laudenklos shouted at Waddell calling him some of the specific obscenities charged in the complaint and accusing him of arresting kids for no reason at all, and ordered Waddell to get out of town. The defendant, Norma Dreifurst, called Officer Waddell similar specific names and told him, with assorted obscenities, that he was not going to take the boys to jail and they were not going to let him do so.

At this point Waddell radioed for assistance and before and after the arrival of Officer Kaup, Harry Laudenklos and Norma Dreifurst called Officer Waddell various names including "son-of-a-bitch" and "bastard." Waddell finally left Monroe with the four boys in his car, followed by Officer Kaup. A few minutes afterward, Deputy Brown arrived in Monroe and was greeted with a similar group of obscenities.

The witnesses for the defense denied that the defendants had called any of the officers the names related by the prosecution witnesses, or had referred to the officers in any obscene terms.

At the conclusion of the State's evidence the defendants moved for a mistrial based on misjoinder of parties, which was denied. The defendants also moved to dismiss charges against all defendants on the ground of insufficient evidence, and the trial court sustained the motion to dismiss as to Raymond Dreifurst and Sharon Laudenklos, but denied the motion to dismiss as to the other two defendants. The prosecutor then asked leave to dismiss as to the two remaining defendants, Norma Dreifurst and Harry Laudenklos, and that motion was denied. At the conclusion of the defendant's evidence the defense renewed its motions to dismiss and for mistrial, and those motions were denied.

The jury returned a verdict of guilty as to both Norma Dreifurst and Harry Laudenklos. The county

court fined each defendant $100 and costs. The District Court affirmed the judgment of the county court and this appeal followed.

The defendants first contend that the complaint was insufficient to charge an offense under section 28-729, R. R. S. 1943. That section provides: "Whoever abuses any judge or resists or abuses any sheriff, constable or any other officer in the execution of his office, shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding three months."

Essentially, the argument is that abuse of an officer is not defined in the statute and that a charge in the terms of the statute would be insufficient. Conceding that argument, the complaint here did more than merely charge an offense in the terms of the statute. It specified the acts which constituted the alleged violation and even specified the specific obscenities the defendants were alleged to have shouted at the officers, as well as naming the officers to whom the obscenities were directed.

The law is quite clear that an information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense. See, State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454; Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111.

The amended complaint in the case before us clearly set forth specific acts which were charged to constitute abuse of an officer and specified with particularity the words and acts involved. The demurrers to the amended complaint were properly overruled.

Defendants next assert that there was an improper joinder of offenses and parties, and assert that they were prejudiced by the refusal to grant separate trials. Under the plain language of section 29-2002,

R. R. S. 1943, two or more offenses and two or more defendants may be charged in the same complaint and tried together under the circumstances involved here unless it can be shown that such joinder will prejudice the defendants. The instructions required the jury to determine what each individual defendant may have said. Even during the course of trial the court specifically cautioned the jury that what was said by one defendant could not be attributed to another. In addition, the individual defendant who made each abusive remark or comment was identified before a witness was allowed to testify as to what was said. Instruction No. 7 instructed the jury that each defendant was entitled to have his guilt or innocence determined from his own conduct and that evidence relating to one defendant could not be considered against the other defendant. The trial court took particular care to guard against possible prejudice to either defendant. The advisability of joint or separate trials is directed to the sound discretion of the trial court and that discretion was not abused here. See State v. Rodgers, 186 Neb. 633, 185 N. W. 2d 448.

The defendants also argue that in order for words to constitute "abuse" they must be words which actually hinder, obstruct, or impede the officer in the performance of his duty. The argument is answered by the case of State v. Boss, 195 Neb. 467, 238 N. W. 2d 639. In that case this court held that the term "abuse" in section 28-729, R. R. S. 1943, may include verbal injury as well as physical. We held that verbal abuse includes only "fighting words," namely, words which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. We also held that whether any particular use of abusive language constitutes "fighting words" depends not only upon the words used but also upon the circumstances in which they are used.

In the case now before us the jury was instructed

in accordance with the Boss case. The court specifically defined "fighting words" in the exact language of Boss, and instructed the jury that it must determine from all the facts and circumstances whether or not the words used by a defendant constituted "fighting words." The jury found each defendant guilty and the evidence is sufficient to support the verdict.

The remaining assignments of error of the defendants are without merit. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

REX J. CROSS, APPELLANT, V. BOARD OF GOVERNORS, MID-PLAINS TECHNICAL COMMUNITY COLLEGE AREA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

281 N. W. 2d 925

Filed August 14, 1979. No. 42368.

1. **Colleges and Universities: Contracts: Due Process.** A teacher employed by the governing board of a state technical community college has a property interest in the renewal of his contract and is entitled to the protection of procedural due process.
2. **Colleges and Universities: Statutes.** Under section 79-2644, R. S. Supp., 1978, the board of governors of a technical community college is charged with the power, duty, and responsibility of establishing curriculum and employing members of the faculty.

Appeal from the District Court of Lincoln County: KEITH WINDRUM, Judge. Affirmed.

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

Kay & Satterfield, for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and BURKE and WHITEHEAD, District Judges.

BURKE, District Judge.

The question presented by this appeal is whether the Board of Governors of the Mid-Plains Technical Community College Area afforded a teacher due process protections - both procedural and substantive - prior to voting not to renew his teaching contract for the 1978-79 school year. We hold that it did.

The community college, located in North Platte, Nebraska, offered a variety of technical courses, including a machine shop program. However, the machine shop program suffered from a continual decline in enrollment, and eventually no one enrolled for the 1977-78 school year. Inasmuch as Rex J. Cross was the sole machine shop program instructor, he was assigned to other duties for the 1977-78 school year.

At its regular meeting on November 16, 1977, the Board of Governors voted to discontinue the machine shop program because of lack of interest in the program by students.

At the Board meeting on December 14, 1977, a motion was made to abolish the position of full-time machine shop instructor. This motion was tabled until the next regular meeting in order to afford Mr. Cross, the sole machine shop instructor, a right to a hearing on this matter.

On December 19, 1977, Mr. Cross made a written demand for a hearing before the Board. His request was granted and, by agreement, a hearing was held on January 25, 1978. At this hearing before the Board, counsel for Mr. Cross produced evidence and cross-examined all five witnesses who testified. § 79-1254.02, R. S. Supp., 1978.

The Board took the matter under advisement and at its regular meeting on February 22, 1978, after considering all of the evidence submitted at the hearing on January 25, 1978, voted unanimously not to offer Mr. Cross a teaching contract for the 1978-79 school year.

Upon appeal to the District Court, the decision of the Board was affirmed.

The parties appear to be in agreement here that the required property interest of Mr. Cross in renewed employment entitled him to procedural due process under the Fourteenth Amendment to the United States Constitution. See, Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); § 79-1254.02, R. S. Supp., 1978.

The argument arises over when Mr. Cross was terminated. Mr. Cross argues that he was, in effect, terminated at the November 16, 1977, meeting of the Board of Governors when the Board voted to discontinue the machine shop program; that since he was the sole instructor in the program, he should have been given an opportunity to be heard with respect to this decision; and that the hearing afforded him on January 25, 1978, was a sham. As a result, he contends he was denied procedural due process.

This inventive argument deftly sidesteps the fact that the Legislature has placed the duty and responsibility of administering the affairs of the college with the Board of Governors, not with the faculty. This responsibility, by statute, includes establishing curriculum and employing members of the faculty. § 79-2644, R. S. Supp., 1978. Clearly, Mr. Cross had neither a constitutional nor a statutory right to take part in the process of making this decision.

In addition, at the time the Board determined to discontinue the machine shop program, Mr. Cross had been assigned to other duties for the 1977-78 school year. Hence, the termination of the program did not, ipso facto, terminate his teaching contract.

There is no contention here that a new teacher was hired to fill a vacancy that Mr. Cross was qualified to fill. Witt v. School District No. 70, 202 Neb. 63, 273 N. W. 2d 669.

The decisions of the Board of Governors, in voting to discontinue the machine shop program and, after

a proper hearing, in voting not to renew the teaching contract of Mr. Cross for the 1978-79 school year, were made in accordance with its statutory responsibilities. The decisions easily survive attacks upon their substance and procedure.

The judgment of the District Court is affirmed.

AFFIRMED.

THOMAS B. RILEY, SR., APPELLANT, V. THE CITY OF LINCOLN, A CITY OF THE PRIMARY CLASS, A MUNICIPAL CORPORATION, APPELLEE.

282 N. W. 2d 586

Filed August 21, 1979. No. 42309.

1. **Trial: Witnesses.** 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. Also, triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which the conclusion can properly be drawn that parol testimony is not true.
2. **Workmen's Compensation: Verdicts: Judgments: Statutes.** The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award. § 48-185, R. R. S. 1943.
3. **Workmen's Compensation: Evidence.** In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

J. L. Krause, for appellant.

William F. Austin, Lincoln City Attorney, and James D. Faimon, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, and BRODKEY, JJ., and BUCKLEY and KELLY, District Judges.

BRODKEY, J.

This case involves an appeal by the plaintiff, Thomas B. Riley, Sr., from an order issued by the Nebraska Workmen's Compensation Court after rehearing, dismissing his claim for benefits against his employer, the City of Lincoln, for certain injuries which he claims arose out of and in the course of his employment by the City of Lincoln for whom he was working as an equipment operator in the City water department.

In plaintiff's amended petition on rehearing, Riley alleges, among other things, that on or about September 12, 1974, he suffered personal injuries in an accident arising out of and in the course of his employment and that he "hurt and damaged his back, left arm and left shoulder in the process of handling and lifting heavy objects [as] required in his job, for the Defendant." He further alleges that in 1972 and 1973 he had several minor injuries at work, one as a result of a caving in of a ditch; that he had several operations, the first being on or about April 28, 1973, for numbness in the left wrist, and on April 9, 1974, he had an operation for the removal of a cervical rib to cure numbness in his right and left arms, but he had recovered from those operations which were not covered under workmen's compensation. He alleged that on September 12, 1974, he injured his back, with pain radiating into his left shoulder, left arm, and neck, while moving heavy loads at defendant's job

site as required by his duties and was treated for his injuries by Dr. John R. Thompson. He was admitted to the hospital on September 13, 1974, through September 16, 1974, returned to light work on or about September 30, 1974, and during the period of September 12, 1974, through September 30, 1974, he received workmen's compensation benefits for the injuries. On or about October 18, 1974, he reinjured his back and arm and returned to work again on or about October 24, 1974. He further alleges that the initial medical diagnosis for the September 12 and October 18, 1974, injuries was that it was an apparent minor injury to the back, arm, and hands, but, at that time, with no apparent indication of permanent disability. He further alleges that in June, July, and August of 1975, while employed by the defendant, he continued to experience great pain in the back, left arm, and shoulder, which became so extremely painful that he was finally diagnosed by his doctors as of September 3, 1975, to be totally disabled, that this was the first diagnosis of serious and permanent injury he had received, and that he has been totally and temporarily disabled since September 3, 1975. He further alleges that his injury was, and is, latent and progressive, and did not develop into a compensable disability until September 3, 1975. He finally alleges the defendant knew of his disability but has refused to make any additional payments to him, and that the defendant specifically waived the issue of the running of the statute of limitations. In his prayer, plaintiff not only prays for the determination of the amount of benefits to which he is entitled, but also asks the court to assess a 50 percent penalty against the defendant and award him a reasonable attorney's fee.

Defendant filed an answer to plaintiff's petition, which, in effect, amounts to a general denial of the essential allegations of plaintiff's petition, and a plea of the running of the statute of limitations. It is the

position of the defendant, City of Lincoln, that plaintiff had suffered from arm and shoulder difficulties from at least 1972, which was a preexisting and ongoing condition, not arising out of plaintiff's employment.

Evidentiary hearings were held before one judge of the compensation court, and later, on motion for rehearing, before the three-judge court. Defendant prevailed in both hearings, although it appears that there was additional evidence adduced at the three-judge court hearing, which was not presented at the one-judge hearing.

In its written "Order of Dismissal on Rehearing," the Nebraska Workmen's Compensation Court, in disposing of the issues presented, stated in material part as follows: "The evidence clearly shows that plaintiff experienced bilateral arm pain and paresthesia with arm weakness some time in 1972. This difficulty increased until he became unable to work because of arm pain and carpal tunnel release surgery on the left wrist was performed in 1973, and resection of left cervical rib and first thoracic rib was performed on April 9, 1974.

"Medical evidence would indicate that plaintiff's left shoulder problem, diagnosed as a thoracic outlet syndrome, was most likely caused by a congenital condition. The plaintiff did make claim for a compensable minor back injury which occurred on September 12, 1974, and which resulted when he was lifting metal wire. Medical evidence shows that he recovered fully from that injury and that he received payment of his medical expense and three days disability benefits from his employer. There is no credible evidence that this minor accident contributed in any manner to plaintiff's shoulder and arm disability.

"The plaintiff has received all benefits to which he is entitled and has not maintained his burden of proving that the shoulder, arm and side disabilities

of which he complains are the result of the accidents and injuries which he alleges arose out of and in the course of his employment by the defendant and his petition should be dismissed." It is clear from the language contained in the above-quoted order that the Nebraska Workmen's Compensation Court specifically based its decision on the lack of competent evidence to sustain plaintiff's claim, and did not base it upon the defense of the running of the statute of limitations, as pled by the defendant. That being the case, we need not discuss that issue in this opinion, nor the allied issue of whether the City of Lincoln had expressly waived in writing its right to rely upon that defense.

We have reviewed the record in this case and have concluded that under the facts and the applicable law the decision of the Nebraska Workmen's Compensation Court on rehearing must be affirmed. At the outset, we point out that plaintiff contends in his briefs on appeal that the defendant presented no evidence at the trial, although he qualified the assertion somewhat by limiting it to *oral* testimony of witnesses. It is clear from the record that the medical evidence adduced in this case was presented by way of depositions, letters, and medical records, of various physicians and surgeons, which were admitted into evidence under the joint stipulation of the parties. Among these depositions was that of a Dr. Paul E. Collicott, whose deposition was taken by the defendant City. Also, it is to be noted that counsel for defendant, City of Lincoln, vigorously cross-examined plaintiff's medical experts and elicited a great deal of factual information, helpful to the defendant, by this technique. The rule is well established in this jurisdiction 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). We have also announced the rule that triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is not true. Siefford v. Housing Authority, 192 Neb. 643, 223 N. W. 2d 816 (1974). The scope of review, and other applicable principles of law, in appeals from the Workmen's Compensation Court to this court, are clearly stated in Salinas v. Cyprus Industrial Mineral Co., 197 Neb. 198, 247 N. W. 2d 451 (1976), as follows: "The fundamental issue in this case involves the effect of the findings of the Nebraska Workmen's Compensation Court and the sufficiency of the evidence to support its award. Under the new statutory procedure for workmen's compensation cases, appeals from the judgments, orders, or awards of the Workmen's Compensation Court are taken directly to the Supreme Court, and there is no longer a de novo review in this court.

"Section 48-185, R. S. Supp., 1976, provides in part: 'The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award.'

"Under the language which makes the findings of fact by the Workmen's Compensation Court after

rehearing have the same force and effect as a jury verdict, it is obvious that related rules as to verdicts in civil cases also come into play. We have consistently held that in testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. Speedway Transp., Inc. v. DeTurk, 183 Neb. 629, 163 N. W. 2d 283. We now hold that in testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom. Obviously the findings of fact after rehearing are not required to be unanimous in order to have the statutory effect."

With the foregoing rules in mind, let us examine some of the medical testimony adduced at the trial before the Workmen's Compensation Court. The principal medical witness for plaintiff was Dr. John R. Thompson, of Lincoln, Nebraska, and counsel for plaintiff urges that we read carefully his medical report dated July 30, 1976. We have done so, but also note that there is in the record in this case an earlier letter from Dr. Thompson to counsel for Mr. Riley, dated December 5, 1975. In the earlier letter, Dr. Thompson states in part as follows: "I have seen Tom several times since January 7, 1972 and through October 23, 1974. Those visits comprised of low back stress for which he was hospitalized two times, I believe.

"In June (6-23-75) Tom was seen in the office complaining of left shoulder pain, which had not been re-

lieved by surgery. I did not know anything about this until that day.

"He was seen again on July 8, 1975, September 3, 1975, and September 9, 1975, with the same complaints of left shoulder pain and weakness of left arm.

"From the description of his pain resulting in the ultimate surgery, I have no doubt his pain could well have been caused by the cervical rib and the nature of his heavy type of work."

In his later report, dated July 30, 1976, Dr. Thompson sets forth the history of the problems as related to him by Riley "including a surgical procedure in April of 1973. He further related continuing arm problems and pain in the shoulder and a further surgical procedure resulting in the removal of left cervical rib on April 9, 1974." In his report he also refers to the accident of September 12, 1974, in which Riley "injured his back, left arm and shoulder, by lifting a heavy object;" and notes that on October 18, 1974, Riley had reinjured his back, and was thereafter released for work on October 24, 1974, "apparently well recovered." Dr. Thompson in his report then recites visits by Riley to him on June 23, 1975, July 8, 1975, and September 3, 1975, at which time Riley complained of excruciating pain in the left arm and left shoulder and weakness in the left arm. At the later date, Dr. Thompson found the entire left shoulder, left arm, and back muscles were atrophied and patient was unable to work, and was 100 percent totally disabled since that date. His conclusions, as set out in his report of July 30, 1976, were as follows: "It is the opinion of the undersigned, based upon reasonable medical certainty, that there is a definite causal connection between the injury of September 12, 1974, and the work of Mr. Riley for his employer, even though the patient has other mechanical problems with the body. He seemed to be fully recovered from those injuries

and it was not until September 3, 1975, that his injury sufficiently manifested itself into a degree of total disability. Prior to the summer of 1975, the injuries seemed to be slight, but it progressed until on September 3, 1975, his disability was complete and was total. It is my opinion that this is a latent and progressive type injury, and was related to his work and particularly the injury of September 12, 1974." In his later reports, Dr. Thompson saw no change in his condition. Dr. Thompson's testimony at the trial on direct examination for the most part supported his medical reports to plaintiff's counsel. He testified that in his opinion his patient apparently got worse in the spring of 1975, but admitted there was a hiatus in that period when he did not see him at all because his client was seeing someone else, Dr. Collicott in particular.

On cross-examination, Dr. Thompson was asked with reference to his notes on Riley's low back strain in September 1974, as follows: "Now do your notes of '74 have any reference to shoulder or arm pain at that time? A. No." He was also asked: "In reference to that report of July 30, '76, which has been marked as Exhibit 2 by the court reporter, you indicate in the history section of that report that Mr. Riley injured back, arm and shoulder, September 12, 1974. And that the arm and shoulder — well, was that arm and shoulder injury reported to your [sic] later, or is that in your records? A. It's not in my records per se. * * *." Dr. Thompson was also asked on cross-examination with reference to his opinion that Riley had been continuously and totally disabled from September 3, 1975, to date: "Is that opinion then not based on the complaints made to you by Mr. Riley concerning his pain? A. Well, I — there's a little — like I say, there's a little hiatus in there where I didn't see him, but when I saw him he still had the pain in his back, starting from September — whatever the date was, early — and con-

tinuing on through the time I seen him, he still had pain in his back and was probably disabled. And when I saw him again in June he was certainly disabled at that time. Q. In other words, as opposed to any specific medical findings, his difficulty is related — or results from his pain which he tells you about? A. Yes, pain and loss of muscular power, muscular strength." Finally, Dr. Thompson was questioned on cross-examination with reference to the statement contained in his letter of December 5, 1975, to the effect that: " 'From the description of his pain resulting in the ultimate surgery, I have no doubt his pain could well have been caused by the cervical rib and the nature of his heavy type of work.' " With reference to that statement, he was asked: "Now is that a different diagnosis or position in reference to this latent progressive injury than you relate in your letter of July 30th? A. Well, that's what I said it looks like — again, it's a poor copy, but it looks like that's about what I said."

