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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 11, 1979 and APRIL 7, 1980

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1979 and JANUARY TERM 1980

VOLUME CCV

BARBARA R. JACKSON

ACTING REPORTER

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By Barbara R. Jackson,
Acting 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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Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	Trenton
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TABLE OF CASES REPORTED

Aby; State v. 267
Accessory Sales, Inc.; Diesel Service, Inc. v. 381
Adams, County of; Fraternal Order of Police v. 682
Allied Financial Services, Inc.; Foremost Ins. Co. v. 153
American Community Stores Corp.; Craig v. 286
American Community Stores; Wolfe v. 763
Ames Bank v. Hahn 353
Anderson Farms, Inc.; Conkey v. 708

Baker v. Buglewicz 656
Batenhorst v. Batenhorst 601
Bd. of County Commissioners; State ex rel. Schuler v. 647
Bd. of Trustees; State Coll. Ed. Assoc. & Chadron State Coll. v. 107
Beck; County of Merrick v. 829
Beck; Rosenberry v. 664
Beekman; Ceres Fertilizer, Inc. v. 768
Benton; Taylor v. 203
Bird v. Bird 619
Bishop v. Department of Roads 760
Black; Porter v. 699
Blome, State ex rel., v. Bridgeport Irr. Dist. 97
Bolte; Turnbough v. 24
Botsch v. Leigh Land Co. 401
Bremers; McGreevy v. 554
Bridgeport Irr. Dist.; State ex rel. Blome v. 97
Brown v. State 332
Bryan; Remington v. 372
Buglewicz; Baker v. 656
Buker v. Buker 571
Burger; State v. 340
Burton v. Burton 865

Cagle v. Cagle 747
Carlson v. Nelson 483
Carpenter; Waite Lumber Co., Inc. v. 860
Carter; State v. 407
Celeryvale Transport, Inc.; Stephens v. 12
Ceres Fertilizer, Inc. v. Beekman 768
Chadron State Coll., State Coll. Ed. Assoc. &, v. Bd. of Trustees ... 107
Chambers; Howard v. 150
Chapman; State v. 368

City of North Platte; Nash v. 480
City of Omaha, Transit Auth. of; Transport Workers of America v. 26
City of Plattsmouth; Plattsmouth Pol. Dept. Coll. Barg. Comm. v. 567
Coffey v. Coffey 191
Comer; State v. 549
Conkey v. Anderson Farms, Inc. 708
Cornhusker Bank of Omaha, The, v. McNamara 504
County of Adams; Fraternal Order of Police v. 682
County of Merrick v. Beck 829
Craig v. American Community Stores Corp. 286
Crouch; State v. 781

Dairyland Ins. Co. v. Esterling 750
Dale Electronics, Inc. v. Federal Ins. Co. 115
Danish Vennerforning & Old Peoples Home v. State 839
Darin & Armstrong, Inc.; Omaha P. P. Dist. v. 484
Delp v. Laier 417
Denton v. Nelson 833
Department of Banking v. Elm Creek State Bank 323
Department of Correctional Services; Randolph v. 672
Department of Roads; Bishop v. 760
Deyle; Kenyon & Larsen v. 209
Dickson; State v. 476
Diesel Service, Inc. v. Accessory Sales, Inc. 381
DiMauro and Kessler; State v. 275
Dinklage Feed Yard, Inc.; Kurz v. 125
Dinverno; State v. 775
Douglas, State ex rel., v. State Board of Equalization and Assm't 130
Doyle; State v. 234
Dryden v. Dryden 666

Eagle Deer; State v. 249
Edmunds v. Edwards 255
Edwards; Edmunds v. 255
Elm Creek State Bank; Department of Banking v. 323
Estate of Brown v. State 332
Estate of Lonowski, In re, ... 596
Estate of McClow, In re, ... 739
Estate of Rich, In re, ... 554
Estate of Snigler, In re, ... 24
Esterling; Dairyland Ins. Co. v. 750

Fallis; State v. 465
Federal Envelope Co.; Scamperino v. 508
Federal Ins. Co.; Dale Electronics, Inc. v. 115
First Nat. Bank & Trust Co. v. Hermann 169
First State Bank v. Peterson 814
Foremost Ins. Co. v. Allied Financial Services, Inc. 153

Fortin v. Hike 344
Fraternal Order of Police v. County of Adams 682
Frye; Wahlers v. 399
Fuchser v. Jacobson 786

Gray v. State 853

Hadley & Marker; State v. 412
Hahn; Ames Bank v. 353
Hale v. Hale 837
Hanson; Knoell Constr. Co., Inc. 305
Hanson; Knoell Constr. Co., Inc. 311
Harlan; State v. 676
Harris; State v. 844
Hatcher; Hornung v. 449
Haynes v. Haynes 35
Hein v. M & N Feed Yards, Inc. 691
Hermann; First Nat. Bank & Trust Co. v. 169
Hike; Fortin v. 344
Holtan; State v. 314
Holy Sepulchre Cemetery Assn.; McCann v. 444
Hornung v. Hatcher 449
Housing Auth. of City of Omaha; West Fort Residents Assn. v. 397
Howard v. Chambers 150

Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611
Imperial Service Corp. v. Phipps 622
In re Estate of Lonowski 596
In re Estate of McClow 739
In re Estate of Rich 554
In re Estate of Snigler 24
In re Freeholder's Petition of Louis D. Quiring 9
In re Interest of J.L.L. 629
In re Interest of Mosier 340
In re Interests of Wedige 687
In re Trust of Teeters 576
Interest of J.L.L., In re, ... 629
Interest of Mosier, In re, ... 340
Interests of Wedige, In re, ... 687

Jackson; State v. 806
Jacobson; Fuchser v. 786
Johnson; State v. 778
Johnson v. Vitek 745
Juniata Farmers Coop. Assn.; Ideal Basic Industries, Inc. v. 611

Kallhoff; Sherman County Bank v. 392
Keith v. School Dist. No. 1 631

Kennedy v. Kennedy 363
Kennedy; State v. 714
Kenyon & Larsen v. Deyle 209
Kessler, DiMauro and; State v. 275
Knigge v. Knigge 149
Knoell Constr. Co., Inc. v. Hanson 305
Knoell Constr. Co., Inc. v. Hanson 311
Kurz v. Dinklage Feed Yard, Inc. 125

Laier; Delp v. 417
Lambert; McClain v. 629
Lampone; State v. 325
Larsen, Kenyon &, v. Deyle 209
Larson; Panhandle Rehabilitation Center, Inc. v. 605
Leigh Land Co.; Botsch v. 401
Lincoln General Hospital Assn.; Wood v. 576
Linn v. Linn 218
Lippert; Stuthman v. 302
Lockwood v. Lockwood 818
Long; State v. 252
Lonowski; Sherman County Bank v. 596
Lozier; Pettis v. 802

M & N Feed Yards, Inc.; Hein v. 691
Marker, Hadley &; State v. 412
Matlock v. Matlock 357
Matthews; State v. 709
Mays; State v. 730
McCann v. Holy Sepulchre Cemetery Assn. 444
McClain v. Lambert 629
McClow; Reed v. 739
McCormick v. Terry 650
McDaniel; State v. 53
McGreevy v. Bremers 554
McNamara; The Cornhusker Bank of Omaha v. 504
Mendenhall; MFA Ins. Companies v. 430
Merrick, County of, v. Beck 829
MFA Ins. Companies v. Mendenhall 430
Middle Republican Nat. Resources Dist.; Sayer Acres, Inc. v. 360
Moon v. Winger Boss Company, Inc. 292
Myers; State v. 867

Nash v. City of North Platte 480
Neal v. School Dist. of York 558
Nebraska Nurses Assn., State ex rel., v. State Board of Nursing 792
Nelson; Carlson v. 483
Nelson; Denton v. 833
Nevels v. State 642

North Platte, City of; Nash v. 480

Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
Otey; State v. 90
Overland Hills, Inc.; Tedco Development Corp. v. 194

Panhandle Rehabilitation Center, Inc. v. Larson 605
Payne; State v. 522
Peery; State v. 271
Peterson; First State Bank v. 814
Petition of Louis D. Quiring, In re, ... 9
Pettis v. Lozier 802
Phipps; Imperial Service Corp. v. 622
Plattsmouth, City of; Plattsmouth Pol. Dept. Coll. Barg. Comm. v. 567
Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
Porter v. Black 699

Quiring v. School Dist. No. 91 9

Randolph v. Department of Correctional Services 672
Rathbun; State v. 329
Red Feather; State v. 734
Reed v. McClow 739
Reed; State v. 45
Remington v. Bryan 372
Ritter v. Ritter 668
Robbins; State v. 226
Rosenberry v. Beck 664
Roundtree; State v. 479

Sampson v. State Farm Mut. Ins. Co. 164
Samuels; State v. 585
Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
Scamperino v. Federal Envelope Co. 508
School Dist. No. 1; Keith v. 631
School Dist. No. 91; Quiring v. 9
School Dist. of York; Neal v. 558
Schuler, State ex rel., v. Bd. of County Commissioners 647
Schwasinger; State ex rel. Stansbery v. 457
Sherman County Bank v. Kallhoff 392
Sherman County Bank v. Lonowski 596
Sidel v. Travelers Ins. Co. 541
Sikes v. Sikes 441
Stansbery, State ex rel., v. Schwasinger 457
State v. Aby 267
State; Brown v. 332
State v. Burger 340
State v. Carter 407