Dr. Paul E. Collicott, Lincoln, Nebraska, was the surgeon who operated on Mr. Riley on April 9, 1974, for a left transaxillary first and cervical rib resection. He testified that Riley had excellent relief of his left arm pain as the result of the operation. He was not seen again until June of 1974, at which time Riley complained of pain in his right posterior back. In his later report of September 2, 1976, Dr. Collicott states in part as follows: "As to whether this injury is work related, as you know, as stated in the previous letter sent to you dated March of 1975, I cannot definitely say that this is work related.

"The patients [sic] condition has been present since birth and could very well have been aggravated by his job. His employment has certainly aggravated a pre-existing condition." Dr. Collicott's testimony was largely with reference to his operation to relieve a thoracic outlet syndrome which he performed on Riley on April 9, 1974, with Riley's release from the

hospital on April 13, 1974. He testified that Riley had bilateral arm pain and paresthesia with mild weakness for approximately 1 year and that he had undergone a carpal tunnel release 1 year previous, with mild relief of hand symptoms on that side; and that he was experiencing acute exacerbation of pain on the left as well as on the right. He also testified that Riley could possibly be having some residual pain from the cervical rib operation and that it might also be from a mild synovitis or neuritis. He was asked: "Are you saying that you feel that the pain that he [Riley] was relating was not connected to or caused by the operation of April 9, '74? A. I am saying that it could very well not be. Q. It could be some other cause? A. Yes." Dr. Collicott was very careful not to testify with reference to matters outside his field of expertise.

Also in evidence in this case is a letter from Dr. Charles W. Newman, Lincoln, Nebraska, addressed to the attorney for the defendant, under date of March 12, 1976. In his letter he states that the examination of Riley's chart poses a problem for him, and that "I find it a little bit difficult to attribute his condition directly to the specific circumstances of employment with the City of Lincoln. * * * I really find it difficult to assign specific responsibility without a specific instance or a specific traumatic episode being recounted." On August 31, 1976, in a letter to the attorney for the plaintiff, Dr. Newman states: "However I do not consider him [Riley] totally disabled as a heavy equipment operator. * * * I have not treated this man. I didn't feel there was any treatment which I could offer. Of course the diagnosis is still up in the air. Electromyograms [sic] have been performed and the whole business has come out negative. That sort of leaves us without a diagnosis."

There is also in evidence a letter report of Dr. Stuart R. Winston, Lincoln, Nebraska, to counsel for

plaintiff, dated September 13, 1976. In his report Dr. Winston relates his examinations and findings, and included there is the statement that he had sent the plaintiff to Dr. John Goldner of Omaha for neuromuscular studies and he encloses in his letter Dr. Goldner's findings, stating: "I have not seen the patient since that time and am frankly surprised in view of my findings and those of Dr. Goldner's that the gentleman should be so incapacitated."

We have set out above in some detail some of the findings of the various doctors with reference to plaintiff's claimed injuries and disability, not for the purpose of indicating which evidence is the more correct and trustworthy, but rather to indicate that there is in the record respectable evidence going both ways, and that there is in the record evidence from which the Nebraska Workmen's Compensation Court could find that the accident of September 12, 1974, did not contribute to plaintiff's shoulder and arm disability. That being so, under section 48-185, R. R. S. 1943, the order of the Nebraska Workmen's Compensation Court after rehearing, dismissing plaintiff's petition, must be affirmed.

AFFIRMED.

JOHNSON'S APCO OIL COMPANY, INCORPORATED, APPELLANT, V. THE CITY OF LINCOLN, NEBRASKA, APPELLEE.

282 N. W. 2d 592

Filed August 21, 1979. No. 42314.

1. **Eminent Domain: Witnesses.** A resident owner who is familiar with his property and knows its worth may testify as to its value without further foundation.
2. **Corporations: Eminent Domain: Witnesses.** A resident stockholder and officer of a closely-held family corporation, who was familiar with the characteristics of property owned by the corporation, its actual and potential uses, and who had several years ex-

perience in dealing with the property, is competent to testify as to the value of the property without further foundation.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded.

Edward F. Carter, Jr., of Barney & Carter, P.C., for appellant.

William F. Austin, Lincoln City Attorney, for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and BURKE and WHITEHEAD, District Judges.

BURKE, District Judge.

The question presented by this appeal is whether a resident owner of a family business, who under our decisions would be competent to express his opinion as to the value of his property in a condemnation action, ceases to be a competent witness of value if he incorporates his business and assumes the status of an officer and stockholder of the corporation.

Johnson's Apco Oil Company, Incorporated, is a family corporation owned by Wilbert Johnson and his wife. The corporation is a retailer of gasoline products and owns the service station located at the southeast corner of Touzalin Avenue and Fremont Street in Lincoln, Nebraska. The corporation purchased the service station in 1970 and Mr. Johnson testified that $35,000 was spent renovating the property.

Prior to 1978 the property was served by four 30-foot-wide curb cuts; two were located on the Fremont side of the property and two were located on the Touzalin side of the property.

In February 1978, the City of Lincoln initiated condemnation proceedings which, while not taking any land, resulted in a diminution of access to and from the service station. One 30-foot curb cut on Fremont and one 30-foot curb cut on Touzalin were eliminated.

While the two remaining points of access are 30 feet wide at the throat, under the new design the curb cut on Fremont is 65 feet wide and the curb cut on Touzalin is 70 feet wide.

At a jury trial to determine whether the landowner's right of access to existing highways had been materially impaired and, if so, to fix the amount of just compensation to be paid, the jury returned a verdict in favor of the condemner.

The condemnee contends that the trial court committed reversible error in refusing to allow Wilbert Johnson, as a resident owner and as one who was familiar with the property and knew its worth, to testify as to its value without further foundation.

The trial court, in refusing to allow Johnson to testify as to value, based his ruling on the fact that the corporation owned the property and, as a stockholder, Johnson was not an owner of property belonging to the corporation in the sense of the word when applied to an individual owner.

The trial court apparently based its ruling on the language found in First Baptist Church v. State, 178 Neb. 831, 135 N. W. 2d 756: "Membership in the church does not bring these witnesses into a relationship with the property so they may testify as to valuation without foundation. An officer or president of a corporation is not an owner of property belonging to the corporation in the sense of the word when applied to an individual owner. There is no presumption in his favor as in the case of an individual owning property, and in order to qualify he must be shown to be familiar with the property and have such a knowledge as to qualify him to testify because of his knowledge of values generally in the vicinity. Omaha Loan & Trust Co. v. Douglas County, 62 Neb. 1, 86 N. W. 936. We come to the conclusion that membership in the church does not qualify them to testify as to the value of the church without further foundation."

While it is true that with stock ownership alone one does not become an owner of property held by a corporation in the sense of the word when applied to an individual owner, yet, do our decisions permitting a resident owner who is familiar with his property and knows its worth to testify as to its value without further foundation rest upon the mere fact that the owner holds legal title to the property? We think not. Rather, our decisions rest upon the owner's familiarity with the property's characteristics, its actual and potential uses, and his experience in dealing with it. This is what qualifies him to testify as to value. Miller v. Drainage District, 112 Neb. 206, 199 N. W. 28; Dawson v. City of Lincoln, 176 Neb. 311, 125 N. W. 2d 908; Thacker v. State, 193 Neb. 817, 229 N. W. 2d 197.

Under this reasoning we hold that it was reversible error for the trial court to refuse to allow Mr. Johnson to testify as to the value of the property without further foundation.

In doing so we do not fashion an inflexible, per se rule. We simply hold that Mr. Johnson, as president of a closely-held family corporation, who was familiar with the property's characteristics, its actual and potential uses, and who had several years experience in dealing with the property, should have been permitted to testify as to the value without further foundation.

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

REVERSED AND REMANDED.

H. W. MCDOWELL ET AL., APPELLEES, V. RURAL WATER DISTRICT NO. 2, BOYD COUNTY, NEBRASKA, A PUBLIC CORPORATION, APPELLANT.

282 N. W. 2d 594

Filed August 21, 1979. No. 42331.

1. **Summary Judgments: Evidence.** Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law. Even where there are no conflicting evidentiary facts, a summary judgment is not appropriate if the ultimate inferences to be drawn from those facts are not clear. In considering such a motion, the trial judge must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence.
2. **Waters: Statutes: Licenses and Permits: Public Corporations.** The Rural Water District Act, sections 46-1001 to 46-1026, R. R. S. 1943, contains no specific requirement that such district must first obtain a permit to construct, install, maintain, and operate wells and other facilities for the storage, transportation, or utilization of water, which are necessary to carry out the purposes of its organization.
3. **Waters: Public Corporations: Governmental Subdivisions.** A rural water district is not a municipal corporation within the purview of the City, Village and Municipal Corporation Ground Water Permit Act.

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

James L. Sedgwick and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

William W. Griffin and George C. Rozmarin of Swarr, May, Smith & Andersen, for appellees.

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

BRODKEY, J.

All the plaintiffs are persons owning real property in Holt County, Nebraska, who have brought this ac-

tion for declaratory and injunctive relief against the defendant, a rural water district organized pursuant to the provisions of sections 46-1001 to 46-1026, R. R. S. 1943, located in Boyd County, Nebraska. The district owns land located in Holt County, Nebraska, in the general vicinity of the property owned by the plaintiffs. In their petition filed in the District Court for Holt County, plaintiffs, after alleging the status of the respective parties, allege that defendant has constructed a well and a water distribution system upon its property in Holt County for the purpose of withdrawing substantial amounts of ground water from beneath its property in Holt County and for transporting it off that land for use in Boyd County; and that the ground water will be withdrawn from an acquifer which extends under the land owned by the plaintiffs. Plaintiffs further allege in their petition that such withdrawals of ground water will result in a serious depletion and shortage of ground water supply available to plaintiffs for irrigation and domestic use, and that the injury and damage to plaintiffs is irreparable. Plaintiffs further allege that defendant's intended withdrawal and use of ground water located under its land in Holt County is in violation of the American rule of reasonable use because the use will not be on the overlying land, and further is in violation of the law of Nebraska prohibiting the transportation of waters from one watershed to another watershed. Plaintiffs pray that the court declare defendant's intended withdrawal and use of the ground water is unlawful, and permanently enjoin the defendant from such withdrawal and use.

In its answer and counterclaim filed in the action, the defendant admits that it is a public corporation organized under the provisions of the Rural Water District Act and owns land located in Holt County, and alleges that it has drilled test holes on its property and intends to construct two water supply wells on the property and a water distribution system in

order to transport the water to Boyd County for use of residents of Boyd County who are without adequate water supplies for domestic purposes. Defendant also alleges there is sufficient ground water for plaintiffs' continued use and also for the use of the defendant, but that even if there is insufficient ground water for that purpose, defendant has priority under section 46-613, R. R. S. 1943, since its intended use is for domestic purposes while the plaintiffs' use is primarily for irrigation. Defendant further alleges the American rule of reasonable use is not applicable to the facts in the case at bar, since there is sufficient water for both plaintiffs and the defendant; and further alleges the intended use by the defendant is within the same water basin as the source of the ground water. Defendant finally alleges that plaintiffs have an adequate remedy at law, and that plaintiffs have not and will not in the future suffer any cognizable injury or damage.

Plaintiffs thereafter filed a motion for a summary judgment requesting the court to grant the prayer set forth in their petition based upon the pleadings, answers to interrogatories, and an affidavit attached to the motion, for the following reasons: "1. There are no genuine issues of material fact. 2. Defendant's actions will be illegal per se under the reasonable use doctrine as adopted by the Supreme Court of Nebraska. 3. Defendant's actions will be illegal per se as a transbasin diversion. 4. As raised in their Reply, Defendant fails to state a cause of action in its counterclaim upon which relief may be granted. * * * In the alternative, Plaintiffs move the Court for a partial Summary Judgment declaring Defendant's actions to be unreasonable per se under the reasonable use doctrine as adopted by the Supreme Court of Nebraska." At the hearing on the motion for summary judgment, there was also introduced in evidence an affidavit of Carl Nuzman, a consulting engineer and expert in ground water

hydrology, employed by the plaintiffs, to the effect that the proposed movement of water by the defendant from Holt County into Boyd County will result in movement of water within the same general watershed area. However, there was also introduced in evidence at the hearing an affidavit from Ralph Marlette from the Department of Civil Engineering of the University of Nebraska-Lincoln, whose specialty was in the area of river engineering and ground water hydrology, who was also retained to consult with and appear as an expert witness on behalf of the plaintiffs in this case, and he stated in his affidavit: "That the proposed movement of water by defendant from Holt County into Boyd County will result in movement of water from the Niobrara River Watershed into the Ponca Creek Watershed, each of which is independent of one another and flows into the Missouri river." It is obvious that the affidavits of the above two experts, both employed by the plaintiffs, were in direct contradiction to each other on the issue of transbasin diversion.

Defendant contends, however, that the trial judge, on his own motion and without notice, raised a new issue at the hearing on summary judgment as to whether the Rural Water District was required to obtain a permit under the City, Village and Municipal Corporation Ground Water Permit Act, sections 46-638 to 46-650, R. R. S. 1943, before it could withdraw and transport ground water off its land in Holt County to its patrons in Boyd County; and that if it had had notice that the trial judge was raising the issue of whether it needed a permit in accordance with that act, it would have introduced evidence at the hearing pertinent to that issue. We must therefore examine the record in this case to determine upon what basis or for what reason the court sustained plaintiffs' motion for a summary judgment.

The order of the court, entered on August 28, 1978, provides, in pertinent part, as follows: "The matter

was heard, and the same submitted, and the Court being advised finds from the pleadings and the evidence and taking judicial notice of the provisions of Sections 46-638 through 46-655, R. S. Nebr. 1943, Reissue 1974, that the Defendant's well is illegal, and that the Plaintiff's Motion should be granted.

"IT IS THEREFORE ORDERED that Defendant should be, and it is hereby enjoined permanently from the exportation of groundwater from and for use off of the Defendant's land located in Holt County, Nebraska, until application is made and permit granted by the Director of Water Resources of the State of Nebraska, authorizing such action." The language of the order itself, therefore, would seem to support defendant's contention that the court's reason in sustaining plaintiffs' motion for a summary judgment for injunctive relief was based on the fact that it felt the defendant's well or wells were illegal because of the fact a permit had not been obtained. The bill of exceptions covering the hearing on the motion for summary judgment is enlightening in this regard, especially the comments of the trial judge evidencing his reasoning, and also the colloquy between counsel and the court at that time; and we quote certain pertinent portions thereof.

The record reveals that early in the hearing on the motion for summary judgment, the trial court stated: "Before we get into extended dissertation on the merits of this case, I am concerned about the question raised on the last page of the brief of Mr. Griffin and Mr. Rozmarin that states simply, 'Secondly, even if defendant could properly raise the issue as pleaded, it must at least exhaust administrative remedies available with the Natural Resources District, in whom the Legislature placed authority under the Groundwater Management Act of 1975.' I note from reading all of the cases cited with reference to water, they arise by reason of application made to the old Department of Roads and Irrigation,

and more recently an application made to the director of water resources. He makes the determination of whether or not to issue a permit, and it is appealed from there to the Supreme Court. There is nothing in the pleadings to indicate that any procedure seeking authority to drill a well anywhere was ever made by the Rural Water District No. 2 of Boyd County, Nebraska. MR. SEGLIN: That is correct, Your Honor. THE COURT: Nowhere. Well, I note from reading your empowering statutes that at least you must have sought the approval of the director of water resources and the Department of Health. This, in forming your district. MR. SEGLIN: Yes. THE COURT: Was that done? MR. SEGLIN: Yes. THE COURT: All right. Sections 46-638 through 46-655 provide for the procedure of municipal water suppliers to obtain a license or permit from the Department of Water Resources, and this district would, under the general definitions of municipal corporations, seem to be a municipal corporation. MR. SEGLIN: I disagree with that, Your Honor. THE COURT: I know you might well disagree with it, but it is a municipal — it is a subdivision of the state, and generally in the — its general authority is as a municipal corporation, and these are my concerns before we reach the general merits of the case that you discussed at an extended length, and I am not sure that you have it — that it is properly before me on the merits of the case, and it should have been developed by a hearing on application for permit, and I also note in the section which provides the authority for a rural water district, that their condemnation power is limited to land within the district, which would indicate they could not have condemned land outside the district for purpose of production of water. MR. SEGLIN: That is correct, Your Honor. The land was not condemned; it was purchased. * * * THE COURT: That is my problem from reading your briefs and searching through

the statutes that deal with this case, and reading most of the cases that you have cited to me, and all of the cases that are of any substance that you cite to me arise by reason of an application made to the present Department of Water Resources, and formerly to the Department of Roads and Irrigation, which supervised the statutory procedures before that time, and I think this is entirely a proper matter to resolve on a motion for summary judgment. MR. SEGLIN: Your Honor, for the record, I may point out that those points that you are raising were not raised in the plaintiff's petition, nor challenged by the plaintiffs, and accordingly — THE COURT: Well, you assert a right to do these things in your answer, and I wonder where that right develops from? MR. SEGLIN: That right, Your Honor, develops from the statute. The statute gives the district, as pointed out in the district's brief, certain rights to do things. It is our contention that it is not necessary to obtain a permit like municipalities do, since we are not under that statute. THE COURT: You are not a municipal corporation? MR. SEGLIN: Well, we are a political subdivision, but we are governed by a specific statute which authorizes — the sole purpose that a rural water district has is to bring water to people that do not have water. Now, it seems to me that the legislature carved that out as a specific purpose and authority for a rural water district, and municipalities, of course, can do many things." The court also stated: "And, of course, by the reading of that statute, it applies to any entity that attempts to drill a well in a district formed under the Groundwater Control Act, and that would definitely apply to a rural water district, or anyone.

"So, I am finding that it is — that the rural water district has failed to avail itself of the necessary permits to be pumping water from the tract of land described in the petition of the plaintiffs, and the Court does enjoin pumping until proper permits are ob-

tained. MR. SEGLIN: Your Honor, is that the permit under that one section of the statute that you mentioned? THE COURT: Under the municipalities. That is the one I find applies. This is not within a district — groundwater control district, so those sections would not apply; but this is a governmental subdivision developed to provide water, and must have a permit issued by the Department of Rural Water Resources before it can pump water from this land. MR. SEGLIN: Your Honor, is that your final decision that you are entering in this court? THE COURT: Yes, that is the order of this Court. I think I should clarify that by further finding that the well is an illegal well, and therefore enjoined. MR. SEGLIN: Your Honor, might I inquire as to illegal in what respect? THE COURT: It is beyond domestic uses on the land and requires a permit, and therefore it is an illegal well under the terms of the statute. * * * MR. SEGLIN: On behalf of the defendant, I would move at this time that you set your order aside on the basis that the defendant has not had an opportunity to brief that issue for the Court, and the issue is not, at this time, properly before the Court on a motion raised by the plaintiffs. * * * We have not had an opportunity to be heard on that issue. The Court raising it on its own motion took the defendant by complete surprise. We did not have the opportunity to brief the matter." The court overruled defendant's motion.