State v. Chapman 368
State v. Comer 549
State v. Crouch 781
State; Danish Vennerforning & Old Peoples Home v. 839
State v. Dickson 476
State v. DiMauro and Kessler 275
State v. Dinverno 775
State v. Doyle 234
State v. Eagle Deer 249
State v. Fallis 465
State; Gray v. 853
State v. Hadley & Marker 412
State v. Harlan 676
State v. Harris 844
State v. Holtan 314
State v. Jackson 806
State v. Johnson 778
State v. Kennedy 714
State v. Lampone 325
State v. Long 252
State v. Matthews 709
State v. Mays 730
State v. McDaniel 53
State v. Myers 867
State; Nevels v. 642
State v. Otey 90
State v. Payne 522
State v. Peery 271
State v. Rathbun 329
State v. Red Feather 734
State v. Reed 45
State v. Robbins 226
State v. Roundtree 479
State v. Samuels 585
State v. Stewart 626
State v. Svoboda 175
State v. Tara Enterprises, Inc. 516
State v. Trader 282
State v. Vail 1
State v. Valencia 719
State v. Walker 42
State v. Wedige 687
State v. Williams 56
State v. Woodruff 638
State Board of Equalization and Assm't; State ex rel. Douglas v. ... 130
State Board of Nursing; State ex rel. Nebraska Nurses Assn. v. 792
State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees 107
State ex rel. Blome v. Bridgeport Irr. Dist. 97

State ex rel. Douglas v. State Board of Equalization and Assm't 130
State ex rel. Nebraska Nurses Assn. v. State Board of Nursing 792
State ex rel. Schuler v. Bd. of County Commissioners 647
State ex rel. Stansbery v. Schwasinger 457
State ex rel. Svoboda v. Weiler 799
State Farm Mut. Ins. Co.; Sampson v. 164
Stephens v. Celeryvale Transport, Inc. 12
Stewart; State v. 626
Stuthman v. Lippert 302
Svoboda, State ex rel., v. Weiler 799
Svoboda; State v. 175

Tara Enterprises, Inc.; State v. 516
Taylor v. Benton 203
Tedco Development Corp. v. Overland Hills, Inc. 194
Terry; McCormick v. 650
The Cornhusker Bank of Omaha v. McNamara 504
Trader; State v. 282
Transit Auth. of City of Omaha; Transport Workers of America v. 26
Transport Workers of America v. Transit Auth. of City of Omaha ... 26
Travelers Ins. Co.; Sidel v. 541
Trust of Teeters, In re, ... 576
Turnbough v. Bolte 24
Turner v. Turner 6

Ulmer v. Ulmer 351

Vail; State v. 1
Valencia; State v. 719
Vitek; Johnson v. 745

Wahlers v. Frye 399
Waite Lumber Co., Inc. v. Carpenter 860
Walker; State v. 42
Wedige; State v. 687
Weiler; State ex rel. Svoboda v. 799
Welke v. Welke 426
West Fort Residents Assn. v. Housing Auth. of City of Omaha 397
Williams; State v. 56
Winger Boss Company, Inc.; Moon v. 292
Wolfe v. American Community Stores 763
Wood v. Lincoln General Hospital Assn. 576
Woodruff; State v. 638
Woodward v. Woodward 40

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1979

STATE OF NEBRASKA, APPELLEE, V. JACK F. VAIL, APPELLANT.

286 N. W. 2d 97

Filed December 11, 1979. No. 42416.

1. **Trial: Evidence: Witnesses.** A defendant is entitled to see and hear the witness and other evidence presented against him at trial.
2. **Trial: Evidence: Juries.** The use of a substitute tape recorder was merely a more critical examination of evidence properly before the jury. The defendant's rights of confrontation were not violated.

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

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

WHITE, J.

This is an appeal from a criminal action which charged the defendant, Jack F. Vail, with unlawfully delivering marijuana and cocaine in violation of section 28-4,125, R. R. S. 1943. The jury found the defendant guilty of both counts. The court sentenced the defendant to a term of probation for 2 years, a fine of $500 on each count, and assessed the costs of the action. The defendant moved for a new trial based upon an alleged improper communication by

the trial judge to the jury. The motion was denied and defendant perfected this appeal.

The conviction arose from a drug transaction at the defendant's residence. On June 7, 1977, at approximately 10:45 p.m., Paul Wagner, an officer of the Nebraska State Patrol, and two confidential informants, Michael Gibbany and Kevin Wall, arrived at the defendant's residence to purchase drugs. Gibbany and Wall were acquainted with the defendant and had arranged the meeting. An electronic recording device was concealed on Gibbany's body. The defendant arrived at the farmhouse shortly after the three men. Gibbany asked the defendant if he could purchase marijuana and cocaine. The defendant indicated "that he could fulfill [their] needs." Gibbany followed defendant into the house and "snorted" two lines of cocaine at defendant's insistence. Gibbany agreed to purchase a gram of cocaine. Defendant informed him the price was $100 a gram. Gibbany went back to the porch to get $50 from Wagner. The investigating officer told him to try to "score a bag or some marijuana." The defendant agreed to sell Gibbany a bag. Gibbany waited on the front porch. Shortly thereafter, the defendant emerged with a bag of marijuana which he gave to Wall. Wagner, Gibbany, and Wall left at approximately 11:35 p.m. Vail was subsequently arrested and charged with delivery of marijuana and cocaine.

The defendant tendered an alibi defense at trial. Defendant testified that he was employed at the Farmland Foods plant as a loading supervisor and remained at the plant after the dockworkers left. Defendant asserted that he then went to a restaurant and did not return home until 1 a.m., June 8, 1977. A roommate corroborated his testimony.

The tape produced from Gibbany's electronic device was introduced into evidence. The tape was played to the jury during trial on a battery-operated

Uher tape recorder. The jury played the tape again during deliberations. Because of the poor sound quality, the jury foreman asked the bailiff if the batteries of the recorder might be recharged. The bailiff advised the prosecutor and the judge. The bailiff did not notify the defendant or his counsel. The judge and prosecutor determined a substitute tape recorder should be obtained because it would take too long to recharge the batteries. The court reporter provided a similar sized tape recorder. The bailiff instructed the jury foreman on the operation of the recorder.

At an evidentiary hearing on the motion for a new trial, two jurors testified the substitute recorder improved the quality of the tape. Certain words and phrases not audible on the old recorder were understandable on the substitute recorder. Specifically, the words "Come on, Earl" were discernible on the new recorder. The jurors testified that their discussion, after hearing the phrases containing defendant's nickname, generally centered upon the significance of that phrase.

Approximately one-half hour after listening to the tape, the jury returned a verdict of guilty on both counts.

Defendant contends the court erred by not informing the defense counsel of the jury's request for a new recorder. Normally a judge's communication with the jury outside the presence of the accused is reversible error only if the communication was prejudicial. This is the so-called "harmless error" rule. The first question is whether the court "communicated" with the jury outside the presence of defendant. If the court did "communicate" with the jury outside the presence of defense counsel, then in order to set aside the verdict, a determination must be made that the communication prejudiced the defendant.

In Nebraska, the harmless error rule is set out in

State v. White, 191 Neb. 772, 217 N. W. 2d 916 (1974). In this case, defendant appealed from a conviction of possessing heroin with the intent to distribute or deliver it. Outside the presence of the accused, the court instructed the jury to disregard a portion of the instructions dealing with agency. The defendant contended the trial judge erred by giving this instruction. This court said: "Under the evidence, that part of the instruction was surplusage as there was no question of agency raised. Although the giving of the instruction in the absence of the defendant was error, it was harmless error. There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, * * *."

It is obvious that the furnishing of a substitute recorder is not a communication in the sense of State v. White, *supra*, or United States v. Treatman, 524 F. 2d 320 (8th Cir., 1975) (clarifying instruction given to the jury outside of presence of defense counsel), or State v. Simants, 202 Neb. 828, 277 N. W. 2d 217 (1979) (conversation by key prosecution witness with jury while sequestered). We would be reluctant to set forth a rule which suggests that a failure of equipment designed to examine evidence properly admitted results in an improper communication, error, and possible reversal.

Rather, the question is whether the defendant's rights to confrontation under the Sixth Amendment of the United States Constitution were abridged when words were heard in the jury room not previously heard in the courtroom. A defendant is entitled to see and hear the witness and other evidence presented against him at trial. Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 934 (1965).

Defendant concedes the words "Come on, Earl"

were on the tape at all times; the tape itself was received in evidence with proper foundation; and he does not assert that the tape was not at all times available to him for inspection prior to the trial.

We think that the matter is similar in principle to State v. Everson, 166 Wash. 534, 7 P. 2d 603 (1932). This was an appeal by the defendant from his conviction of the crime of manslaughter. The decedent was walking along the left-hand side of the road and was carrying a walking stick. The decedent was struck and found unconscious. The defendant was found in a drunken state, and the walking stick of the deceased was then hanging from underneath his car. The walking stick was introduced into evidence, and was in the jury room during the time that the jurors were deliberating their verdict. The stick was examined by the jurors to determine whether the grain of the wood in one end was bent over, which would indicate whether it had been rubbing in the gravel. One of the jurors produced a magnifying glass which had not been introduced in evidence. Holding that the use of the magnifying glass was not reversible error, the court stated: "The walking stick was introduced in evidence, and the jury merely more critically examined it by aid of a magnifying glass. This did not put them in possession of material facts which were not already in evidence."

The use of a substitute tape recorder was merely a more critical examination of evidence properly before the jury. The defendant's rights of confrontation were not violated. The judgment and sentence of the trial court is affirmed.

AFFIRMED.

LINDA K. TURNER, APPELLANT, V. STEVE W. TURNER, APPELLEE.

286 N. W. 2d 100

Filed December 11, 1979. No. 42447.

1. **Divorce: Parent and Child: Minors.** In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child.
2. **Divorce: Parent and Child: Minors: Appeal and Error.** The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

E. H. Powell, for appellant.

Russell & Mousel, P.C., for appellee.

Heard before BOSLAUGH, CLINTON, and MCCOWN, JJ., and COLWELL and L. W. KELLY, JR., District Judges.

COLWELL, District Judge.

Petitioner, Linda K. Turner, appeals from a decree of dissolution claiming as error an abuse of discretion by the trial court and the awarding of custody of Craig, age 4, to respondent father, Steve W. Turner.