Subsequently, at the hearing on defendant's motion for a new trial, Mr. Sedgwick, who, along with Mr. Seglin, were attorneys for the defendant, stated as follows: "The Court's earlier order found that the well of the defendant was illegal due to the fact that a permit had not been applied for or obtained from the Department of Water Resources, pursuant to 46-638 and the statutes that follow. In light of the Court's ruling, we would ask the Court to reconsider three aspects of the Court's decision. We recognize

the wide discretion granted to the Court; but we feel that a fairer procedure should have been to permit the defendants the opportunity to brief and argue the point raised by the Court, since it had not been previously raised by the parties. The second point we would ask the Court to take a look at is to consider that the act is not applicable to a municipal corporation, unless that municipal corporation supplies water to cities and villages, and there was no evidence that the defendant is supplying water to cities and villages. The third point was that if the Court feels that the act is applicable to the defendant, we would suggest that the act is not a mandatory act but a discretionary act. The statute talks about an applicant which desires to avail itself of the act, and therefore, failure to follow the act would not make the defendant's well illegal. * * * THE COURT: I am not opposed to giving you some time to brief this thing. Now, I did read the entire water resources statute, and my impression from it was that, especially if you are going outside the territorial limits of your district, you are a municipality, and it is intended that that statute apply to municipalities."

It seems clear from a reading of the above-quoted portions of the hearings on the motion for summary judgment that the court decided the issue primarily, if not entirely, on the basis that the defendant was required to obtain a permit before digging its well on its own property in Holt County. Nowhere in the record does it appear that the court discussed, ruled upon, or found that there were no genuine issues of material facts present in the case. The final order of the court on the motion for rehearing, as set out above, merely finds that the defendant's well is illegal, but no finding is made thereon with reference to whether the evidence or facts necessary to prove such illegality might not be in dispute, and thus require a trial before the finder of facts to determine

that issue. The rules relating to the issuance of summary judgments have often been considered and are well settled in this jurisdiction. They are well summarized in Reeves v. Associates Financial Services Co., Inc., 197 Neb. 107, 247 N. W. 2d 434 (1976), where we stated: "The rules as to summary judgments are well-established in this jurisdiction. 'The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law.' Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152 (1973). The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541 (1976); Farmland Service Coop., Inc. v. Klein, 196 Neb. 538, 244 N. W. 2d 86 (1976). This court has stated that summary judgment is not appropriate even where there are no conflicting evidentiary facts if the ultimate inferences to be drawn from those facts are not clear. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976). Thus, 'Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.' Barnes v. Milligan, *supra*, at p. 53."

A review of the record in this case convinces us that under the issues of this case, as framed by the pleadings of the parties, there exist genuine issues of material facts. An obvious example is on the issue of whether there has been or will be a transbasin diversion of water, an issue raised by the plaintiffs,

where the two expert witnesses employed by the plaintiffs apparently hold diametrically opposing views on that issue, as exemplified by their affidavits in the record. Other fact questions subject to dispute between the parties will undoubtedly be the amount of the water supply in the aquifer underlying the land owned by the plaintiffs and the defendant in Holt County; and there are also fact issues, not presently resolved by the record, relating to the right of the Rural Water District to appropriate and put to good use the water lying beneath its land, and whether the plaintiffs will experience any harm or damage as a result of the Rural Water District's use of the water. These, and other issues, must be resolved factually, as well as legally, on a remand of this case to the District Court for trial on the merits.

Since the trial court apparently placed much emphasis and reliance upon the proposition that the defendant was required to first obtain a permit before digging its wells, and that therefore the wells in question were illegal wells and must be enjoined, we believe it will be helpful and desirable for us to comment briefly upon this issue. At the outset, we note that the Rural Water District Act, under which defendant was organized, being sections 46-1001 to 46-1026, R. R. S. 1943, nowhere required the District to obtain a permit to dig wells for the purpose of supplying water to its patrons in need thereof, and, in fact, specifically authorizes the transportation of water into the District for that purpose. § 46-1003, R. R. S. 1943. Plaintiffs argue, however, that notwithstanding this fact the defendant was obligated to obtain such a permit under the provisions of the "City, Village and Municipal Corporation Ground Water Permit Act." §§ 46-638 to 46-650, R. R. S. 1943.

Even assuming it is mandatory under that act to apply for and obtain a permit, we do not believe that a rural water district is a city, village, or municipal corporation within the purview of that act which sets

up the purpose, and the procedure to be employed, in forming such a district. While a rural water district may well be a public corporation, our court has recognized the distinction between them. In Bliss v. Pathfinder Irrigation District, 122 Neb. 203, 240 N. W. 291 (1932), we stated: "Corporations are generally classed as public and private. While a municipality is a public corporation, it does not follow that every public corporation is a municipality. In 1 Dillon, Municipal Corporations (5th ed.) 58, sec. 31, the term 'municipal corporation' is defined as follows: 'A *municipal corporation*, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of the city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.' A like definition is found in 43 C. J. 65, and in the same volume, at page 72, we find the following with respect to public corporations: 'Public corporations are all those created specially for public purposes as instruments or agencies to increase the efficiency of government, supply public wants, and promote the public welfare. Public corporations are classified as municipal, quasi-municipal, and public-quasi corporations. Public corporations include not only municipal corporations, but also all other incorporated agencies of government of whatever size and form or degree of organization. While all municipal corporations are public corporations, all public corporations are not municipal corporations.'

"In 43 C. J. 73, it is said: 'There is a want of harmony in the decisions relating to what local subdivisions are embraced by the phrase "municipal

corporations." There are many public bodies which are not corporations in the full sense but resemble them in that they have some of the attributes of a corporation, and which are therefore called quasi corporations. Some of these are almost perfect in their organization and scarcely distinguishable from municipal corporations. Others represent the lowest order of corporate life, with few powers and imperfect organization. Between these two extremes are a large number of districts erected as agencies of government, of diverse names and objects, with varying degrees of organization; sometimes styled political, sometimes public, sometimes civil; including counties, towns, townships, school districts, drainage districts, highway districts, improvement districts, hospital districts, irrigation districts * * * and all other sections of territory delimited and organized for the performance of certain governmental functions; * * * such bodies are not "municipal corporations" or "municipalities" in the proper sense.' " *Id.* at p. 205-206.

While we have never specifically passed upon the status of a water district in this state, we have on numerous occasions made such a determination with respect to irrigation districts. In Loup County v. Rumbaugh, 151 Neb. 563, 38 N. W. 2d 745 (1949), we stated: " 'Irrigation districts organized under our laws are public, rather than municipal corporations, and their officers are public agents of the state.' Board of Directors of Alfalfa Irrigation District v. Collins, 46 Neb. 411, 64 N. W. 1086; Lincoln & Dawson County Irrigation District v. McNeal, 60 Neb. 613, 83 N. W. 847; Platte Valley Public Power & Irrigation District v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412; Draver v. Greenshields and Everest Co., *supra*; Elliott v. Calamus Irrigation District, *supra*." By analogy, we hold that a rural water district is not a municipal corporation as used in the act, even though it may be a

public corporation, and therefore the requirements of the act are not applicable, at least so far as any mandatory requirement that a permit be obtained.

In view of what we have stated above, we reverse the decision of the District Court, and remand the matter for a trial on the merits.

REVERSED AND REMANDED.

STATE AUTOMOBILE AND CASUALTY UNDERWRITERS, A CORPORATION, APPELLANT, V. FARMERS INSURANCE EXCHANGE AND CLAYTON W. KLINE, APPELLEES.

282 N. W. 2d 601

Filed August 21, 1979. No. 42340.

1. **Pleadings: Demurrer.** A petition which fails to plead actionable facts is vulnerable to a general demurrer.
2. **Subrogation.** Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.
3. **Subrogation: Torts: Negligence: Insurance.** The right of an insurance company to recover against a wrongdoer, whose negligence has subjected the insurance company to a liability, is traced through the insured; that is, no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured.
4. **Torts: Negligence: Damages.** To state a cause of action in tort it is necessary to allege facts from which a conclusion can be drawn that the defendant was guilty of one or more acts of negligence, that such negligence was a proximately contributing cause of the accident, and that as a proximate result thereof the plaintiff was damaged.
5. **Insurance: Torts: Negligence.** Direct actions against liability insurance carriers because of the negligence of their insureds are not permitted in Nebraska.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Kutak Rock & Huie, for appellant.

David A. Svoboda and Neil B. Danberg, Jr., of

Kennedy, Holland, DeLacy & Svoboda, for appellees.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for amicus curiae Blue Cross & Blue Shield.

Heard before BOSLAUGH, CLINTON, WHITE, and HASTINGS, JJ., and KORTUM, District Judge.

HASTINGS, J.

This is an appeal by the plaintiff, State Automobile and Casualty Underwriters, from an order of the District Court sustaining defendants' demurrer to State Auto's petition and dismissing the same. The motion for a new trial was overruled. State Auto assigns as error that: "The trial court erred in finding that State Auto *did not have a cause of action* against Farmers and Kline." (Emphasis supplied.) Apparently State Auto elected to stand on its second amended petition because there is no complaint made that it was not permitted an opportunity to file an additional pleading.

State Auto's second amended petition stated that it insured one Kurt Kardell under a family automobile policy and that the defendant, Farmers Insurance Exchange, "insured Kline at the time of the accident under a policy of insurance applicable to the accident;" that on June 28, 1974, Kardell was operating an automobile in Omaha, Nebraska, when struck from the rear by Kline; that State Auto paid Kardell for medical expense under Coverage C-1 of its policy; that Coverage C-2 provided "In the event of any payment under Coverage C-1 of this policy, the company shall be subrogated to all the rights of recovery therefor which the injured person * * * may have against any person or organization * * *."; that State Auto notified Farmers of its subrogation rights, but Farmers replied, "Sorry — we don't honor med pay subrogation." State Auto also noti-

fied Kline of its subrogation rights; thereafter Farmers paid Kardell, obtained a release from Kardell, and thereby willfully disregarded State Auto's subrogation rights. State Auto prayed for judgment against Farmers only for the amount of the claimed subrogation right. Interestingly enough, the petition alleges no facts supporting a cause of action for negligence on behalf of its insured Kardell against either defendant; it does not allege in any way that Farmers had issued to the apparent tort-feasor, Kline, a policy of *liability* insurance; and, finally, the prayer of the petition is only against Farmers.

Section 25-804, R. R. S. 1943, requires of a petition that it contain "a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition * * *." A defendant may demur to a petition when it appears on its face "that the petition does not state facts sufficient to constitute a cause of action." § 25-806, R. R. S. 1943. "It is unimportant how meritorious a cause of action a litigant may have. It cannot avail him anything if he fails to properly state in his petition concerning it sufficient actionable facts. A petition which fails to plead actionable facts is vulnerable to a general demurrer." Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717 (1956). See, also, Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp., 194 Neb. 810, 235 N. W. 2d 870 (1975). With that rule in mind, it becomes incumbent upon us to identify the actionable facts necessary to plead a cause of action to enforce rights of subrogation.

Subrogation is defined as: "The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. * * * The lawful substitution of a third party in place of a party having a claim against another party." Black's Law Dictionary

(5th Ed., 1979). Also, "Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other." Olin Corp. (Plastics Div.) v. Workmen's Comp. App. Bd., 324 A. 2d 813 (Pa. Commw. Ct., 1974). "The right of an insurance company to recover against a wrong-doer, whose negligence has subjected the insurance company to a liability, whether the company's right be based on an equitable subrogation or an express assignment, is traced through the insured; that is, no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured." Omaha & R. V. R. Co. v. Granite State Fire Ins. Co., 53 Neb. 514, 73 N. W. 950 (1898). " 'The rights of a subrogated insurer can rise no higher than the rights of its insured against the third party.' " Stetina v. State Farm Mut. Auto. Ins. Co., 196 Neb. 441, 243 N. W. 2d 341 (1976).

It would therefore be necessary for State Auto to allege sufficient facts to state a cause of action for negligence in favor of Kardell and against Kline in order to stand an attack by demurrer. Citations are unnecessary to support the proposition that to state a cause of action in tort it is necessary to allege facts from which a conclusion can be drawn that the defendant was guilty of one or more acts of negligence, that the acts of negligence were a proximately contributing cause of the accident, and that as a proximate result thereof the plaintiff was damaged. It is only through assumption and elimination of alternatives that we are able to determine that State Auto's alleged right of subrogation is founded in tort, but upon examination it becomes readily obvious that no facts are alleged to state a cause of action against Kline.

The only relationship between Farmers and Kline, as stated in the petition, is that Farmers "insured Kline at the time of the Accident * * *." We can only guess that it was a *liability* policy, which it

would have to be before Farmers would have any connection with the case at all. Even assuming this to be true, and Farmers is the only defendant against whom State Auto seeks recovery, it is prohibited from doing so by the well-established rule that we have no direct action statute except section 44-508, R. R. S. 1943, which applies where the insured is bankrupt. Direct actions against liability insurance carriers because of the negligence of their insureds are not permitted in Nebraska. Royal Ind. Co. v. Aetna Cas. and Sur. Co., 193 Neb. 752, 229 N. W. 2d 183 (1975).

If by chance State Auto is claiming some sort of contract or estoppel theory, such as was utilized in State Farm Mut. Auto. Ins. Co. v. Budd, 185 Neb. 343, 175 N. W. 2d 621 (1970), to prevent the running of the statute of limitations, its petition is again short of its mark. In State Farm, defendant's insurance carrier had three times assured plaintiff that it would honor its claim and that it was liable to State Farm for the full amount. In reliance on these claims, State Farm forbore suit only to have defendant's carrier plead the statute of limitations in a suit by State Farm against the defendant tort-feasor. Of course, we refused to permit such chicanery. However, here State Auto pled just the opposite facts, i.e., that it had made claim against Farmers which the latter promptly and unequivocally denied.

The parties have expended a great deal of time and effort in their briefs discussing the theories of splitting causes of action, real parties in interest, and public policy relating to subrogation of medical pay insurance. However, the threshold question is whether State Auto has alleged facts, all of which must be assumed to be true, which state a cause of action on the merits under any theory against either or both defendants. It has not.

The trial court was correct in sustaining the de-

murrer and dismissing the petition, and its judgment is affirmed.

AFFIRMED.

CAROLYN M. FLEHARTY, APPELLEE, V. EDGAR C. FLEHARTY, APPELLANT.

282 N. W. 2d 604

Filed August 21, 1979. No. 42343.

1. **Divorce: Minors: Custody.** The best interests of the children is the paramount consideration in determining issues of custody.
2. ____: ____: ____. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
3. ____: ____: ____. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Ronald J. Palagi, for appellant.

William C. Stanek of Stanek & Smith, for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and BRODKEY, JJ., and BUCKLEY and KELLY, J.R., District Judges.

KELLY, J. R., District Judge.

Respondent appeals from an order of the District Court for Burt County, Nebraska, which modified an earlier order of the District Court with regard to the custody of the minor children of the parties. We affirm the order of the District Court.

This is the second appearance of this case before this court this term. The earlier appeal likewise contested that portion of the court's decree which

dealt with the custody of the minor children. See Fleharty v. Fleharty, 202 Neb. 245, 274 N. W. 2d 871.

While the first appeal was pending before this court, respondent filed an application seeking a modification of the court's original decree with regard to the custody of the minor children of the parties. After hearing, the trial court sustained the request for modification, and placed the legal custody of the children with the court but the physical custody with the petitioner, except for the period from June 1 to August 15, when the physical custody was to be with respondent. Each party was granted reasonable rights of visitation whenever the children were in the physical custody of the other party. In addition, the county welfare department of the county in which the children reside was, from time to time, to make periodic visits.

Respondent maintains the trial court erred in finding that it was in the children's best interests to remain in the physical custody of petitioner. No useful purpose would be served in detailing the various claims of the parties, except to say that at best the evidence was in conflict. We must not lose sight of the fact that the best interests of the minor children constitute the paramount consideration in determining the issues of custody. Fleharty v. Fleharty, *supra*. A decree fixing the custody of the minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Carper v. Rokus, 194 Neb. 113, 230 N. W. 2d 468; Bokelman v. Bokelman, 202 Neb. 17, 272 N. W. 2d 916. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence. Mason v. Mason, 200 Neb. 476, 263 N. W. 2d 865. An examination of the record fails to

disclose either such an abuse or the lack of evidence.

We might add that if the parties truly have the best interests of the children at heart, and we have no doubt they do, some effort to live by the decree for a time would be helpful. Constant conflicts do little to aid the children. The judgment of the trial court is affirmed.

AFFIRMED.

MARLYS KNIGGE, APPELLEE AND CROSS-APPELLANT, V. CURTIS L. KNIGGE, APPELLANT AND CROSS-APPELLEE.

282 N. W. 2d 581

Filed August 21, 1979. No. 42356.

1. **Mineral Interests: Valuation.** Valuation of mineral interests by capitalizing prior income does not reflect the market value and is an improper method of valuation because production of minerals is based on a declining asset and production is of an indefinite duration.
2. **Evidence: Witnesses: Stipulations: Contracts.** In the absence of fraud or mistake, an agreement or stipulation by the parties that the judgment of a third person shall be relied upon in determining a fact is binding upon the parties.
3. **Divorce: Alimony: Property.** 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.
4. **Divorce: Property.** Generally, an award from one-third to one-half of the property involved in a marriage of long duration, and where the parties were the parents of all children involved, does not constitute an abuse of discretion.
5. **Divorce: Parties: Property.** The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets.

Appeal from the District Court for Kimball County: ROBERT R. MORAN, Judge. Affirmed as modified.

Winner, Nichols & Meister and Wright & Simmons, for appellant.

George P. Burke of Van Steenberg, Myers & Burke, for appellee.

Heard before KRIVOSHA, C. J., CLINTON, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This appeal and cross-appeal arises from the dissolution of a marriage between Marlys Knigge, petitioner and appellee, and Curtis L. Knigge, respondent and appellant.

Primary issues in dispute are the division of property and interest due upon the unpaid balance as a result of the property division.

This action was commenced on October 12, 1976. On March 22, 1977, the trial court entered a decree of dissolution which dissolved the marriage of the parties. However, the questions of child custody, child support, alimony, and division of property were set for trial at a later date. Thereafter, several orders were entered concerning custody of the children, child support, and visitation, which are not in issue on this appeal.

On March 3, 1978, the trial court issued a "Decree on Property Division, Alimony and Child Support" in which the court ordered: "That there shall be an equal division of the property and assets of the parties, * * *." In this decree the court provided for an equal division of the oil and gas leasehold interests between the parties and awarded a judgment to Marlys Knigge in the sum of $320,542.50, subject to certain deductions and allowances, which the court found to be 50 percent of the value of the assets of the parties other than the oil and gas interests, which were also divided equally. The decree further provided that the above judgment would draw interest at the rate of 6 percent per annum from Oc-

tober 12, 1976, to March 3, 1978, and 8 percent per annum from March 3, 1978.

Following this decree, Curtis L. Knigge filed a motion for a new trial. And on August 25, 1978, the trial court entered an order modifying the previous decree, which provided that: "[I]n lieu of a division of property the petitioner shall have judgment against the respondent for $535,880.00 which is one-half his net worth * * * the judgment shall bear interest at 8% per annum from October 12, 1976, on the unpaid balance * * *." Credits for prior payments were allowed, leaving a balance due on the judgment of $474,255, payable $25,000 (plus one-half of the accrued interest) on September 13, 1978, and $56,156.87 plus interest on the unpaid balance on the 1st day of September of each year from 1979 through 1986. No alimony was awarded in the decree of March 3, 1978, nor in the order of modification on August 25, 1978.

From this order of modification, Curtis L. Knigge appealed; and Maryls Knigge cross-appealed, asserting that the trial court erred in sustaining Curtis L. Knigge's motion for new trial in part and in setting aside its decree of March 3, 1978, and entering a new decree on August 25, 1978.

The trial court's order of modification of August 25, 1978, is reversed; and the decree of March 3, 1978, is reinstated as modified.

Curtis and Marlys Knigge were married on March 13, 1955, at Newcastle, Wyoming, and moved to Kimball County, Nebraska, where they have resided until the present time. Four children were born of this marriage. The names and ages of the children at the time this action was commenced are as follows: Steven, age 21; Marla, age 20; Linda, age 16; and John, age 7.

Marlys Knigge was born in 1935 and resided on a farm with her father in South Dakota. After completing the tenth grade in school, she moved to New-

castle, Wyoming, where she worked as a telephone operator. Her employment terminated with her marriage to Curtis and taking up residence in Kimball County, Nebraska. No assets of any substance were brought to the marriage by either party.

After her marriage, Marlys Knigge's primary responsibilities were to rear the children and keep the home. However, occasionally she assisted her husband in his business and farming operations by posting checks, assisting in installing a flow line on one of the oil wells, and taking care of newly born calves.

Marlys Knigge is required to take thyroid daily for a goiter problem and is unable to do any heavy lifting because of difficulties with her back.

Curtis Knigge was born in 1930. He has an eighth grade education. After his discharge from the U. S. Marine Corps in 1954, he worked in a gasoline service station in Newcastle, Wyoming. About the same time he became employed with an oil-drilling company as a roughneck. During the marriage, Curtis Knigge has also been employed as a car salesman, boat salesman, chemical salesman, oil well pumper, and as a dynamiter of oil pits.

In 1965 Curtis Knigge made the first of a series of purchases of marginal oil wells or fractional interests thereon together with the operating equipment thereon. It is the valuation of these oil wells which is a major issue in this litigation. Some of these oil well interests are held in the name of Curtis Knigge. The rest are owned by C & M Oil, Inc., a corporation whose stock is owned solely by the parties hereto. The wells in controversy are known in the trade as "stripper" wells. A stripper well is a well producing less than 10 barrels a day. At the time of trial, stripper oil was selling for $14.20 a barrel, whereas oil from wells discovered prior to 1970 producing more than 10 barrels a day was selling for $5.25 a barrel. There was testimony at the trial that, subse-

quent to the Arab oil embargo, operating equipment "doubled or tripled" in value.

During the marriage, the family also acquired a farm, the value of which is not in issue.

A detailed chronicle of the failure of the Knigge marriage would serve no purpose. However, to assert that Marlys Knigge was not permitted to squander the marital assets on frivolities would be a gross understatement. Marlys was required to purchase second-hand clothing for herself and the children. The family spent one winter in Kimball County with no blankets in the house. Emergency medical treatment for the children could not be obtained without Curtis' consent, which was not freely given. In one instance Curtis removed a cast from his daughter's broken arm in order to save money. The arm was never checked by the physician after the cast was removed. Against her wishes, Marlys Knigge was forced to live on the farm in a house with holes in the walls where the plaster was gone, with faulty plumbing, and with only two bedrooms for six people. During this period of time, the Knigge family acquired assets which the trial court found were worth $1,071,760 and which Curtis acknowledges on appeal were worth $782,919.

Paul H. Roberts, a petroleum engineer who is employed by the State of Nebraska Oil and Gas Commission, was hired jointly by the parties to appraise the oil wells. Both parties stipulated that they would rely upon and accept his appraisal as correct. This stipulation was accepted by the court; and the decree of March 3, 1978, which was later set aside by the order of modification of August 25, 1978, was based upon the Roberts appraisal.

Mr. Roberts appraised the fair market value of the oil interests of C & M Oil, Inc., at $176,267 and the value of Curtis Knigge's individually owned oil interests at $78,357. The Roberts valuation takes into consideration two factors on each well. The

equipment is valued at what it would sell for when the well stops producing. The oil itself is valued at fair market value of the reserves, considering that a purchaser would expect an annual 20 percent return on investment because of risk. The two valuations added together equal the fair market value of the working interest in a particular well as of the date of appraisal.

Although neither party objected to the Roberts appraisal, the trial judge in the order of modification of August 25, 1978, found: "* * * that the appraisal of working interests by Paul H. Roberts does not reflect their fair market value. I have determined the value by averaging the net profit per income tax returns for the year [sic] 1974, 1975 and 1976 and determining their value to be eight times earnings. This factor seems to be a legitimate one to determine value. The same procedure was used to determine the value of working interests in C & M Oil Company * * *."

On this basis the trial court valued the oil interests individually owned by Curtis Knigge at $248,000 compared to the Roberts appraisal of $78,357 and the oil interests of C & M Oil, Inc., at $236,000 compared to $176,267 in the Roberts appraisal.

There is nothing in the record to even suggest that capitalization of earnings is a valid method of valuing mineral interests. In employing this formula, the trial court completely disregarded estimated reserves and thus paid no attention to the life of individual wells. The income multiple also disregards the separate value of the equipment.

It has been held that valuation of mineral interests by capitalizing prior income does not reflect the market value and is an improper method of valuation because production of minerals is based on a declining asset and production is of an indefinite duration. So. Utah Mines v. Beaver County, 262 U. S. 325, 43 S. Ct. 577, 67 L. Ed. 1004; Angle v. Board of

County Commissioners, 214 Kan. 708, 522 P. 2d 347.

It follows that the trial court's valuation of the oil interests at issue, which was completely without evidentiary support in the record and which was contrary to the stipulation of the parties with respect to the Roberts appraisal, was in error and must be set aside. In the absence of fraud or mistake, an agreement or stipulation by the parties that the judgment of a third person shall be relied upon in determining a fact is binding upon the parties. 17A, C. J. S., Contracts, § 498 (1), p. 731, at 732; 83 C. J. S., Stipulations, § 34, p. 88. There is nothing in the record to suggest fraud or mistake in the Roberts appraisal.

Therefore, the trial court's granting of Curtis Knigge's motion for a new trial and the order of modification which was entered on August 25, 1978, was in error and is hereby set aside. The decree of March 3, 1978, in which the court endeavored to make an equal division of the assets of the parties is reinstated as hereinafter modified.

It is well established that the fixing of alimony or the 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; Schmer v. Schmer, 197 Neb. 800, 251 N. W. 2d 167.

Generally, an award from one-third to one-half of the property involved in a marriage of long duration, and where the parties were the parents of all children involved, does not constitute an abuse of discretion. Baker v. Baker, 201 Neb. 409, 267 N. W. 2d 756; Grummert v. Grummert, 195 Neb. 148, 237 N. W. 2d 126; Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430. The trial court's decision to award Marlys Knigge one-half of the net assets of the marital estate finds support in the record and does not constitute an abuse of discretion.

In the "Decree on Property Division, Alimony and Child Support," the trial court made no specific find-

ing in regard to the value of the gas and oil interests owned by C & M Oil, Inc., or those owned by Curtis and Marlys Knigge. However, no specific finding was necessary in light of the court's decision to give each party an undivided one-half interest in all the gas and oil leases owned by C & M Oil, Inc., and the parties. The court found that the gross value of all other assets of C & M Oil, Inc., was $210,755; that the gross value of the Knigge assets (other than gas and oil leases) was $430,330; and that the total gross value of the non-oil-producing assets of the corporation and the parties was $641,085. On that basis, subject to certain deductions for liabilities and temporary allowances previously awarded, the trial court granted Marlys Knigge a judgment against Curtis Knigge in the sum of $320,542.50. In other words, the court divided the non-oil-producing assets of the parties and the corporation equally between the parties. This division of the assets is affirmed.

The decree is modified in the following particulars. Paragraph 10 (c) of the decree is amended to provide for interest at the rate of 6 percent per annum from March 3, 1978, rather than October 12, 1976.

Paragraph 8 of the decree provides: "The petitioner is awarded so much of the C & M Oil, Inc. stock as is necessary on a redemption of all of her shares to have distributed to her an undivided one-half of the interests in oil and gas leases owned by C & M Oil, Inc., together with like interests in the rights incident to and the personal property thereon * * *." Paragraph 8 should be amended to provide that the C & M Oil, Inc., stock shall be divided equally between the parties in order to provide that each shall have an undivided one-half of the interests in oil and gas leases owned by C & M Oil, Inc., and an undivided one-half interest in the personal property thereon.

The court further ordered that the individually

owned gas and oil leases should be divided by giving each of the parties an undivided one-half interest in each lease together with a one-half interest in the personal property thereon. This award is affirmed.

By reason of the equal division of the marital assets, no provision was made for alimony, which is also affirmed.

Curtis Knigge shall be required to account to Marlys Knigge for one-half of the net proceeds from oil runs from all leases from the date of the commencement of the dissolution action of October 12, 1976.

The original decree provides for payment of the judgment awarded Marlys Knigge in installments in order to satisfy the judgment and all accrued interest by March 1, 1980. We believe that this would place an undue financial hardship on Curtis Knigge. The trial court is directed to order the satisfaction of the judgment in 60 installments over the next 5 years.

In its decree the trial court attempted to anticipate tax consequences arising from a division of the marital assets. In Young v. Young, 200 Neb. 787, 265 N. W. 2d 666, this court stated, "The entire area of trial courts attempting to direct, or by implication to control, the determination of federal tax has been characterized as a 'Pandora's box' which the state Supreme Court should not open." Paragraph 18 of the decree provides: "This decree is premised on the basis that the income tax consequences are: (1) that the difference between respondent's basis and the fair market value of the stock in C & M Oil, Inc. awarded to the petitioner is long term capital gain to respondent; (2) that the difference between respondent's basis and the fair market value of the interests in the oil and gas leases owned by respondent and awarded to petitioner, which fair market value is shown by the appraisal of Paul H. Roberts in the evidence, with the exception of depreciation recap-

ture is long term gain to the respondent; (3) that petitioner's basis is the fair market value of the said stock and interests in the oil and gas leases; and (4) that the amount of the judgment awarded to petitioner in paragraph 10 is neither income to petitioner nor a deduction to respondent, and the parties shall file their income tax returns accordingly, and the court retains jurisdiction to modify this decree if the tax consequences turn out to be different than premised." For reasons stated in Young v. Young, *supra*, the decree of the trial court is modified by the elimination of the above provision.

Paragraph 10 (d) of the decree of March 3, 1978, provides that: "[T]here shall be deducted [from the judgment awarded Marlys Knigge] an amount equal to the difference between what the federal and state income taxes of C & M Oil, Inc. and the respondent are by reason of the awards and redemption ordered in paragraphs 8 and 9 above, and what they would have been if the awards and redemption ordered in paragraphs 8 and 9 above had not been ordered; * * *." This provision is amended to provide that additional tax liabilities resulting from a division of the stock in C & M Oil, Inc., and the individually owned oil and gas leases shall be borne equally by the parties.

Finally, Curtis Knigge asserts that the trial court erred in including certain assets owned by the Knigge children in the marital assets which were divided between the parties.

A review of the record indicates that the trial court was justified in including these assets among the marital assets for the purpose of determining the amount of the judgment to be awarded Marlys Knigge. The court did not attempt to determine ownership between Curtis Knigge and his children as to these assets. The court merely determined that these assets were to be considered in the division of marital assets.

The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Baker v. Baker, 201 Neb. 409, 267 N. W. 2d 756.

For reasons stated herein, the judgment of the trial court in entering an order of modification on August 25, 1978, is reversed; the decree of March 3, 1978, is affirmed as modified.

AFFIRMED AS MODIFIED.

CLINTON and WHITE, JJ., concur in the result.

KIKUE NIMURA JETTER, DOING BUSINESS AS "AKASAKA INN," APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

283 N. W. 2d 5

Filed August 21, 1979. No. 42403.

1. **Administrative Law: Intoxicating Liquors: Notice: Evidence.** Unless otherwise agreed, the issues to be determined in a contested hearing before the Nebraska Liquor Control Commission are limited to those stated in the notice of the hearing.
2. **Administrative Law: Intoxicating Liquors: Licenses and Permits.** In the absence of a violation of a statute or valid regulation of the Nebraska Liquor Control Commission, it has no authority to cancel a liquor license.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded.

Russell S. Daub, for appellant.

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

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

Jetter appeals from a judgment of the District Court for Douglas County which affirmed an order of the Nebraska Liquor Control Commission canceling her Class C liquor license. We reverse.

Jetter held a Class C liquor license authorizing her to do business at a restaurant-bar in Omaha, Nebraska. Under the automatic renewal provisions in section 53-132, R. R. S. 1943, Jetter paid the registration fee for her license, and the Omaha city clerk published the notice of renewal for the license year beginning November 1, 1976. There were no objections to the renewal and the license was executed by the Commission and delivered to the city clerk for delivery to Jetter upon payment of the requisite fees. § 53-132, R. R. S. 1943. Jetter never paid the fees, and the license remained with the clerk. Jetter never operated the business after the latter part of October 1976. On May 3, 1977, the clerk returned the license to the Commission at its request. On May 20, 1977, the Commission issued an order to Jetter to show cause at a hearing to be held June 1, 1977, why the license should not be canceled "for failure to operate the business." At the hearing it was conceded that Jetter had not operated the business. The Commission found that the license should be canceled and did so effective June 21, 1977. This order was appealed to and affirmed by the District Court, and is before this court for review.

Evidence before the Commission, which was more fully developed in the District Court, established that from early in November 1976 Jetter was in the process of selling the business, but delays due to financing problems had delayed consummation of the sale.

Errors assigned by Jetter are that the decision was contrary to law, it was not supported by sufficient evidence, and it was an abuse of discretion. We need only discuss the first.

The Commission was limited to the issue stated in its notice of hearing sent to Jetter. J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694 (1975). Therefore, the question before us is whether the Commission may cancel a license for failure of the licensee to operate the business in the absence of a statute, rule, or regulation authorizing it to do so on that ground.

Nowhere in the Nebraska Liquor Control Act can we find authority for the Commission to revoke or cancel a license except as authorized by statute.

In Bali Hai', Inc. v. Nebraska Liquor Control Commission, 195 Neb. 1, 236 N. W. 2d 614 (1975), we upheld a municipal ordinance which called for revocation of a liquor license when the licensee failed to operate the business. We said that a municipality was free to legislate in this area since the Nebraska Liquor Control Act was silent on the question, and the state had not preempted the field by statute or regulation. It has not done so since.

We hold that the act requires proof of violations of statutes or valid regulations before a license may be canceled. §§ 53-117 (2) and 53-118 (1) (d), R. R. S. 1943.

The judgment is reversed and the cause remanded to the Commission with directions to issue a Class C liquor license to Jetter for the current license year provided Jetter then meets all other requirements for the issuance of such a license.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY PIERCE, APPELLANT.

283 N. W. 2d 6

Filed August 21, 1979. No. 42462.

1. **New Trial: Evidence: Motions, Rules, and Orders.** A motion for

new trial for newly discovered evidence will not be granted unless the evidence in support thereof is so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.

2. **Criminal Law: Habitual Criminals: Statutes: Time.** In order for the enhancement provisions of section 29-2221, R. R. S. 1943, to apply to an offense, it makes no difference whether the two prior sentences were to be served consecutively or concurrently, nor is it required that there be a time interval between conviction and commitment for the first offense and commission of the second offense.

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

Scott & Kelly, 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.

PER CURIAM.

This is an appeal from a jury conviction of unlawfully delivering a controlled substance, amphetamines, under section 28-4,125, R. R. S. 1943; a finding that defendant was an habitual criminal under the provisions of section 29-2221, R. R. S. 1943; a sentence of 12 years imprisonment in the Nebraska Penal and Correctional Complex; and an overruling of defendant's amended motion for new trial.

Defendant was charged in an amended information, count I, that on or about June 7, 1978, he unlawfully assaulted Kirk Cross with intent to inflict great bodily injury contrary to section 28-413, R. R. S. 1943, and count II, that on the same date he unlawfully and knowingly delivered to Kirk Cross a controlled substance, amphetamines. In addition, each count recited that the defendant, on July 14, 1976, had been convicted of the crime of burglary and sentenced to a term of 18 months, and on the same date had been convicted of the crime of grand larceny and sentenced to a concurrent prison term of 1 year, and

that by reason of such convictions the defendant is deemed to be an habitual criminal.

As indicated, the case was tried to a jury and the State's principal witness was Kirk Cross. He testified he himself had been charged with one or more felony counts relating to controlled substances, and was told by the state patrol that if he were able to set up some drug buys leading to prosecution his felony charges would be dropped. He was wired with a miniature "bugging device" and given $65 to make the purchase.

Cross originally talked to Rick Fisher about 5:30 p.m., on June 7 at a time when Fisher and the defendant were together. Later on in the evening, in the presence of the defendant, Fisher told Cross that the defendant would obtain the drugs. Fisher, Cross, the defendant, and the defendant's younger brother Monty drove around the vicinity of Scottsbluff, Nebraska, for several hours that evening, drinking beer, and at one point, approximately 10:30 p.m., they parked outside Gustav's Stable Club where Cross and Monty Pierce remained in the car and Fisher and the defendant went inside for approximately 1 hour. When the latter two returned to the car, according to the testimony of Cross, defendant handed Cross a package which turned out to be amphetamines. Cross said he had earlier in the evening paid the $65 to the defendant for the drugs. All four of the parties then went to an address within the city where defendant was helping Fisher cut amphetamines contained in a second package. During the course of the evening the radio transmitter was found on the person of Cross and a scuffle ensued involving Fisher, the defendant, and defendant's brother Monty, which was the cause of the filing of the assault charge.

Although the bugging device had not been successfully monitored by law enforcement officers during the negotiations and actual purchase and transfer of

the drugs, nevertheless they were able to hear the fight which was developing and thereupon immediately entered on the premises where all parties were arrested.

Another witness for the State, patrol investigator Jack Robinson, testified, simply corroborating the fact that he had made the promise to Cross to try to get the felony charges dropped against him in return for the drug buy; that he had furnished the money and the radio device. The other State's witness was Janie Strotheide, a chemist, who identified the controlled substance. The State's evidence also disclosed that the packet of amphetamines was found on the person of Cross at the time of his arrest, and that only a small amount of money and marijuana residue was found on the person of the defendant.

Following the conclusion of the State's case a motion for dismissal or a directed verdict on the grounds of insufficient evidence was overruled.

The defendant's case consisted only of the testimony of the defendant himself who denied all involvement in the drug transaction and testified that whatever activities he engaged in in connection with the fight amounted only to self-defensive measures. He also testified to several alleged facts which amounted to a direct attack on the truthfulness of Cross. Defendant admitted he had been convicted of two prior felonies not, however, involving drugs.

On rebuttal the State called defendant's brother, Monty Pierce, who corroborated the State's case to the extent that he recalled he and defendant were driving uptown early that evening and defendant was looking for a guy by the name of Kirk Cross. Although denying he saw any drugs change hands when defendant got back into the car after having been in the Stable Club, Monty did say that later in the evening, at the place where the arrests were made, he heard Cross ask defendant how many drugs he had gotten that evening, and Monty testi-

fied, "He [defendant] said something to the effect, 'Yes, I got one for you and one for Fisher,' or something to that effect."

Defendant's motion for a dismissal or in the alternative for a directed verdict made at the close of all the evidence was again overruled and the case was submitted to the jury on both counts I and II. The jury returned a verdict of not guilty on count I, the assault, but guilty on count II, delivering a controlled substance.

Later, a hearing was held on the charge of defendant's being an habitual criminal. The trial court found defendant had previously been found guilty on a two-count information to breaking and entering and grand larceny, both occurring on the same day, but at different locations. These findings were based on exhibits 1, 2, and 3, the journal, commitment, and the warden's receipt of the defendant at the penal complex. In those proceedings, the evidence revealed that defendant had received sentences of 18 months and 1 year respectively, the same to run concurrently.

Defendant's amended motion for a new trial complained that the verdict was not sustained by sufficient evidence, it was contrary to law, the court erred in overruling certain of defendant's objections to evidentiary questions, there was newly discovered evidence mandating a new trial, and that the exhibits were improperly received at the habitual criminal hearing. The motion was overruled and immediately thereafter defendant was sentenced to a term of 12 years in the Nebraska Penal and Correctional Complex. The maximum sentence under section 28-4,125, R. R. S. 1943, for delivery of amphetamines is 5 years, but with the enhancement provisions of the habitual criminal statute the term is not less than 10 nor more than 60 years. § 29-2221, R. R. S. 1943.