The parties were married in 1972; petitioner has two children by a prior marriage; and they lived in New Mexico and Colorado prior to moving to Bartley, Nebraska, in March 1977. Linda first filed a petition for separation, and by stipulation temporary custody was awarded to Linda on July 1, 1977. In November 1977, Linda moved with her three children to her present residence at Giltner, Nebraska, some 150 miles distant. Upon application of Steve and following a hearing, the temporary custody order was modified on December 22, 1977, awarding

custody of Craig to Steve. On May 9, 1978, upon motion of Steve, Linda's petition was amended praying for a dissolution of marriage, custody of Craig, and other relief. The issues were joined and upon trial on August 28, 1978, a decree of dissolution was entered awarding custody of Craig to Steve. We affirm.

During the marriage both parties were employed, each contributing their earnings and resources to the marriage. Steve has been employed full time as a custodian and bus driver by the Bartley public schools since the summer of 1977. In September 1977, Linda began training as an over-the-road truck driver, and since December 1977, she has been so employed full time, generally traveling to the West Coast and return. Her employment takes her away from Giltner from 5 to 7 days at a time, and upon return from each trip she usually has free time from 3 to 7 days. While she is away from Giltner her children are under the care of a Giltner family having other young children in the home.

"In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. * * * Usually the trial court is in the best position to make this determination.

"Our law is clear. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853.

It is settled law that this court, in considering this appeal de novo, will give weight to the fact that the trial court observed the witnesses and their manner of testifying. Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617.

The principle question for the trial court and for

our decision is the best interests of the minor child, Craig, with focus on the child's need for parental supervision and a stable home environment. At trial the court found that both parties were fit parents to have custody of the minor child. Linda is not critical of the care and supervision given to Craig by Steve. Generally, Steve's hours are from 7 a.m., to 6 p.m., with a 2-hour layoff in the afternoon. His home in Bartley is adequate and when he is absent from the home a babysitter is present to supervise Craig. Linda's employment as a trucker requires her absence from the home for extended periods during which time the supervision of Craig would be by a neighbor family. Linda intends to continue her employment as a truck driver. She argues that the custody of a child of tender years should be awarded to her as the natural mother, citing as authority Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361, and other cases. The tender age of the child is, of course, a matter which a court should consider in determining to which parent custody should be given. However, in this case the child is 4 years of age and the mother is gone from the home for many days at a time. No presumption of degree of fitness of a parent arises from sex alone. § 42-364, R. R. S. 1943.

From the review of the entire record, the trial court gave studied and full consideration of the best interests of Craig and there is no showing of abuse of discretion. The award of custody of Craig to Steve was fully supported by the evidence.

AFFIRMED.

IN RE FREEHOLDER'S PETITION OF LOUIS D. QUIRING ET AL. LOUIS D. QUIRING ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 91 OF HAMILTON AND YORK COUNTIES, NEBRASKA, ET AL., APPELLEES.

285 N. W. 2d 834

Filed December 11, 1979. No. 42451.

1. **Schools and School Districts.** Class II school districts are those districts which maintain both elementary and high school grades and have a population of 1,000 or less, while Class III school districts, also maintaining elementary and high school grades, have a population in excess of 1,000 and less than 50,000.
2. _____. A district of the third class may be reclassified as a district of the second class, upon application of the board of education of such district, if the commissioner finds that the number of inhabitants of such district has decreased to the level established for districts of the second class.
3. _____. Automatic reduction from a Class III to a Class II district does not take place on a reduction in population.
4. **Constitutional Law: Statutes: Waiver.** An issue regarding the constitutionality of a statute must be raised at the earliest opportunity consistent with good pleading or it will be deemed waived.

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

John R. Brogan of Brogan, McCluskey & Wolstenholm, for appellants.

Luebs, Dowding, Beltzer, Leininger & Smith, for appellees.

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

WHITE, J.

Louis D. Quiring and Grace E. Quiring appeal from an order of the District Court for Hamilton County, Nebraska, affirming the decision of the freeholder's board of Hamilton County denying a petition for transfer of appellants' land from School District No. 91 to School District No. 95 of Hamilton County. We affirm.

There are several errors assigned but only one

merits discussion here: That the District Court erred in finding that School District No. 91 of Hamilton County was a Class III school district.

Class II school districts are those districts which maintain both elementary and high school grades and have a population of 1,000 or less, while Class III school districts, also maintaining elementary and high school grades, have a population in excess of 1,000 and less than 50,000. § 79-102, R. R. S. 1943.

Persons residing in a Class II school district may be eligible to freehold out of the district but those persons residing in a Class III school district are not. § 79-403, R. R. S. 1943.

At the hearing on the motion for summary judgment, the parties stipulated that School District No. 91 had a population of less than 1,000 at the time the petition was filed.

It is the contention of the appellants that a Class III district whose population is reduced to less than 1,000 is automatically changed to a Class II district whose residents are thereby eligible to freehold out of the district. Section 79-106, R. R. S. 1943, provides: "Whenever any school district of the second, third, or fourth class shall attain the number of inhabitants which shall require its classification as a school district of the third, fourth, or fifth class, respectively, the Commissioner of Education shall forthwith reclassify such district as a district of the next higher class. A district of the third class may be reclassified as a district of the second class, upon application of the board of education of such district, if the commissioner finds that the number of inhabitants of such district has decreased to the level established for districts of the second class. Any reclassification pursuant to this section shall become effective at the beginning of the next fiscal year after the order of the commissioner."