Defendant's assignments of error include the over-

ruling of the motion for new trial in that the verdict was not sustained by sufficient evidence and was contrary to law; the court erred in failing to grant a new trial because of newly discovered evidence; the court erred in not requiring corroboration of the State's witness, a paid informer; and the court erred in finding that the defendant was an habitual criminal.

As far as the insufficiency of the evidence was concerned, a review of the testimony of the witnesses as outlined above reveals that the State did make a prima facie case. Although the witnesses contradicted each other, it was simply a matter of credibility and the jury chose to believe the State's witnesses.

The only error of law raised by defendant in his amended motion for a new trial had to do with the overruling of objections to certain hearsay testimony relating to statements allegedly made by the defendant to his brother Monty. Both of the parties were present at the time of the alleged conversation; they were strictly admissions made by the defendant; and they were clearly admissible as such. § 27-801 (4) (b), R. R. S. 1943.

Defendant's motion for a new trial based on newly discovered evidence consisted first of an affidavit by defendant's attorney that in the preparation for trial he discussed the case with Rick Fisher and was told that Fisher had no knowledge of the alleged transaction between the defendant and Kirk Cross. Also, in an affidavit, Rick Fisher generally states that he was at Gustav's Stable Club on the evening in question with defendant and Kirk Cross; that he had personal knowledge of the drug transaction in question which is of a nature beneficial to the defendant and which tends to exonerate him and discredit the testimony of Kirk Cross; that at the time of filing of the charges the affiant was under criminal investigation charged with six or seven felonies and did not come

forward with the information because his testimony could be used against him; that the felony charges which had been pending against him were dropped in exchange for a plea of guilty to a charge in another county for which he is currently serving a sentence of 2 to 5 years in the Nebraska Penal and Correctional Complex; and that he is willing to make a more complete statement upon assurances of a grant of immunity in the instant case. Nowhere is there any showing of one fact to which Fisher might testify.

In State v. Seger, 191 Neb. 760, 217 N. W. 2d 828 (1974), we said: "The statute, section 29-2103, R. R. S. 1943, specifically provides that where: '* * * it shall be made to appear * * * the defendant * * * has discovered new evidence material to his defense which he could not with reasonable diligence have discovered.' The newly discovered evidence must be competent, material, credible, and which might have changed result of trial and which by the exercise of due diligence could not have been discovered and produced at the trial. * * *

"Moreover, new evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict."

Here, mere conclusions rather than evidence have been tendered, and certainly there are no additional facts exhibited which we could say are so potent that if offered a new trial would probably result in a different verdict. The trial court properly denied the motion for a new trial on this basis.

The defendant complains that there was no corroboration of the testimony of the State's cooperating individual, Kirk Cross. Defendant points out that section 28-439, R. S. Supp., 1978, prohibits a conviction based solely on the uncorroborated testimony of the cooperating individual. He admits that the statute was not in effect at the time of his conviction

and the law was not intended to have a retroactive effect, but insists that it does show a legislative recognition that a conviction based solely on the uncorroborated testimony of the cooperating individual does not satisfy the reasonable doubt standard mandated by the Fourteenth Amendment of the United States Constitution. The statute is not applicable here. However, it should be pointed out that Cross' testimony was in fact corroborated by no less than the defendant's own brother, who was with him all evening. Monty Pierce not only testified that he was driving around that evening with his brother, the defendant, and that his brother was looking for Kirk Cross, but also testified that in response to an inquiry by Cross as to how many drugs the defendant had gotten, the defendant replied, "Yes, I got one for you [Cross] and one for Fisher." This certainly would be sufficient corroboration even under the new statute.

Defendant's assignment of error involving the enhancement of his punishment is simply that the trial court erred in finding him to be an habitual criminal. Specifically, he argues that because his two prior offenses were committed on the same date, prosecuted in the same information, and resulted in concurrent sentences, he had not been "twice convicted of a crime, sentenced and committed to prison * * * for terms of not less than one year each" as required by section 29-2221, R. R. S. 1943, in order to be an "habitual criminal."

Although we have not decided this precise question, similar facts were presented in Huffman v. Sigler, 182 Neb. 290, 154 N. W. 2d 459 (1967), i.e., enhancement was based on convictions of breaking and entering, escape from custody, and robbery, with sentencing apparently all on the same date, for terms of 1 year, and 1 year concurrent, and 3 years consecutive. However, the contention made by Huffman in that case, on appeal from a denial of a

writ of habeas corpus, was that the three convictions "will not support his sentence as a habitual criminal because his imprisonment was continuous and, in effect, amounted to one 4-year sentence." In refusing this contention, we said: "The statute provides that 'Whoever has been twice convicted of crime, sentenced and committed to prison' shall be deemed a habitual criminal. § 29-2221, R. R. S. 1943. The defendant was thrice convicted of crime, sentenced and committed to prison. It is of no consequence that the defendant was imprisoned continuously from the start of the 1-year sentences until the end of the 3-year sentence."

It is defendant's position that having approved consecutive sentences as supporting enhancement, it would be an unwarranted extension of the statute's intent and purpose to include two concurrent sentences as being similarly sufficient. He paraphrases from the following language in State v. Losieau, 182 Neb. 367, 154 N. W. 2d 762 (1967), justifying enhancement statutes: "Where the very purpose of the habitual criminal act is to penalize the repetition of criminal conduct * * *." We agree wholeheartedly and reaffirm our holding in that case. That is exactly what the statute says: "(1) Whoever has been twice convicted of crime, sentenced and committed to prison, * * * for terms of not less than one year each, shall, upon conviction of a felony * * * be deemed to be an habitual criminal * * *." § 29-2221, R. R. S. 1943. That statute applies precisely to the defendant.

Defendant contends that in keeping with the purpose of the statute as expressed in State v. Losieau, *supra*, the statute should be interpreted to require that a second offense, in order to support a finding of habitual criminality, must have been committed after the commission and conviction of the first offense. We would agree that such reasoning would be applicable to the principal offense, i.e., the of-

fense for which enhancement is sought must have been committed after conviction and sentencing for the two prior offenses. However, we do not believe that a reading of our statute on its face requires or supports such a holding with regard to the prior offenses themselves.

We are not unmindful of the fact that several jurisdictions, perhaps even a majority, have adopted the position urged by the defendant. The theories which they have used are either that a defendant should receive two separate and independent warnings before being charged as an habitual criminal or that the defendant should have two separate opportunities for the beneficent influence of penal incarceration before giving up on him as an habitual offender. Although somewhat distinguishable because it involved enhancement for a second offense felony similar to our former section 28-512, R. R. S. 1943, second offense petit larceny, the language from Ansell v. Com., 250 S. E. 2d 760 (Va., 1979), nevertheless expresses our philosophy in this case. "We have stated that the purposes of the recidivist statute are to protect society against habitual criminals and to impose further punishment upon them."

Having said that we recognize that very possibly the majority view is contrary to the one adopted by us here today, we think the language of Cox v. State, 255 Ark. 204, 499 S. W. 2d 630 (1973), is particularly appropriate. "We like the logic of the Louisiana Supreme Court in the case of State of Louisiana v. Williams, 77 So. 2d 515." The Arkansas court then went on to explain that in the Williams case, although the trial judge had found that three previous consecutive sentences given in convictions occurring on the same day could only be counted as one previous conviction, the Supreme Court of Louisiana disagreed. The Arkansas court went on to quote further from Williams: " '[T]he argument is made that under multiple offender legislation, which is directed at

recidivism, "The increased penalties for habitual offenders are not intended to follow according to a numerical count of the offender's crimes, but are imposed for his successive failures to rehabilitate himself. The result is that two or more offenses of a contemporaneous nature amount to but one offense." This argument might be effective if addressed to the lawmakers. But with respect to a judicial interpretation of the particular statute under consideration it has no merit.' " See, also, State v. Bomar, 213 Tenn. 487, 376 S. W. 2d 446 (1964).

We likewise like and adopt such logic. We therefore hold that one having been "twice convicted of crime, sentenced and committed to prison" who thereafter commits and is convicted of a third crime, is eligible for the enhanced penalties provided for one "enjoying" the status of an habitual criminal. It makes no difference whether the two prior convictions provided for consecutive sentences, or whether, as here, the defendant was permitted to serve his two terms concurrently, nor that there was no time interval between conviction and commitment for the first offense and commission of the second.

None of the defendant's assignments of error have any merit and the trial court was correct in all respects and its judgment is affirmed.

AFFIRMED.

HASTINGS, J., dissenting.

I am in complete agreement with the majority opinion in every respect except for its finding that defendant is an habitual criminal under section 29-2221, R. R. S. 1943. In my opinion, the Legislature did not intend to nor does the language of its enactment reasonably permit such designation to apply to one whose prior crimes consist of two burglaries committed within minutes of each other, which resulted in the filing of a single information and con-

viction, sentencing, and commitment out of the same court on the same day.

"Recidivist statutes are enacted in an effort to deter and punish incorrigible offenders. * * * They are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment." State v. Conley, 222 N. W. 2d 501 (Iowa, 1974). "It is the *commission* of the second felony after conviction for the first, and the *commission* of the third felony after conviction of the second that is deemed to make the defendant an incorrigible." (Emphasis supplied.) Coleman v. Commonwealth, 276 Ky. 802, 125 S. W. 2d 728 (1939). Finally, "* * * where the sequence of prior convictions is in issue, the rule followed in the majority of jurisdictions is that each successive felony must be committed after the previous felony conviction in order to count towards habitual criminal status." State v. Carlson, 560 P. 2d 26 (Alaska, 1977). See, also, Faull v. State, 178 Wis. 66, 189 N. W. 274 (1922); Washington v. United States, 343 A. 2d 560 (App. D. C., 1975); Hutchinson v. State, 481 S. W. 2d 881 (Tex. Crim. App., 1972); Cooper v. State, 284 N. E. 2d 799 (Ind., 1972); Holst v. Owens, 24 F. 2d 100 (5th Cir., 1928); Karz v. State, 279 So. 2d 383 (Fla. App., 1973); State v. Mitchell, 2 Wash. App. 943, 472 P. 2d 629 (1970); State v. Lohrbach, 217 Kans. 588, 538 P. 2d 678 (1975); Moore v. Coiner, 303 F. Supp. 185 (N. D., W. Va., 1969); Hill v. Boles, 149 W. Va. 779, 143 S. E. 2d 467 (1965); State v. Sanchez, 87 N. M. 256, 531 P. 2d 1229 (1975); Annotation, 24 A. L. R. 2d 1247.

I am authorized to state that Krivosha, C. J., and McCown, J., join in this dissent.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLANT, V. NEBRASKA MORTGAGE FINANCE FUND, APPELLEE.

283 N. W. 2d 12

Filed August 21, 1979. No. 42733.

1. **Legislature: Constitutional Law.** In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality.
2. **Legislature: Statutes.** An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the Legislature has a basis in reason, and is not purely arbitrary.
3. **Statutes: Constitutional Law.** If a law affects equally all persons who come within its operation it cannot be local or special within the meaning of the Constitution of the State of Nebraska. A law is not local or special in a constitutional sense that operates in the same manner upon all persons in like circumstances.
4. _____: _____. General laws are those which relate to or bind all within the jurisdiction of the lawmaking power, and if a law is general and operates uniformly and equally upon all brought within the relation and circumstance for which it provides, it is not a local or special law in the constitutional sense.
5. **Legislature.** The findings of the Legislature, while not absolutely controlling, are entitled to great weight.
6. **Legislature: Public Policy: Police Power.** What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.
7. **Legislature: Public Policy: Appropriations.** It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature.
8. **Legislature: Public Policy: Constitutional Law.** The rule that the benefits to the public must be direct and not remote and that the past course or usage of government is to be resorted to for guidance must in each case be considered in the light of the principle

that the Legislature has a very wide discretion to determine what constitutes a public purpose, and that courts will not interfere unless the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use.

9. **Statutes: Public Policy.** A law may serve the public interest although it benefits certain individuals or classes more than others.
10. **Statutes.** A statute may not operate retroactively where it would impair the obligation of a contract or interfere with a vested right.
11. **Legislature: Administrative Law: Public Policy: Courts.** The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations.
12. **Legislature: Constitutional Law: Courts: Statutes.** The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation.
13. **Police Power: Constitutional Law: Statutes.** Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where they operate uniformly on all within a class which is reasonable. This is so even if a statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

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

Terrence J. Ferguson and J. Thomas Marten of Kutak, Rock & Huie, for appellee.

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

KRIVOSHA, C. J.

This appeal, brought by the Attorney General of the State of Nebraska (State), attacks the constitutionality of the Nebraska Mortgage Finance Fund Act (Act), sections 76-1601 to 76-1651, R. S. Supp., 1978, enacted by the 1978 Legislature as L.B. 476. The trial court, after examining the various claims made by the State, determined that the Act was in all respects valid and not in violation of the Constitution of the State of Nebraska. In review of these matters, we concur with the trial court's finding that the Act does in all respects meet constitutional requirements, and accordingly affirm the judgment of the trial court.

The purpose of the Act is to assist private mortgage lenders in providing mortgage financing for single family residences at reduced interest rates for low and moderate income families through two programs. Under the "loans-to-lenders" program, section 76-1622, R. S. Supp., 1978, the Fund will make loans to mortgage lenders which will use the proceeds to make mortgage loans. Under the "mortgage purchase" program, section 76-1623, R. S. Supp., 1978, the Fund will purchase or take assignments of mortgage loans made by mortgage lenders for the construction, rehabilitation, or purchase of residential housing. Each program is intended to enable mortgage lenders to use a new source of capital solely for the purpose of making mortgage loans to persons otherwise unqualified for mortgage financing because of insufficient personal or family income. § 76-1606 (5), R. S. Supp., 1978.

The Fund will issue tax-exempt revenue bonds bearing interest at rates lower than the outstanding mortgages. The differential between the interest paid the Fund by mortgagors and the interest paid by the Fund to bondholders is expected to provide the margin to operate the mortgage programs established by the Act.

The Act itself is quite long and complete in operating detail but, in short, the principal function of the Fund is to issue tax-free revenue bonds and to use the proceeds either to encourage lenders to make lower interest loans to low or moderate income persons or in turn to purchase from lending institutions mortgages made to low or moderate income persons.

The Act creates "a body politic and corporate, not a state agency, but an independent instrumentality exercising essential public functions, to be known as the Nebraska Mortgage Finance Fund." § 76-1607, R. S. Supp., 1978. The Fund is composed of nine members; three are ex officio state officers and six are appointed by the Governor. § 76-1607 (2), R. S. Supp., 1978. The six public members, to the extent possible, represent all areas of the state, and not more than three public members may belong to the same political party. § 76-1607 (3), R. S. Supp., 1978.

The three ex officio state officers are the Director of Economic Development, the chairman of the Nebraska Investment Council, and the Director of Planning. The chairman of the Fund is the Director of Economic Development. The Fund members elect a vice chairman and such other officers as they may determine. Members of the Fund receive no compensation for their services but are reimbursed for expenses solely from revenue of the Fund in the same manner as the law provides for state employees.

In passing the Act, the Legislature set out a declaration of intent which provides: "It is hereby found and declared that: (1) From time to time the high rates of interest charged by mortgage lenders seriously restrict existing housing transfers and new housing starts and the resultant reduction in residential construction starts causes a condition of substantial unemployment and underemployment in the construction industry; and (2) Such condi-

tions generally result in and contribute to the creation of slums and blighted areas in the urban and rural areas of this state and a deterioration of the quality of living conditions within this state, and necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident prevention, and other public services and facilities." § 76-1602, R. S. Supp., 1978.

The Legislature further set out in clear and concise terms its findings which included the fact that there existed in the urban and rural areas of the state an inadequate supply of, and a pressing need for, sanitary, safe, and uncrowded housing at prices which persons of low and moderate income can afford, and as a result such persons are forced to occupy insanitary, unsafe, and overcrowded housing. § 76-1603, R. S. Supp., 1978. The Act further notes: "Such problems cannot alone be remedied through the operation of private enterprise or individual communities or both, but can be alleviated through the creation of a governmental body to encourage the investment of private capital and stimulate the construction of sanitary, safe, and uncrowded housing for low and moderate income persons through the use of public financing as provided by * * * [the Act] and loans at reasonable interest rates, and by coordinating and cooperating with private industry and local communities, which is essential to alleviating the foregoing conditions and is in the public interest." § 76-1604, R. S. Supp., 1978.

In particular, the Legislature found that "[a]lleviating such conditions and problems through such encouragement of private investment and stimulation of construction by a governmental body is a public purpose and use for which public money provided by the sale of revenue bonds may be borrowed, expended, advanced, loaned, or granted. Such activities shall not be conducted for profit." In concluding

ing its intent, the Legislature said: "Such activities are proper governmental functions and can best be accomplished by the creation of a governmental body vested with the powers and duties specified in * * * [the Act]. The necessity for the provisions of sections 76-1601 to 76-1651 to protect the health, safety, morals, and general welfare of all the people of this state is hereby declared as a matter of legislative determination. The governmental body created by sections 76-1601 to 76-1651 shall make financing available for new or existing housing to serve those people which private industry is unable to serve at current interest rates." § 76-1605, R. S. Supp., 1978.

These legislative findings are reinforced by testimony and documents submitted at hearings conducted by the Urban Affairs Committee of the Nebraska Legislature (Committee) in 1976 and 1977, and by housing studies conducted in Nebraska from 1971 through 1978.

A 1976 study of declining neighborhoods, commissioned by the Committee as part of its inquiry into housing conditions in Nebraska, found substantial interest by local officials, lenders, and realtors in the creation of a housing finance agency or some other mechanism that would use public funds to make mortgage loans available to lower income persons.

Other studies by governmental agencies in Nebraska have emphasized the adverse effect of the housing crisis on persons of low and moderate income. A 1972 Nebraska Housing Advisory Council study entitled "Projection of Housing Needs" contained the following statistical analysis:

Total Number of Housing Units Needed by 1980	
Per Population Growth	45,428 Units
Per Housing Replacement	97,128 Units
Per Desired Vacancy	15,344 Units
Total Production Needed by 1980	157,900 Units

Anticipated Production Capacity (12% of 556,901 Units)	108,595 Units
Production Deficit	49,305 Units

According to the testimony, in 1972, 29 percent of persons across the state saw housing deficiencies as a major problem of their local community.

Sixty-three percent of small town manufacturers in Nebraska, when asked to give opinions about their communities, said the availability of suitable housing constituted a problem for their employees and that this problem was likely to increase in the future.

The Department of Economic Development in reports concerning housing in Nebraska identified inflation, income levels, job opportunities, and interest rates as contributing factors in a family's inability to afford housing. The department's reports in 1975, 1976, and 1977 reflected the continuing rapid rate of inflation of housing costs which have made it increasingly difficult for low and moderate income people to afford safe and decent housing.

The State maintains that the Act is unconstitutional for a number of specific reasons. In particular, the State maintains: (1) That the Act creates a single public corporation by special law in violation of Article XII, section 1, of the Constitution of the State of Nebraska; (2) that the Act granted to the Fund special privileges and immunities in violation of Article III, section 18, of the Constitution of the State of Nebraska; (3) that the Act permitted the extension of the credit of the State for a purely private purpose in violation of Article XIII, section 3, of the Constitution of the State of Nebraska; (4) that the Act permitted the issuance of revenue bonds in excess of $100,000 in violation of Article XIII, section 1, of the Constitution of the State of Nebraska; (5) that the Act unconstitutionally limited the people of Nebraska in their right to initiative and referendum as provided in Article III, sections 2 and 3, of the

Constitution of the State of Nebraska; (6) that the Act permitted an unlawful delegation of legislative authority to the Fund in violation of Article II, section 1, of the Constitution of the State of Nebraska; and (7) that the Act did not effect a valid public purpose.