The appellants assert that since there is a mandatory change to a higher class when the population

increases above the next required figure, Schroeder v. Oeltjen, 184 Neb. 8, 165 N. W. 2d 81, there is a corresponding mandatory change to a lesser-numbered district on an appropriate reduction in population. A fair reading of section 79-106, R. R. S. 1943, does not support this conclusion. Indeed, the statute specifically provides for reclassification of a Class III to a Class II district "upon application of the board of education of such district."

The record indicates that School District No. 91 changed from a Class II to a Class III district in 1971, and no application of a change from a Class III to Class II district has been made by the board of education of School District No. 91.

The history of L.B. 212, Laws 1971, which amended section 79-106, R. R. S. 1943, supports the conclusion that automatic reduction from Class III to Class II does not take place on a reduction in population. See, Education Committee hearings, January 26, 1971, Introducer's Statement of Purpose, L.B. 212, Laws 1971, Proceedings of the Legislature of February 3, 1971, p. 103, p. 309.

The District Court in its judgment pointed out that no relief was asked of the court to compel an application for reclassification by the board of education. We do not decide whether such relief could have been granted in view of the discretion vested in the board by section 79-106, R. R. S. 1943. Appellants argue here that the possibility of automatic changes of classification from a lower to a higher class without an automatic change from the higher to the lower class raises issues of a constitutional dimension. Those issues were not presented to the District Court and will not be considered here. An issue regarding the constitutionality of a statute must be raised at the earliest opportunity consistent with good pleading or it will be deemed waived. Zoimen v. Landsman, 192 Neb. 561, 223 N. W. 2d 49. The ap-

pellants have also failed to comply with Rule 18 of this court.

The judgment of the District Court is affirmed.

AFFIRMED.

ROBERT D. STEPHENS, APPELLEE AND CROSS-APPELLANT, V. CELERYVALE TRANSPORT, INC., APPELLANT AND CROSS-APPELLEE.

286 N. W. 2d 420

Filed December 11, 1979. No. 42463.

1. **Workmen's Compensation: Employer and Employee: Contracts.** The relationship of employer and employee, as well as that of employer and independent contractor, arises from the contract between the parties.
2. **Workmen's Compensation: Employer and Employee: Contracts: Contractors.** There is generally no single test by which the determination may be made of whether or not a workman is an employee as distinguished from an independent contractor. However, the ultimate question is what was the contract between the parties.
3. **Workmen's Compensation: Employer and Employee: Contracts: Proof.** The burden of proof is on the claimant employee to prove the nature of the contractual relationship.
4. **Workmen's Compensation: Employer and Employee: Contracts.** If there exists a written contract, it must be considered and may be of prime importance. However, a writing which merely denominates the relationship may not be used to conceal the true arrangement.
5. **Workmen's Compensation: Employer and Employee: Contracts: Contractors: Statutes.** Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and dismissed.

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

William A. Wieland of Healey, Brown, Wieland & Kluender, for appellee.

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

CLINTON, J.

This is an appeal by the defendant, Celeryvale Transport, Inc., from the Nebraska Workmen's Compensation Court on rehearing, from an order by a divided court awarding the plaintiff, Robert D. Stephens, compensation for injuries received while allegedly in the employment of Celeryvale. The issue which is determinative of the outcome of this appeal is whether the finding of the Workmen's Compensation Court that Stephens was an employee of Celeryvale, rather than an independent contractor, is clearly wrong. We determine, as a matter of law, that Stephens was an independent contractor and reverse the judgment of the Workmen's Compensation Court and direct dismissal.

The standard of review governing factual determinations of the Workmen's Compensation Court is governed by the relevant portion of section 48-185, R. R. S. 1943, which provides: "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." That statute also limits the grounds for reversal to four, which include: "(3) there is not sufficient evidence in the record to warrant the making of the order, judgment, or award . . . ." In applying this statute we have held the findings of fact made by the Workmen's Compensation Court on rehearing will not be set aside on appeal unless clearly wrong. Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92. However, final determination of issues of law are for this court. Where the inference is clear that there is, or is not, a master and servant relationship, the determination is for the court and not for the trier of

fact. Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N. W. 2d 474; Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749; Vontress v. Ready Mixed Concrete Co., 170 Neb. 789, 104 N. W. 2d 331.

The evidence shows that at the times pertinent to this litigation Celeryvale was an interstate motor freight carrier holding an I. C. C. certificate and appropriate certificates from various state commissions. It also shows that Stephens was the owner of a certain 1968 Kenworth tractor. For a number of years Stephens has made his living by operating his own truck, which he leased to others who held the appropriate operating certificates.