In examining the validity of a legislative act, we must keep in mind the oft-declared rule to the effect that in construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236; United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576; Prendergast v. Nelson, 199 Neb. 97, 256 N. W. 2d 657.

While the creation of an entity to aid in the financing of housing for low and moderate income residents of the state is new to Nebraska, it is neither new nor unique in the country and has been adopted by numerous states having constitutional provisions similar to those of our Constitution. The overwhelming majority of jurisdictions considering such legislation have had little difficulty in finding its validity. See, Walker v. Alaska State Mortgage Association, 416 P. 2d 245 (Alaska, 1966); Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N. E. 2d 276; Maine State Housing Auth. v. Depositors Trust Co., 278 A. 2d 699 (Me., 1971); Massachusetts Housing Finance Agency v. N. E. Merchants National Bank, 356 Mass. 202, 249 N. E. 2d 599; Minnesota Housing Finance Agency v. Hatfield, 297 Minn. 155, 210 N. W. 2d 298; New Jersey Mortgage Finance Agency v. McCrane, 56 N. J. 414, 267 A. 2d 24; Vermont Home Mortgage Credit Agency v. Montpelier National Bank, 128 Vt. 272, 262 A. 2d 445; State ex rel. v. Copenhaver, 153 W. Va. 636, 171 S. E. 2d 545; State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391, 208 N. W. 2d 780; Utah Housing Finance Agency v. Smart, 561 P. 2d 1052 (Utah, 1977). The fact that so many others

may have found such legislation valid does not, in and of itself, compel us to reach a similar conclusion. Nevertheless, the examination made by the various jurisdictions as set out in their opinions is of particular aid to us in reaching our conclusion, and of some persuasion in convincing us as to the real existence of the problem and the need to solve that problem. We are likewise not unmindful of the fact that the Attorney General in contesting the constitutionality of this Act does not, by such action, mean to indicate his disconcern for the problem, but only seeks to exercise his constitutionally imposed duty to determine the Fund's legality before it embarks upon its duties.

We believe an appropriate place to start this examination may be with the State's contention that the Fund is a corporation created in violation of Article XII, section 1, of the Constitution of the State of Nebraska, which reads in pertinent part as follows: "The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations * * *. No corporations shall be created by special law * * * except those corporations organized for charitable, educational, penal or reformatory purposes, * * *." The argument is made to us by the State that the Fund is a corporation covered by Article XII, section 1, and therefore in violation thereof. The appellee, on the other hand, argues first that the Fund is not a public corporation but rather a quasi-corporation, and second it was created by a general law and not by a special law so that no violation of Article XII, section 1, of the Constitution occurred. We believe the appellee is correct.

There can be little argument that the state of the law with regard to the distinctions between public corporations, quasi-corporations, and governmental entities in general is at best confused. While the Fund has certain characteristics of a corporation,

including being called a body corporate, it is likewise clear that it lacks most of the characteristics of a corporation, and is designated as an "independent instrumentality exercising essential public functions." § 76-1607, R. S. Supp., 1978. An examination of the Act makes it clear that regardless of what name may be ascribed to the Fund, it is in some manner a governmental body. To begin with, the Act itself in several places talks about the need to create "a governmental body." §§ 76-1604 and 76-1605, R. S. Supp., 1978. Moreover, three of the nine members are ex officio members solely and wholely by reason of holding other state positions. § 76-1607, R. S. Supp., 1978. It seems to us that the Legislature could not compel the Director of Economic Development to be the chairman of the Fund unless the entity was a governmental body related to state government over which the Legislature had some control.

We need not, however, add to the confusion by attempting to isolate the species to which the Fund belongs. Regardless of its class, we find that it was created by a general law and not a special law. Therefore, regardless of how it is characterized, as a public corporation or as a quasi-public corporation, it is a governmental body created by general law which is not in violation of Article XII, section 1, of the Constitution of the State of Nebraska.

"An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the legislature has a basis in reason, and is not purely arbitrary. * * * 'If a law affects equally all persons who come within its operation it cannot be local or special within the meaning of the Constitution.' * * * 'A law is not local or special in a constitutional sense that operates in the same manner upon all persons in like circumstances.' 'General

laws are those which relate to or bind all within the jurisdiction of the law-making power, and if a law is general and operates uniformly and equally upon all brought within the relation and circumstance for which it provides it is not a local or special law in the constitutional sense.' " Bauer v. State Game, Forestation and Parks Commission, 138 Neb. 436, 293 N. W. 282; State v. Stuht, 52 Neb. 209, 71 N. W. 941; State, ex rel. Johnson, v. Consumers Public Power District, 143 Neb. 753, 10 N. W. 2d 784.

There is little dispute that the housing needs of low and moderate income citizens of this state exist all across the state and not just in one isolated area. All persons of low or moderate income needing assistance in obtaining financing for housing will be eligible to benefit from this Act, and all will equally receive the benefits of the Act. In every sense the Act applies generally over the entire class and not specially for an isolated group or area.

The State points to the majority opinion in Wittler v. Baumgartner, 180 Neb. 446, 144 N. W. 2d 62, in support of its position that the Act is special legislation in violation of Article XII, section 1, of the Constitution of the State of Nebraska. It is true this court did hold in Wittler v. Baumgartner, *supra*, that the creation of a grid system corporation violated Article XII, section 1, because it created a public corporation by special law. The dissenting opinion in Wittler, however, called our attention to the fact that the court's finding with regard to Article XII, section 1, was extreme and broke with settled definitions of general and special laws. We believe that the minority in Wittler was correct with regard to its analysis of general laws and special laws. The Legislature may very well determine that a legitimate public purpose can be accomplished by creating a single entity to handle the matter. To the extent that Wittler is in conflict with our decision herein as it relates to Article XII, section 1, of the Constitution

of the State of Nebraska, it is overruled.

In answering the question of whether the Act is a general law or a special law, we find that it is a general law. The more important question, however, is whether the Act accomplishes a public purpose. We believe it does.

While, as already noted, we have not heretofore passed upon the constitutionality of the Act, we nevertheless have had a previous opportunity to pass upon what constitutes a public purpose and in particular what constitutes a public purpose with regard to housing. In the case of Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451, we examined the constitutionality of the act creating the Housing Authority of the City of Omaha. In the course of that opinion we discussed "public purposes," saying: "Plaintiffs contend that the legislation before us was not enacted for a public purpose. In enacting the legislation, the legislature made certain findings to the effect that conditions existed relative to slum clearance and low income housing which required the establishment of sanitary and wholesome housing projects in cities of the metropolitan class with a view of promoting health and sanitation and preventing the spread of crime and disease. The findings of the legislature, while not absolutely controlling, are entitled to great weight. It is obvious that the legislation was passed in the exercise of the police power of the state to protect the health, safety, morals and general welfare of its people. We think that these objectives subserve a public purpose and as such are proper subjects for legislative action. Many states have enacted similar laws and we are impressed with the unanimity with which they have been upheld as being for a public purpose." The fact that the public purpose sought to be eliminated in Lennox v. Housing Authority of City of Omaha, *supra*, was slum clearance and the public purpose sought to be

fulfilled in the instant case is the providing of adequate housing for low and moderate income persons is of no significant difference. It simply reflects the changing times and a society more mindful and concerned with the needs of its citizens.

This was most ably pointed out by the Minnesota Supreme Court in passing upon the constitutionality of their mortgage financing act when they said: " 'The notion of what is public use changes from time to time. Public use expands with the new needs created by the advance of civilization and the modern tendency of the people to crowd into large cities. Such a taking as here proposed could not possibly have been thought a taking for public use at the time of the adoption of our Constitution when the state was practically a wilderness without a single city worthy of the name. The term "public use" is flexible, and cannot be limited to the public use known at the time of the forming of the Constitution.' * * *." Minnesota Housing Finance Agency v. Hatfield, 297 Minn. 155, 210 N. W. 2d 298.

We are persuaded by the reasoning of the Utah Supreme Court in the case of Utah Housing Finance Agency v. Smart, 561 P. 2d 1052 (Utah, 1977), wherein they said: "The matter of a serious shortgage of safe, sanitary, decent housing for a large segment of the citizenry falls squarely within the police power of the legislature to deal with the health, safety, and morals of the populace. Courts which have discussed the matter indicate numerous ways in which making decent housing more readily available beneficially affects the health, safety and morals of the public. * * * It cannot be said that the finding of the legislature that a public purpose is served by increasing the availability of financing for construction, purchase, and rehabilitation of low and moderate income housing, is incorrect or unreasonable on its face."

What is a public purpose is primarily for the Leg-

islature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576. It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature. Power Oil Co. v. Cochran, 138 Neb. 827, 295 N. W. 805.

It requires little evidence and less imagination to realize the effect upon communities and the state generally when housing is inadequate and substandard. The lack of adequate housing underlies many of the problems suffered by a state. Inadequate housing is but the harbinger of poor health, increased crime, and general community unrest. It ultimately leads to economic depression within a community and destroys the incentive to succeed. It is within a state's right and is a public purpose to attempt to save the now almost lost but nevertheless worthwhile dream that a family may have a decent, clean, and adequate home they can call their own. Not only is this goal morally right, but from the standpoint of good government it is essential. Once clean, sanitary, and adequate housing disappears, the costs for crime prevention and rehabilitation, for health protection, and for public welfare increase. All citizens are then called upon to bear the cost of

combating the evils which are inevitable in the absence of good, adequate, clean, and financially possible housing. Nothing could be more of a public purpose.

In State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391, 208 N. W. 2d 780, the Wisconsin Supreme Court said: " '. . . The rule that the benefits to the public must be direct and not remote and that the past course or usage of government is to be resorted to for guidance must in each case be considered in the light of the principle that the legislature has a very wide discretion to determine what constitutes a public purpose, and that courts will not interfere unless at first blush the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use. It is to be observed that the tendency of later cases is toward greater liberality in characterizing taxes or appropriations as public in purpose, doubtless in recognition of the fact, as was stated in Laughlin v. City of Portland, *supra* [111 Me. 486, 90 A. 318], that:

" 'Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual efforts may vary. . . . On the one hand, what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. . . . Its two tests are: First, the subject matter, or commodity, must be one "of public necessity, convenience or welfare." . . . The second test is the difficulty which individuals have in providing it for themselves.' "

Our Legislature has found and declared that there exists a serious shortage of adequate housing which can be financed by low and moderate income people. We have no reason to doubt that declaration nor to ignore its public purpose.

The fact that certain of the funds once obtained through bonds may go to private lending institutions who in turn will make the funds available for low and moderate income citizens does not change the public purpose for which the funds are intended. The vital point in all such disbursements is whether the purpose is public. If it is, it does not matter whether the agency through which it is dispensed is public or not. How the funds are disbursed is not the critical issue, but rather whether the object for which it serves is a public purpose. The test is in the end result, not in the means. See United Community Services v. The Omaha Nat. Bank, *supra*. A law may serve the public interest although it benefits certain individuals or classes more than others. John R. Grubb, Inc. v. Iowa Housing Finance, 255 N. W. 2d 89 (Iowa, 1977).

In examining this very issue, the North Carolina Supreme Court in Martin v. Housing Corp., 277 N. C. 29, 175 S. E. 2d 665, observed: "Unquestionably, when construction of residential housing is made possible by the Corporation's assistance, all persons in the building industry benefit from such construction. Such benefit is similar to that which results from the construction of any public project, e.g., public buildings, school buildings, highways, etc. Too, the 'persons and families of lower income' who will occupy such residential housing as owners or tenants will benefit from the existence and availability thereof. Although these benefits will flow from the Corporation's authorized activities, its raison d'etre, the reason and justification for its existence, is to make available decent, safe and sanitary housing to 'persons and families of lower income' who cannot otherwise obtain such housing accommodations. The General Assembly, with good reason, was fully aware that the acquisition of homes by 'persons and families of lower income' gives them a stake in the preservation of our so-

ciety. Nothing could contribute more to the stability of our institutions than the acquisition of homes by an ever-increasing proportion of our people."

While the Legislature may not, under the guise of public purpose, pass a law solely for the benefit of a selective few, the facts in this case should demonstrate the vast statewide benefit to be obtained. The benefits, if any, to be realized by the building industry are only incidental benefits obtained by providing adequate housing for citizens of the state. It seems difficult to understand how it could be legally permissible to provide welfare payments for housing to low income families, but legally impermissible to aid in providing private financing to the same people so that they could acquire adequate housing with dignity. We believe that the overall intent and purpose of the Act is clearly a public purpose and in no manner violates Article XII, section 1, of the Constitution of the State of Nebraska.

It is further contended by the State that the Act violates Article XIII, section 3, of the Constitution of the State of Nebraska, which provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation * * *." The Act does not, however, violate Article XIII, section 3, because the credit of the state is not in any manner being given or loaned in aid of any individual. Only the Fund is involved. It is the Fund which acquires the monies through the sale of bonds, and it is the Fund which repays the bonds through revenue it acquires. If there is insufficient revenue with which to repay the bonds, the state in no manner becomes obligated or liable. The Act specifically provides that the bonds may not be a debt, liability, or general obligation of the state, and must contain on the face thereof a statement that neither the faith and credit nor the taxing power of the state is pledged to the payment of the principal of or the interest on such bonds. § 76-1630, R. S. Supp., 1978.

The Act could not be clearer that the credit of the state is not being given or loaned in any manner.

A similar argument was made in the attack against the Minnesota Housing Finance Act. In rejecting the claim on a similar constitutional provision, the Minnesota Supreme Court in Minnesota Housing Finance Agency v. Hatfield, 297 Minn. 155, 210 N. W. 2d 298, said: "Our attention has not been called to any case directly involving this issue so far as the issuance of bonds of the state or its immediate agency are concerned. However, in actions involving the University and other governmental subdivisions, we have applied the rule that bonds do not constitute a 'debt' if they are to be paid solely out of earnings or income. * * * Other states have consistently held that revenue bonds which specifically deny any liability of the state do not constitute state debt within the meaning of provisions similar to Minn. Const. art. 9, ss. 6 and 7. Walker v. Alaska State Mtge. Assn. 416 P. 2d 245 (Alaska, 1966); New Jersey Mtge. Finance Agency v. McCrane, 56 N. J. 414, 423, 267 A. 2d 24, 29 (1970); Martin v. North Carolina Housing Corp., 277 N. C. 29, 53, 175 S. E. 2d 665, 679 (1970); Maine State Housing Authority v. Depositors Trust Co., 278 A. 2d 699, 706 (Maine, 1971). * * *" We accordingly hold that the issuance of the bonds and the repayment thereof, as provided under the Act, do not constitute an extension of the credit of the state in violation of Article XIII, section 3, of the Constitution of the State of Nebraska.

The State further maintains that the Act permits the state to incur indebtedness in excess of $100,000 in violation of Article XIII, section 1, of the Constitution of the State of Nebraska. We likewise reject that argument because we do not believe the state is in any manner incurring a debt within the meaning of Article XIII, section 1. The bonds are repaid out of the revenue derived by the Fund. No state appropriation, revenue, or tax is used to repay the

bonds. It is clearly within what is recognized as the "Special Fund Doctrine." The special fund doctrine appears to have had its origin in a case where the construction of a waterworks system by a municipality was financed by obligations payable only from revenue derived from the operation of the system. Winston v. Spokane, 12 Wash. 524, 41 P. 888. The court in that case held such a plan was not subject to a constitutional limitation upon indebtedness because there was no liability upon the city to pay the debt out of its general funds. This court has likewise held the special fund doctrine applicable to the improvement of a light plant in Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114, and to the construction of a toll bridge in Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776. Likewise, see, State ex rel. Meyer v. Steen, 183 Neb. 297, 160 N. W. 2d 164; State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N. W. 2d 88. There are no state funds involved in the repayment of any debt contemplated by the Act, and the proceeds clearly fall within the special fund doctrine which thereby takes the matter out of Article XIII, section 1. The Act does not violate Article XIII, section 1, of the Constitution of Nebraska.

The State likewise maintains that the Act is in violation of the state Constitution in that it impermissibly restricts the discretion of future Legislatures to revise, amend, or repeal the Act. Section 76-1646, R. S. Supp., 1978, provides in effect that the state pledges to and agrees with the holders of any bonds that it will not change the law insofar as the outstanding bonds are concerned. This section of the Act does not in any manner restrict the Legislature from changing the law with regard to the future. It simply prevents them from changing the law with regard to contracts already made.

While the statutory language may be thought necessary to provide comfort to potential investors, the

law is clear that even in the absence of a section similar to section 76-1646, R. S. Supp., 1978, the Legislature could not change the law insofar as it applies to existing bond obligations. Article I, section 16, of the Constitution of the State of Nebraska, forbids and makes ineffective any law impairing the obligation of contracts. A statute may not operate retroactively where it would impair the obligation of a contract or interfere with a vested right. State v. Haberman, 191 Neb. 127, 214 N. W. 2d 266; Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62.

In view of the fact the Act does nothing more than the Constitution of Nebraska requires, it cannot be said that the Act in any manner impermissibly restricts the discretion of future Legislatures to revise, amend, or repeal the Act as to future matters.

It is further contended by the State that the Act is unconstitutional in that it results in the impermissible delegation of powers reserved to the Legislature in violation of Article II, section 1, of the Constitution of the State of Nebraska. While it is true we held that the Legislature, in creating an administrative body, cannot delegate power which is conferred solely upon the Legislature, in Terry Carpenter, Inc. v. Nebraska Liquor Control Com., 175 Neb. 26, 120 N. W. 2d 374, we have likewise said that a legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations covering the details of the legislative purpose. Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N. W. 2d 221. The exercise of a legislatively delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation or enforcement of a law with clearly designated limitations and standards, is not an exercise of legislative power. State v. Cutright, 193 Neb. 303, 226 N. W. 2d 771; Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W.

451. In the instant case, the legislation establishes clearly the intent and purpose of the Act and the general limitations imposed thereon. The Fund is simply authorized to promulgate rules and regulations sufficient to carry out the declared purposes. The limitations of those rules are, however, clear under the Act. As we have previously indicated, such delegation is not unlawful. Here the Legislature has not delegated to the Fund any authority vested in the Legislature, but merely the authority to promulgate regulations to determine how and in what manner the purpose proclaimed by the Legislature shall be fulfilled.

The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. 1 Am. Jur. 2d, Administrative Law, § 117, p. 923. The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases. 1 Am. Jur. 2d, Administrative Law, § 118, p. 925. This is particularly true where, as here, the violation of any such regulation does not constitute a criminal act. We do not believe the authority granted the Fund by the Legislature is an unlawful delegation of powers reserved to the Legislature.

Finally, the State argues that the Act grants to the Fund special privileges and immunities in violation of Article III, section 18, of the Constitution of the

State of Nebraska. In the first instance, as already noted, the Act applies equally to all persons within the class. Such action is permissible if the classification is based upon some reasonable basis. City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N. W. 588. Certainly, as pointed out above, the classification is reasonable.

We have many times said that the power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236; City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74.

Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where they operate uniformly on all within a class which is reasonable. This is so even if a statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest. State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N. W. 2d 577. The Act does not impermissibly grant to the Fund privileges, immunities, or exclusive franchises because of classification. The classification is constitutionally reasonable and proper.

With regard to the matter of exempting the property of the Fund from taxation, having already determined the Fund is a form of governmental subdivision, it follows that its property is exempt from taxation as a matter of law. Article VIII, section 2, of the Nebraska Constitution, provides that the property of the state and its governmental subdivisions shall be exempt from taxation.

In Lennox v. Housing Authority of City of Omaha,

supra, we said: "We are obliged to hold that a housing authority, created and operated under the legislation before us, is a governmental subdivision within the purview of the Constitution, and consequently its property and bonds are legally exempted from taxation." Exempting the Fund's property from taxation therefore is not an impermissible grant of a privilege, immunity, or exclusive franchise.

Likewise, setting out the manner of issuing its bonds and exempting the bonds from other statutory provisions is not impermissible. The Act is merely attempting to be complete in itself. Such decision by the Legislature under the circumstances is valid. No part of the Act therefore violates Article III, section 18, of the Nebraska Constitution.

While nothing we can say here is intended to grant to the Legislature carte blanche authority to create whatever they will, the facts in this case meet all the tests applied.

Having therefore examined each and all of the objections raised by the Attorney General, and having determined that none of them cause the Act to be in violation of any provision of the Constitution of the State of Nebraska, we must concur with the trial court and hold that the Nebraska Mortgage Finance Fund is a valid act of the Legislature and in all respects constitutional. The judgment is affirmed.

AFFIRMED.

VIRGINIA R. HANCOCK, ADMINISTRATRIX OF THE ESTATE OF LOWELL BURTON HANCOCK, DECEASED, APPELLEE, V. PACCAR, INC., A DELAWARE CORPORATION, AND TRANSPORT INDEMNITY INSURANCE COMPANY, A CORPORATION, APPELLANTS.

283 N. W. 2d 25

Filed September 4, 1979. No. 41938.

1. **Torts: Negligence: Strict Liability.** A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.

2. _____: _____: _____. In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach of the contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety.

3. **Torts: Negligence: Strict Liability: Motor Vehicles.** A manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect.

4. _____: _____: _____: _____. One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no

rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance, the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks.

5. **Judgments: Evidence.** In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in his favor and he must have the benefit of inferences as reasonably deducible from it.

6. **Juries: Evidence.** While the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively the state of the art. The inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined. Whether the design represents the state of the art is still a question of fact to be determined by the jury.

7. **Strict Liability: Words and Phrases.** In a strict liability case "unreasonably dangerous" means that the product had a propensity for causing physical harm beyond that which could be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics.

8. **Torts: Negligence.** Contributory negligence, in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort. Assumption of risk and misuse of the product are.

9. **Burden of Proof: Evidence.** The fundamental principle of the law of evidence is to the effect the burden of proof in any cause rests upon the party who asserts the matter.

10. **Negligence: Burden of Proof.** Assumption of risk, when imposed to defeat recovery, is an affirmative defense and the burden is upon the defendant to establish such defense.

11. **Torts: Strict Liability: Pleadings.** A plaintiff in a strict tort liability case is not required to plead and prove he was unaware of the defect.

12. **Instructions: Evidence.** A trial court is not required to give a

proffered instruction which unduly emphasizes a part of the evidence in the case.

13. **Torts: Strict Liability.** In a strict tort liability case it is not incumbent upon a plaintiff to discover a defect.

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

James M. Bausch of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

Asa A. Christensen and Donald J. Pepperl of Christensen Law Offices, P.C., and Robert I. Eberly, for appellee.

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

KRIVOSHA, C. J.

Defendant (Paccar) appeals from a jury verdict entered in favor of plaintiff and against Paccar in the amount of $251,180 resulting from the death of plaintiff's husband while operating a tractor-trailer on Interstate Highway No. 80 in York County, Nebraska. We first note that this case might have been entitled "Friedrich II." See Friedrich v. Anderson, 191 Neb. 724, 217 N. W. 2d 831. To a large extent, the review in this case, as in Friedrich v. Anderson, *supra,* requires an examination of the doctrine of strict liability as it applies to an alleged defective design and the effect such defect may have within the concept of "an enhanced injury." We have made such a review, together with a review of other errors assigned by defendant in this case, and conclude that the verdict of the jury should be affirmed.

The facts involved in this case disclose that about 5 a.m., on September 12, 1971, plaintiff's husband, Lowell Burton Hancock (deceased), was operating a certain 1969 Kenworth cab-over tractor owned by Scott Truck Lines, Inc., in an easterly direction on

interstate 80 in York County, Nebraska. The tractor was pulling a trailer loaded with about 35,000 pounds of fresh beef. At a location about 1½ miles east of the Waco, Nebraska, interchange, the tractor, which was then traveling at a speed of approximately 60 miles per hour, struck a deer on the highway. The impact of the deer on the truck was severe and resulted in the left side of the front bumper being bent backwards in a V-shape at the place where the bumper passed in front of the left front wheel. The bumper, as bent, was wedged between the inside of the left front wheel and the adjoining framerail. This forced the front wheel in a left turning position and locked it in place, which prevented the deceased from controlling or steering the truck. The tractor and trailer turned in a left direction, left the highway, and entered the median adjacent to the highway. Upon its entry into the median, the unit rolled over and slid into a guardrail which protruded from a nearby bridge abutment. This impact resulted in the death of deceased.

The 1969 Kenworth cab-over tractor which deceased was driving at the time of his collision was manufactured and sold by Paccar in 1969. The front bumper on the tractor, which was only 5 inches in front of the wheel, extended the full width of the front of the tractor. It was made of lightweight aluminum and had several cutouts and holes in the face of the bumper directly in front of the wheel area. These holes were located exactly where the bumper bent after impact. The outer ends of the bumper were not braced to the body of the tractor and were simply cantilevered.

Plaintiff, by her third amended petition, sought recovery on two separate causes of action. The first cause of action was based upon a common law theory of negligence and alleged that Paccar was negligent with regard to the design of the front bumper because (1) the bumper was too long, (2) the

bumper contained cutouts and holes, (3) the bumper was not braced at the ends, (4) the bumper was not made of alternative materials which would either not deform or would yield upon impact before blocking the steering, and (5) the bumper was not tested or inspected.

The second cause of action was based upon the doctrine of strict liability alleging that Paccar placed the bumper on the market without inspection at a time when the design was defective and not reasonably fit for ordinary and foreseeable uses. Paccar admitted that the collision occurred, but denied any liability. After trial the jury returned a verdict for plaintiff and against Paccar in the amount of $251,180.

Paccar assigns multiple errors, which for simplicity and convenience can best be summarized and grouped into several general categories. As so summarized and grouped, the assignments of error are as follows: (1) That the trial court erred in failing to direct a verdict in favor of Paccar and against plaintiff; (2) that the trial court erred in submitting certain instructions to the jury which were not supported in the evidence; (3) that the trial court erred in refusing to give certain instructions requested by Paccar; and (4) that the trial court erred in permitting the introduction of certain testimony. We shall address the various groups in the order in which they are listed above.

Paccar's right to a directed verdict, made either at the close of the plaintiff's case or after all of the evidence, could only be sustained if one of two situations existed: (1) If there was insufficient evidence to create a question of fact for the jury to consider; or (2) under the theories of law pleaded by the plaintiff, plaintiff could not recover as a matter of law.

We first address the legal theories. If the plaintiff could prove that Paccar did in fact design a bumper

in a negligent manner and the negligence was the proximate cause of deceased's injury and death, then under a common law theory of negligence, plaintiff could recover. " 'A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.' " Rose v. Buffalo Air Service, 170 Neb. 806, 104 N. W. 2d 431.

" 'In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. * * * In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach of the contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety.' " Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900. Whether Paccar's acts in this case fall within the legally impermissible spectrum so as to bring about liability is a question of fact for the jury to decide. Graham v. Simplex Motor Rebuilders, Inc., 189 Neb. 507, 203 N. W. 2d 494. If the evidence was sufficient to raise a

proper question of fact, a matter we shall review momentarily, Paccar was not entitled to a directed verdict as a matter of law as against the plaintiff's theory of liability under common law negligence.

The question of liability under a theory of strict liability poses a different question but in the final analysis the same result. In the case of Friedrich v. Anderson, 191 Neb. 724, 217 N. W. 2d 831, we held: "* * * a manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect."

In declaring in Friedrich v. Anderson, *supra*, a rule we recognized to be of first impression in Nebraska, we called attention to the two federal cases which appeared to have set up the two extremes with regard to employing the doctrine of strict liability in a design accident case. The first which narrowed and limited liability was Evans v. General Motors Corporation, 359 F. 2d 822 (7th Cir., 1966), and the second which expanded and extended liability was Larsen v. General Motors Corporation, 391 F. 2d 495 (8th Cir., 1968). The facts of each case are summarized in the Friedrich case.

Time and the realities of life, however, have narrowed the differences between Evans v. General Motors Corporation, *supra*, and Larsen v. General Motors Corporation, *supra*, until in 1977 the Circuit Court of Appeals for the Seventh Circuit, in the case of Huff v. White Motor Corp., 565 F. 2d 104, overruled their earlier decision in the Evans case, and brought the Seventh Circuit into line with Larsen, saying: "One who is injured as a result of a mechan-

ical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks."

Such result, based upon either simple logic or the law, makes sense. It would be a strange result if we said that a manufacturer who carefully designs a product and thereafter negligently produces it should be held liable, but a manufacturer who negligently designs the product and thereafter carefully produces it pursuant to the negligent design should be relieved of liability.

Further, the clear meaning of section 402 A of Restatement, Torts 2d, p. 347, leads to the conclusion expressed in Larsen v. General Motors Corporation, *supra,* and now Huff v. White Motor Corp., *supra.* The Restatement section reads as follows: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection

(1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

We think comment d following is particularly appropriate: "The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. * * *" Restatement, Torts 2d, § 402 A, p. 350.

Paccar's argument that strict liability cannot apply because plaintiff must prove that the defect existed at the time the product left the manufacturer fails to recognize that the defective design, if as a matter of fact it did exist, was created and completed when the manufacturer designed the bumper and assembled it on the truck. If in fact the design was defective, it was defective when it was designed. That act occurred while it was still in the hands of the manufacturer and under his control. The requirements necessary to bring the actions within the definition of strict liability exist. No good reason exists for not applying the doctrine of strict liability to a case where the defective design results in an enhanced injury to the plaintiff even though the product designed did not cause the initial collision. See Comment, Manufacturer's Liability for Defective Automobile Design, 42 Wash. L. Rev. 601.

Liability has been imposed in all variety of cases where the defective design did not proximately cause the collision but did result in an enhanced injury to the driver. The cases range from a severe

lacerating injury to a plaintiff's leg which came in contact with unshielded metal flanges protruding outward from the base of a wheel cover of an automobile following an initial impact between the vehicle and the left handlebar of a motorcycle, Passwaters v. General Motors Corporation, 454 F. 2d 1270 (8th Cir., 1972), to a severe burn sustained by a plaintiff when gasoline ignited which came from a fuel tank not designed with a firewall around it, Nanda v. Ford Motor Company, 509 F. 2d 213 (7th Cir., 1974). Liability from enhanced injuries has also been found in defectively designed door latches, Melia v. Ford Motor Co., 534 F. 2d 795 (8th Cir., 1976), defectively designed fuel systems, Huff v. White Motor Corp., *supra,* ashtrays, roofs, steering assemblies, and others. See, Annotation, Liability of Manufacturer, Seller, or Distributor of Motor Vehicle for Defect Which Merely Enhances Injury from Accident otherwise Caused, 42 A. L. R. 3d 560, and Annotation, Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 A. L. R. 2d 460. On the question of inspection generally, see Annotation, Manufacturer's Duty to Test or Inspect as Affecting His Liability for Product-Caused Injury, 6 A.L.R. 3d 91.

While it is true and we have said that an automobile manufacturer does not insure that its product is incapable of producing injury from a design viewpoint, Friedrich v. Anderson, 191 Neb. 724, 217 N. W. 2d 831, nevertheless, in this day and age a consumer should be able to purchase a vehicle believing that the manufacturer has considered the likelihood of things which may occur to the vehicle. Likewise, a consumer may reasonably expect that the manufacturer has performed a minimum number of tests and inspections to assure that a collision at speeds of normal use of the vehicle will not cause an enhanced injury.

Paccar was aware that the tractor-trailer might strike an animal on the highway while traveling at a high speed. Such events are common enough that the various departments of roads of several states frequently post warnings to drivers to watch for animals, especially deer crossing the road. Furthermore, Paccar knew that the makeup of the bumper was such that, upon severe impact, the bumper would bend backward wherever such bending was not otherwise prevented. With that knowledge, it was not unreasonable to expect that the manufacturer had taken steps and made tests to be sure that the steering was not impaired upon impact. The trial court therefore was not in error in refusing to direct a verdict for Paccar based on a claim that plaintiff could not recover under a theory of strict liability for a defective design which resulted in an enhanced injury. Indeed, if the evidence was sufficient, plaintiff could recover.

Paccar further argues, however, that even if some right of recovery existed under the law, the evidence was insufficient to create a question of fact sufficient to submit this case to the jury.

An examination of the entire record, however, would appear to create questions of fact on either cause of action. Plaintiff's expert testified that in his opinion the bumper was negligently and defectively designed in a number of ways, any one of which, if believed by the jury, could have established the proximate cause of the injury. It was at best a "t'is and t'aint" argument and for the jury to resolve. On appeal we should not second guess the jury or seek to impose our notion of the facts as opposed to theirs. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in his favor and he must have the benefit of inferences as reasonably deducible from it. Marquardt v. Nehawka Farm-

ers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617. Likewise, a jury verdict based upon conflicting evidence cannot be set aside unless clearly wrong. Haney v. L. R. Foy Constr. Co., 186 Neb. 528, 184 N. W. 2d 628. We cannot say from a reading of the record that the jury did not act as reasonable people or did not reach a reasonable conclusion. We cannot reverse this case on a question of fact contrary to the actions of the jury.

Paccar further maintains that the evidence was insufficient to prove several essential elements of the causes of action and therefore even though plaintiff offered evidence which established certain elements of the causes of action, she failed nevertheless to meet her entire burden. In particular, Paccar claims plaintiff failed to prove: (1) That Paccar did not comply with the "state of the art" in designing the bumper; (2) that the defective design, if it existed, was the proximate cause of deceased's injury and death; (3) that the design did create an unreasonably dangerous situation; (4) that the defect was not obvious to the deceased; and (5) that deceased did not know of the defect, if one existed.

Paccar's position with regard to the state of the art apparently is that no one was designing or manufacturing a bumper that was any different from that which Paccar designed and manufactured. Furthermore, Paccar contends there was no evidence indicating the state of the art was such that anything more was being done.

We believe, however, that Paccar misconstrues what constitutes the state of the art and how it applies in a strict liability case. While the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively the state of the art. Obviously, the inaction of all the manufacturers in an area should not be the standard by which the state of the art

should be determined. Whether the design represents the state of the art is still a question of fact to be determined by the jury.

Judge Learned Hand in the case of The T. J. Hooper, 60 F. 2d 737 (2nd Cir., 1932), said: "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." See, also, Gelsumino v. E. W. Bliss Co., 10 Ill. App. 3d 604, 295 N. E. 2d 110.

The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done. Northwest Airlines v. Glenn L. Martin Company, 224 F. 2d 120 (6th Cir., 1955); Whistle Bottling Co. v. Searson, 207 Ala. 387, 92 So. 657; Restatement, Torts 2d, § 298, p. 68. Plaintiff tendered evidence that there were alternatives which could be used and which, if used, would have prevented the enhanced injury. There was evidence that Paccar was using some of the alternatives itself and that both the material and the knowledge to design a safer alternative existed. That evidence included the use of a shorter bumper, a breakaway bumper, or a stronger bumper, all of which could have been designed in 1969. The jury was not required to accept any of those suggestions. Nevertheless, those were questions of fact which the jury had to resolve.

With regard to the question of proximate cause, Paccar argues that plaintiff failed to prove that the accident would not have happened "but for" the bumper and therefore failed to prove the proximate cause.

In support of that position, Paccar argues that there was evidence that even if the bumper had not extended the full width of the tractor, the deer might have gotten into the wheel and caused a similar injury. Paccar fails to recognize that plaintiff's obligation is to prove by a preponderance of the evidence that the alleged negligence of Paccar was the proximate cause of the injuries for which damages are sought to be recovered. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710. Plaintiff was not required to prove that no other event could have produced a similar result even though it did not produce such a result. Furthermore, no one in this case can honestly argue or dispute the fact that the enhanced injury was occasioned by reason of the bumper bending and wedging between the wheel and the framerail, thereby preventing the deceased from retaining control over the truck. There certainly was an issue of fact as to whether or not the design of the bumper was the proximate cause. The best that can be said is that there was a conflict with regard to the proximate cause. Where evidence conflicts on a question of proximate cause of alleged injuries, the question is ordinarily for the jury under proper instructions. Brewer v. Case, 192 Neb. 538, 222 N. W. 2d 823; Abbott v. Northwestern Bell Telephone Co., 197 Neb. 11, 246 N. W. 2d 647. There was sufficient evidence presented to create a question of fact.

Paccar further argues that the plaintiff failed to prove the bumper was unreasonably dangerous. This argument appears to be tied to the argument that the defect was obvious to the deceased. Paccar

argues the evidence failed to establish that full length bumpers had a propensity for causing physical harm beyond that which would be contemplated by drivers of such tractors.

The evidence failed to disclose that the alleged defect was obvious. It is true that if the deceased knew all of the possibilities that might occur if the truck struck a deer with a lightweight aluminum bumper, located 5 inches from the wheel, and the bumper bent and wedged in between the wheel and the framerail, the defect might be obvious. However, the evidence did not disclose that those possibilities were obvious. Nor does speculation create an obvious defect. Certainly, if one thought about any of the possibilities which might occur in an accident, one might realize a potential defect. The law, however, does not require a plaintiff to speculate on injury in order to recognize a possible defect. Had the bumper already been bent before the deceased started to move the vehicle, the argument with regard to an obvious defect might be made. In that absence, such argument does not seem appropriate.

In Nanda v. Ford Motor Company, 509 F. 2d 213 (7th Cir., 1974), the motorist was struck in the rear and pushed into the southbound lane where she was struck in the rear by a second vehicle. The collision caused the gas tank to explode and the plaintiff suffered burns. Plaintiff sued on the basis that the manufacturer negligently designed the gas tank by failing to put some type of firewall around the gas tank. If Paccar's theory of obvious defect is correct, it could be argued therefore that the owner of an automobile should recognize that if there is not a firewall around the gas tank when struck from the rear, injury will follow. In affirming a judgment for the plaintiff, the court in Nanda said: "Plaintiff in this case proceeded upon the theory of strict liability adopted in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N. E. 2d 182 (1965). In order to recover against

the manufacturer under that theory, plaintiff must prove that his injury 'resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control.' [Citations omitted.]" Nothing was said about anticipating defects.

Likewise, in Melia v. Ford Motor Company, 534 F. 2d 795 (8th Cir., 1976), action was brought against an automobile manufacturer based upon an alleged design defect in the left door latch assembly. The Eighth Circuit, in reviewing what it anticipated was the Nebraska law, said: "An analysis of the record here reveals sufficient evidence of unsafe design creating a foreseeable and unreasonable risk of harm. Two well qualified professional engineers testified for the plaintiff that the door latch deviated from safety engineering practice and was not protected from horizontal external forces which could release the latch. In their opinion the collision to the car had only a 'brushing' horizontal effect on the door and the latch had no 'fail-safe' mechanism to prevent the car door from flying open."

Again, it can be argued that if the drivers had thought about all of the consequences the defect would be obvious. That, of course, is not what is meant by an obvious defect. An examination of all the various cases that have been brought to our attention concerning strict liability and enhanced injury fails to disclose any obligation or requirement on the plaintiff's part to anticipate and think out all the consequences which may come from a defect. The manufacturer has this obligation, not the operator. A defect is not obvious simply because, had one thought about it, one would recognize the problem.

Paccar correctly notes that we have not yet had an opportunity to define what is meant by "unreasonably dangerous" in a strict liability case. The trial court instructed the jury in this case that the

term "unreasonably dangerous" meant that "the product had a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics." This was a correct statement of the law and we so adopt it as the definition of "unreasonably dangerous" in a strict liability case.