On May 12, 1977, Stephens entered into an "Equipment Lease and Transportation Agreement" with Celeryvale, in which the latter is described as "carrier" and Stephens as "contractor." By the terms of the agreement, Stephens leased to Celeryvale the above-mentioned tractor for a period of 1 year. The lease provided that the carrier pay contractor 42 cents a loaded mile. Although the agreement does not expressly so provide, it is clear from the evidence the tractor was to be used to pull trailers either owned by carrier or which it leased from others. The contractor agreed to bear "all costs of licenses, proration expenses, fuel and use taxes, gross receipts tax, Colo. G.T.M. tax, intangeable [sic] tax, tolls, and other fees or assessments incident to the ownership and operation of said tractor." Carrier was obligated to pay for the operating permits for the Kenworth and public liability insurance thereon, except bobtail, as well as for all licenses, proration expenses, and maintenance on carrier-owned trailers.

Again, although not expressly provided in the agreement, it is to be clearly inferred from the way in which the parties operated that the agreement contemplated that Stephens would either operate the tractor himself or furnish drivers. It provided:

"All drivers, laborers and other helpers utilized by the Contractor shall be exclusively the employees of and compensated by the Contractor." It provided: "Carrier will bear the cost of Workmens Compensation Insurance for the Contractor," and, "It is expressly understood and agreed that all employees are subject to certain rules and regulations of said Carrier."

Sometime after the written agreement was entered into, Stephens was furnished with a copy of "current procedures and regulations affecting all owner-operators, and owner-operator drivers." The procedures and regulations referred to related to telephone reports and the weighing of vehicles. It contained a prohibition of the presence of alcoholic beverages in the vehicle, made drivers responsible for damage to equipment and cargo, and required them to pay fines for speeding or other moving violations. Also covered were paperwork, bills of lading, filing of logs, the making of cash advances by the contractor, physical examinations, shortages, and certain other responsibilities of drivers.

Both the contract and the regulations required the contractor to make a cash "bond" deposit of $1,000 to guarantee performance of the contract. This was to be paid in installments at a stated rate per trip. The agreement provided that the contractor could cancel the lease on 30 days notice. It further provided: "The parties intend to create by this contract the relationship of CARRIER and INDEPENDENT CONTRACTOR, and not an employer-employee relationship. Neither the CONTRACTOR nor its employees are to be considered the employees of the CARRIER at any time, under any circumstances, for any purpose."

The evidence shows the parties operated in the following manner. Celeryvale solicited shippers, advised Stephens where and when to pick up cargo, and the cargo's destination. The bills of lading re-

ceived from the shipper specified destinations and usually delivery dates.

Celeryvale made advances to Stephens for each trip. The agreement and regulations both indicated payment would be made for each trip after completion of the necessary paperwork. In actual practice, only advances were made and no payment of any balance was made until after the accident in which Stephens was injured. That accident occurred on August 3, 1977, after the agreement had been in effect less than 3 months. During that time Stephens made 21 hauls for Celeryvale.

The evidence shows that neither income tax nor social security tax was withheld from the payments made to Stephens. Whether Celeryvale paid an employer's share of social security on compensation to Stephens is not shown, but it is inferable that it did not, since Stephens' profit or net compensation could be determined only after his business expenses were deducted. The record does not show whether Stephens paid social security as a self-employed person.

The evidence does not leave doubt that Stephens regarded himself as self-employed even though his testimony at the original hearing and at the rehearing was somewhat contradictory on the point. At the rehearing, the testimony on the point, including admissions as to testimony at the original hearing, was as follows: "Q. Mr. Stephens, have you always owned your own unit and worked for yourself, so to speak?
A. Yes.
Q. You've always considered yourself your own boss; right?
A. Not always. I used to work for other people.
Q. While you owned your own tractors?
A. I always leased them to somebody else.
Q. But always considered yourself your own boss?
A. When I was gypsying I did, but when you lease

to somebody, you kind of go by their own agreement.
Q. I am going to call your attention again back to the first hearing. Mr. Stephens, the Court was asking you a little bit about the amount of money you were receiving.

'Q. And you say one of the reasons you didn't have a feel for other truck drivers is that you run your own rig, worked for yourself most of your life; is that correct?

'A. Yes.'

Do you remember that?
A. I guess.
Q. That answer was correct, wasn't it?
A. Yes. . . .
Q. . . . My next question:

'Q. So you've sort of been your own boss?

'A. Yes.'

That was correct, was it not?
A. Whenever it was leased. I was gypsying for a long time."

The evidence indicates Stephens generally selected his own route of travel, although he knew if a trailer owned or leased by Celeryvale required repairs or tires he might have to go to certain places to get these repairs or replacements. Stephens made telephone reports as required by the regulations. He kept and transmitted mileage logs as required. He testified, however, that Celeryvale calculated the mileage by the map for purposes of compensation. He observed driving hours as required by I. C. C. regulations. His hours of departure and driving time were largely determined by the necessities imposed by scheduled delivery times.

Stephens paid his own truck expenses except as we have otherwise indicated. He could satisfy the contract by furnishing a driver other than himself and could take time off when he wanted. It is not made plain by the evidence whether or not he could refuse hauls which were offered. There is no

evidence that he did.