For the reasons we have already suggested with regard to "obvious defects" we find that there was sufficient evidence from which the jury could reasonably conclude that the design of the bumper was "unreasonably dangerous." Paccar knew the wheel was unprotected from the bumper. It also knew it had not designed the bumper to protect the wheel from large objects, likely to be struck by the truck at high speeds, which, upon impact, might bend the bumper impairing steering. Yet no action was taken by the manufacturer to protect the wheel from such impairments. That was sufficient to raise a question of fact as to whether the bumper in its present condition was unreasonably dangerous.

It is not reasonable to assume that an ordinary person with ordinary knowledge as to the characteristics of a bumper would know that if the truck in question, with the bumper in question, struck a deer at 60 miles per hour, the bumper would bend into the wheel and cause the tractor to lose control. Section 402 A of Restatement, Torts 2d, p. 352, when talking about a product being "unreasonably dangerous," refers in terms of the "ordinary consumer" with "ordinary knowledge common to the community." The section does not refer to experts. There was sufficient evidence from which the jury could determine that the design of the bumper was "unreasonably dangerous."

Finally, Paccar argues that plaintiff failed to prove that deceased was not aware of the defect. In

support of this position Paccar cites the cases of Waegli v. Caterpillar Tractor Co., 197 Neb. 824, 251 N. W. 2d 370, and Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601. Paccar is in error as to its reading of Waegli. We did not there say that plaintiff must prove lack of knowledge. In Waegli, we pointed out that language found in Kohler has been criticized and that, in any event, no determination of that issue was being made in Waegli.

A reading of Kohler discloses that the matter of the plaintiff's knowledge was not directly passed upon. The court did approve an instruction which contained as an item of proof that "the plaintiff was unaware of the claimed defect." However, no ruling on that portion of the instruction was made.

Later in Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643, we held that " 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a *defense* to a suit in strict tort, * * *. Assumption of risk and misuse of the product are." (Emphasis supplied.) What we recognized was that assumption of the risk was a *defense*. See, also, Garcia v. Howard, 200 Neb. 57, 262 N. W. 2d 190. The fundamental principle of the law of evidence is to the effect the burden of proof in any cause rests upon the party who asserts the matter. 29 Am. Jur. 2d, Evidence, § 134, p. 167. As an example, in Nebraska contributory negligence is an affirmative defense and the burden is upon the defendant to establish such defense. Kaspar v. Schack, 195 Neb. 215, 237 N. W. 2d 414. To the same extent and for the same reasons, assumption of risk, when imposed to defeat recovery, is likewise an affirmative defense and the burden is upon the defendant to establish such defense. 29 Am. Jur. 2d, Evidence, § 137, p. 173; 57 Am. Jur. 2d, Negligence, § 274, at p. 664. No plaintiff should be required to prove the absence of all possible defenses in order to recover. That burden properly

belongs to the defendant. To the extent that any confusion still remains we hold that a plaintiff in a strict tort liability case is *not* required to plead and prove he was unaware of the defect.

Paccar further claims that the trial court erred in submitting to the jury instruction No. 2, which set out the various claims of negligence made by plaintiff, because the claims were unsupported in the evidence. This assignment must fail for two reasons. In the first instance, the instructions were submitted to counsel and no objections were made to the instructions. We have previously held that the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 205 N. W. 2d 523; Haumont v. Alexander, 190 Neb. 637, 211 N. W. 2d 119. But beyond that, the evidence introduced by plaintiff, if believed by the jury, was sufficient to permit the court to include the instruction as given. It should be kept in mind the court was not instructing the jury as to the truth of the matter in the instruction, but was simply advising the jury as to what the plaintiff's claims were, as set forth in the third amended petition. The court then instructed the jury that the previous instructions which set out the claims "merely state the claims and allegations of the parties and except for the admissions therein are not to be regarded as evidence in the case." Instructions to the jury should be considered as a whole, and if they fairly submit the case, they are not erroneous. First Mid America, Inc. v. Palmer, 197 Neb. 224, 248 N. W. 2d 30.

Specifically, Paccar objects now to those portions of the instructions given by the trial court which advised the jury that plaintiff maintained Paccar was negligent in that the bumper contained cutouts and holes; in that the bumper was not properly braced; in that Paccar did not utilize alternate materials

which were either stronger or of a brittle nature which, upon sufficient impact, would break away rather than deform in a permanent manner; and in that Paccar was negligent in failing to conduct tests, inspections, and calculations necessary to determine the capacity of the bumper to yield upon impact. While again the jury need not have accepted any of those matters, there was sufficient evidence introduced by the plaintiff which would at least have raised the issue in the manner in which it was submitted to the jury by the court. There is no error in this regard.

Paccar further assigns as error the court's failure to instruct the jury on two requested instructions sought by it. Those instructions read as follows: "A manufacturer does not have a duty to design and manufacture a product which represents the ultimate in safety or design." A trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case. First Mid America, Inc. v. Palmer, *supra*. While the trial court did refuse that request, the trial court did in instruction No. 10 advise the jury: "* * * [A] manufacturer is not an insurer that the product is, from a design viewpoint, incapable of producing injury." The language may not be identical; however, reading all of the instructions together as we are required to do, we do not believe the failure of the trial court to give requested instruction No. 3, in view of the entire instructions given, resulted in any prejudicial error to Paccar. Moreover, there was no evidence introduced by the parties to prove that the evidence introduced by plaintiff as a possible alternative design did in fact represent the ultimate in safety or design. Under the circumstances and evidence in the case, the refusal to instruct the jury in accordance with Paccar's requested instruction No. 3 was not error.

Paccar further alleges that the trial court erred in

refusing to give its requested instruction No. 6 which read: "The law does not require that a manufacturer guard against an injury from a danger which is obvious or which is discoverable by reasonable inspection." Again, the trial court did instruct the jury in instruction No. 9 that "* * * [T]here is no duty to warn of a known danger." Insofar as the first part of the defendant's requested instruction No. 6 is concerned, we believe the court's instruction did sufficiently advise the jury with regard to known or obvious defects. Paccar cites us no authority, and we have found none, which obligates a user of a product to make an inspection to uncover an unknown defect. We believe the law with regard to strict liability to be to the contrary. It is not incumbent upon a plaintiff to discover a defect. Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643; Restatement, Torts 2d, § 402 A, note n, at p. 356. We therefore find no error in the court's failing to give Paccar's requested instructions.

Paccar further assigns as error the trial court's permitting plaintiff's witnesses to testify as to the availability of a breakaway bumper in 1976, although the vehicle was manufactured in 1969. As pointed up by plaintiff, the purpose of the testimony was to show that there were subsequent remedial measures taken and that the necessary material was available in 1969. Paccar must further keep in mind that plaintiff sought recovery on two separate theories: (1) Common law negligence; and (2) strict liability. In a negligence action such evidence may be relevant to show that a different and safer design of a product was feasible at the time the product in question was designed, particularly if the defendant claims otherwise. Farner v. Paccar, Inc., 562 F. 2d 518 (8th Cir., 1977). Examination of the evidence would indicate that the changes made in 1976 were done with knowledge and material which was available in 1969. There appears nothing

from the evidence to indicate that manufacturers would not have been able to design and build a breakaway bumper in 1969, as in fact they did in 1976. Such evidence was properly admissible.

Finally, Paccar contends that the trial court erred in permitting the plaintiff's expert witness, John Hill, to testify concerning the alleged effectiveness of the bumper because he was not familiar with the state of the art in 1969 with regard to bumper design. We believe what we have above said with regard to the state of the art applies here. Again, it is because Paccar believes if it is shown that no one in the field was taking necessary steps, it is a complete defense to strict liability. While it may aid in establishing what was reasonable, it is not conclusive. For reasons already pointed out, we do not believe the trial court committed error in not striking the plaintiff's expert witness testimony. The credibility of witnesses and the weight to be given their testimony were for the jury. Merten v. Pedersen, 199 Neb. 34, 255 N. W. 2d 869. They chose to believe the plaintiff's witness and were entitled to do so.

For the reasons therefore given, we find that no error was committed and that the verdict of the jury and judgment entered by the trial court must in all respects be affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I dissent because I believe the undisputed facts did not establish a cause of action under either strict liability in tort or negligent design under the prior decision of this court. I deem it unwise, for reasons which are hereafter set forth, to extend the doctrines to the point that the majority opinion does, i.e., although without saying so it essentially makes the manufacturer an insurer.

The essence of the majority opinion is that the mere opinion of an expert, rendered after the fact, is sufficient to make a prima facie case admissible to

the jury. Such an opinion may or may not be sufficient for that purpose. When legal doctrines are being extended it is for the court to define the extent of the growth. It is not a factual question to be determined by testimony, expert or otherwise.

It is not practical within the bounds of a brief dissent to discuss all of the fallacious underpinnings of the majority opinion so we mention only those which seem most significant.

The purpose of a bumper on a motor vehicle is not to guard against damage to either persons or property on high speed impacts. The bumper in this case was neither negligently designed nor was it unreasonably dangerous. It had no propensity to cause harm. This is not the case as in Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601 (1971), where a gear in the steering mechanism was defective when it left the manufacturer and made the vehicle dangerous to drive and difficult to control and hence had a propensity to cause harm.

What the plaintiff has argued and what the court has accepted in this case is the contention that if a device is constructed in a different way, e.g., stronger, then liability follows because an injury happening in a particular fashion might have been avoided, even though the injury might have occurred in any event had the circumstances of the action been different. The plaintiff has argued that either the bumper should have been shorter, not projecting in front of the wheel; or it should have been a breakaway bumper, which would not wedge; or it should have been stronger, so that it would not impinge on the wheel. However, in each of these alternatives it is clearly possible that the same result could have occurred even though through a different mechanism. In the case of the short bumper or the breakaway bumper the animal might have lodged between the wheel thus restricting steerability, or if the object struck had been some sizable hard or

sharp object it might have deflated a tire and made the truck difficult to steer. If the object had been a hog it could have passed under a strong bumper, under the wheel, and thus put the truck out of control. If the object struck had been a horse or a moose, it might have, regardless of the bumper, been propelled upward into the windshield injuring the driver. In such cases ought the manufacturer to have designed and furnished a bumper of a type which would have prevented that particular kind of accident? Clearly that could be done.

In this case the truck owner selected the particular bumper which he wanted, one of light weight which reduced the total weight of the truck. No statute or design requirement of the law prohibits any of the alternatives which were available to the purchaser. Let us give another example. Instantly inflatable airbags for passenger compartments in motor vehicles are available and are feasible. Are manufacturers liable because they are not furnished or because the user prefers not to have one?

What the court does in this case is devise a theory, after the fact, to afford liability for a particular accident happening in a particular way. This can be done in almost every case. It is probably possible by hindsight to design machines or parts which will avoid particular types of accidents. It is not reasonably possible to design something which will avoid injury in every case in every circumstance.

If the court's purpose is one of social policy to assure that all injuries are to be compensated, then that should be done by the Legislature and the costs spread over the widest possible base.

A manufacturer does not have a duty to design a product which represents the ultimate in safety or design, but rather, has a duty to design a product which is reasonably safe. Mitchell v. Machinery Center, Inc., 297 F. 2d 883 (10th Cir., 1961); Marker v. Universal Oil Products Company, 250 F. 2d 603

(10th Cir., 1957); Olson v. Arctic Enterprises, Inc., 349 F. Supp. 761 (D. N. D., 1972); Garst v. General Motors Corporation, 207 Kan. 2, 484 P. 2d 47 (1971); and Stevens v. Durbin-Durco, Inc., 377 S. W. 2d 343 (Mo., 1964).

In Kohler v. Ford Motor Co., *supra*, this court applied the principles of Restatement, Torts 2d, § 402 A, p. 347, at p. 352. Comment i to that section states in part: "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." It is common knowledge that bumpers on motor vehicles are not designed to avoid damage and injury in high speed impacts. Comment k to section 402 A of the Restatement says in part: "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." The trial court should have granted the motion for a directed verdict.

BOSLAUGH, J., joins in this dissent.

JAMES HENDRICKSON, APPELLANT, V. ALFRED AND ROSELLA GLASER, HUSBAND AND WIFE, APPELLEES.

283 N. W. 2d 41

Filed September 4, 1979. No. 42132.

1. **Property: Adverse Possession.** Where one by mistake as to the true boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
2. _____: _____. It is established law of this state that when a fence

is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.

3. _____: _____. After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period.
4. **Property: Partition.** A confirmation of a partition sale disposes of all the interests of everyone in the suit to the purchaser from the moment the confirmation is pronounced by relation back to the date of the sale of the referee.
5. **Property: Partition: Deeds.** A deed executed pursuant to a judicial sale, absent mistake or fraud, conveys only that property that lies within its calls. It conveys no greater title than the order of sale on which it is based.

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

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin, P.C., for appellant.

John C. Brownrigg of Eisenstatt, Higgins, Kinnamon, Okun & Stern, P.C., for appellees.

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

BUCKLEY, District Judge.

Plaintiff's petition seeks to quiet title in a certain parcel of land to which he claims title by adverse possession, and of which the defendants are record owners. Defendants' motion for summary judgment was sustained and plaintiff's petition was dismissed. From this order, plaintiff appeals. We affirm.

Plaintiff, James Hendrickson, and defendants, Alfred and Rosella Glaser, are respective record title owners of adjoining quarter sections of farmland, plaintiff's to the north of defendants'. Plaintiff's tract is described as the northwest quarter of the northeast quarter of Section 24, Township 20 North,

Range 9 West of the 6th P.M., in Greeley County, Nebraska. Defendants' tract is described as the southwest quarter of the northeast quarter of the same section. The contested parcel lies within the defendants' tract and is along the common boundary of the two quarter section tracts.

Plaintiff purchased his 40-acre tract at a referee's sale, pursuant to a partition action, on April 6, 1971. This sale was contested but upon appeal to this court was affirmed. See Glaser v. Weinberger, 188 Neb. 205, 196 N. W. 2d 113. Whereupon, the sale was confirmed, Hendrickson paid the purchase price, and he was given a referee's deed describing the 40 acres on April 21, 1972. On the same date he received a quitclaim deed describing the same 40 acres from Ida Weinberger, who, along with defendants Glasers, were the prior owners of the property. (Glasers instituted the partition action and contested the sale to Hendrickson.) No additional payment was made for the quitclaim deed from Mrs. Weinberger.

Plaintiff, however, claims in his petition that when he received the referee's deed and the quitclaim deed, he purchased not only the 40 acres described in the deeds, but in addition thereto, "all of that property on the south side of said 40 acres up to the original boundary fence line as established for the last twenty years or more * * *." He alleges that all the property owners for the past 20 years or more, prior to defendants' ownership, have considered the fence line as the division fence between the two quarter sections. Defendants deny that plaintiff's predecessors in title acquired any title to the contested portion of their quarter section by adverse possession.

Where one by mistake as to the true boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and contin-

uous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession. Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

It is established law of this state that when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. McCain v. Cook, 184 Neb. 147, 165 N. W. 2d 734; Abood v. Johnson, 189 Neb. 87, 200 N. W. 2d 20.

On the motion for summary judgment, the only evidence presented, in addition to the deeds previously mentioned, was plaintiff's deposition. Though his testimony is somewhat sketchy on the point, it may be assumed that it supports his contention that his predecessors in title to the 40 acres he purchased had acquired title to the adjoining contested property by adverse possession, since the land north of the mistaken boundary line fence, along with the tract plaintiff purchased, had been farmed as one tract. Even if it is assumed that title by adverse possession vested in plaintiff's predecessors, his contention that he purchased this property through the deeds must fail by operation of law, whether he relies on the referee's deed or the quitclaim deed, or both.

After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. McCain v. Cook, *supra*; Converse v. Kenyon, 178 Neb. 151, 132 N. W. 2d 334.

At 3 Am. Jur. 2d, Adverse Possession, § 243, p. 342, it is stated: "Title by adverse possession is not affected by recording statutes. In other words, ad-

verse title once obtained is good even as against those holding a title recorded as provided by statute, or a title derived from a recorded title, without regard to whether or not the adverse holder continued in actual possession after having perfected his title by adverse possession."

Hendrickson is not the grantee of any deed specifically describing the disputed parcel. Nor does he claim title by a subsequent disseisin of his own. Therefore, his claim of title must rely upon the quitclaim deed from Mrs. Weinberger or the referee's deed, or both. His claim must fail, since neither conveyance by operation of law can vest title to the contested parcel in him.

The quitclaim deed of Mrs. Weinberger passes nothing. She was a party to the partition action. The 40 acres she quitclaimed was sold at the partition sale over a year earlier.

A confirmation of a partition sale disposes of all the interests of everyone in the suit to the purchaser from the moment the confirmation is pronounced *by relation back to the date of the sale of the referee.* Drake v. Morrow, 140 Neb. 258, 299 N. W. 545.

It follows that upon the confirmation of the sale herein, Mrs. Weinberger's interest in the 40 acres was disposed of by, *and at the time of,* the sale by the referee to Hendrickson. She has no interest in the property conveyed by a quitclaim deed over a year later. Her deed was, in legal effect, a nullity.

The partition action involved only the 40 acres purchased by Hendrickson at the referee's sale. Hendrickson does not claim that the property ordered to be sold included the contested land, or that the referee's deed did not correctly describe the property sold. In response to the question, "What are you attempting to do in this lawsuit?" he answered, "Acquire the land that I haven't purchased."

Hendrickson apparently claims that the referee's deed conveyed to him not only the quarter section as

described in the deed, but the contested parcel adjoining to the south, because the predecessors in title, due to the original boundary line fence, had considered the contested parcel to be a part of the quarter section described. Hendrickson seems to concede now that the contested parcel lies outside the calls of the deed, but claims that since title vested by adverse possession, the entire tract passed to him by the partition sale and referee's deed.

While we have not heretofore specifically addressed the question of what property is conveyed by a judicial sale, the law seems well settled that the deed pursuant to a judicial sale, absent mistake or fraud, conveys only that property that lies within its calls. See, 50 C. J. S., Judicial Sales, § 39d, p. 651; 68 C. J. S., Partition, § 213d, p. 348. Also, in 50 C. J. S., Judicial Sales, § 35e, p. 635, it is stated: "The deed is to be construed with the judicial proceedings of which it forms a part. It conveys no greater title than the order of sale on which it is based, although absolute in form, and is void in so far as it includes land the decree did not authorize to be sold, the grantee receiving nothing more than color of title thereto. On the other hand, *the deed conveys only that which is described therein;* yet, where through the mistake of an officer it does not include that which was intended to be conveyed, the purchaser may obtain relief in equity." (Emphasis supplied.)

In Johnson v. Hubbard, 299 Ky. 604, 186 S. W. 2d 406, Johnson sought to quiet title to certain property, claiming to be the record owner pursuant to a deed from G. M. Adams. Many years before, in a suit between Adams and others claiming an interest in a certain parcel of land, the court entered judgment partitioning the property. After the judgment, but before the master commissioner's deed was executed, Adams deeded his interest in the property to Johnson. This deed, however, described land greater than the property partitioned, and included

the land in dispute. Whereupon, the commissioner's deed was made directly to Johnson, who replaced Adams in the partition suit. It described only the property partitioned and described in the partition judgment.

In finding against Johnson, the court stated, "Even if Adams had owned an undivided interest in the land in dispute at the time he pretended to deed it to Johnson, the Commissioner's deed executed in pursuance of the judgment of the Court partitioning the land, and which did not include the land in dispute, was binding on Johnson. His remedy in respect to any error of the Court in the description of the property was by appeal from the judgment in the partition suit, which was not perfected. * * * It is obvious that appellant's claim to the property by record title must be rejected."

Hendrickson does not assert any mistake in the property described in the referee's deed. Nor does he contend now that the property involved in the partition action, as described, extends to include the parcel in question. Accordingly, the land he purchased at the partition sale and which was ultimately deeded to him by the referee does not include the parcel he claims title to because (1) the property is not included within the calls of the deed, and (2) no claimed title by adverse possession can pass to him by that deed.

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

AFFIRMED.