At the time of the occurrence of the accident, Stephens had just picked up a load of pork at Crete, Nebraska, for delivery in New Orleans. He did not plan to make that trip himself, since he wanted to take some time off to work on the Kenworth tractor. He had, therefore, arranged for another driver. The Kenworth was not to be used for the trip to New Orleans because it would exceed the legal length limits in some states when coupled to that particular trailer. He had arranged for the use of a cab-over tractor of which he had possession and control. At the time of the accident, he was driving the Kenworth and pulling the loaded trailer en route to Shoemaker's truck stop at Lincoln. He was being followed in the cab-over tractor by the driver who would make the trip to New Orleans. Some small repairs were to be made to the cab-over tractor at Shoemaker's to prepare it for the trip. That tractor would then be attached to the trailer in place of the Kenworth.

Because the cab-over tractor was not covered by the lease of May 12, 1977, a "trip lease" with Celeryvale was to be picked up at Shoemaker's. This had been previously arranged with Celeryvale. The agreement of May 12, 1977, contemplated "trip leases" (apparently special leases covering one trip only with equipment other than that described in the lease). The pertinent provision was: "Carrier will guarantee $.42 a mile for trip lease for all equipment."

Stephens testified that for the proposed New Orleans trip the driver would be paid separately by Celeryvale and that Stephens was to receive the mileage payment less the driver's pay. He also testified he had been promised $100 by Celeryvale for finding the driver, but he had never received that payment.

The relationship of employer and employee, as

well as that of employer and independent contractor, arises from the contract between the parties. Meyer v. State Farm Mut. Auto. Ins. Co., 192 Neb. 831, 224 N. W. 2d 770; Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527. Whether the ultimate issue is workmen's compensation coverage, liability for acts of a servant, or some other matter, the question is, what was the real agreement between the parties? The answer to the contract question is not at all dependent upon the ultimate issue, i.e., the criteria to be applied in determining the nature of the contract is the same whether it involves workmen's compensation coverage or something else. See, Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N. W. 2d 474; Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749; In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523; Heilner v. Workmen's Compensation Appeal Bd., 393 A. 2d 1085 (Pa. Commw. Ct., 1978).

We have held there is no single test by which the determination of whether or not a workman is an employee, as distinguished from an independent contractor, may be made. This must be determined from all the facts in the case. Voycheske v. Osborn, 196 Neb. 510, 244 N. W. 2d 74. The burden of proof is upon the employee to prove the nature of the relationship. Voycheske v. Osborn, *supra*.

If there exists a written contract, it must, of course, be considered and may be of prime importance. Bohy v. Pfister Hybrid Co., 179 Neb. 337, 138 N. W. 2d 23; Tretter v. Dart Transit Co., 271 Minn. 131, 135 N. W. 2d 484; Bartle v. Travelers Ins. Co., 171 F. 2d 469 (5th Cir., 1948). However, a writing which merely denominates the relationship may not be used to conceal the true arrangement. Bohy v. Pfister Hybrid Co., *supra;* Tretter v. Dart Transit Co., *supra*. Most workmen's compensation cases do not involve written agreements which define the relationship. Bohy v. Pfister Hybrid Co., *supra,* is the

only such Nebraska case which our research has disclosed.

An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. Such a person is not an employee within the meaning of the workmen's compensation statutes. Schneider v. Village of Shickley, *supra*.

Most of the pertinent criteria are enumerated in Voycheske v. Osborn, *supra*. Authority to direct, control, and supervise details of the work is indicative of an employer-employee relationship and in many cases this may be the most important criterium. However, even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms. The right of the parties to terminate the relationship at will without any consequent liability may be indicative of employer-employee status. An independent contractor usually furnishes equipment to perform the service. The fact that the worker may substitute the services of another for his own is indicative of the status of independent contractor. The deduction of social security taxes and the withholding of income tax tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication. The method of paying compensation is to be considered. If its profitability depends upon the worker's own capital investment, management, and the difference between income and expense, that is an indication of independent contractor status.

In this case, the written contract not only denominated the relationship as carrier and independent contractor, the specific terms of the agreement describe that kind of relationship. The manner in

which the agreement was carried out was not in any way inconsistent with Stephens' status as an independent contractor under the terms of the writing.

In Bohy v. Pfister Hybrid Co., *supra,* there existed a detailed contract, called a "Dealer's Agreement," pertaining to the sale by plaintiff of seed corn for defendant. The question was whether the plaintiff was an employee or an independent contractor. The written contract contained a provision as follows: " 'NEITHER said dealer nor any of his agents or employees shall in any manner be deemed or held to be employees of the Pfister Hybrid Company, nor shall said dealer or any agent or employee of his be entitled to any benefits payable to employees of the Pfister Hybrid Company, such as, but not limited to, workmen's compensation, pension, unemployment insurance and social security laws of the United States or the several States thereof.' " The record in that case showed the parties performed in accordance with the terms of the contract with only slight deviations in that the plaintiff sold corn for others as well as the defendant and "did not transmit proceeds . . . weekly or in the same form as received," as was required by the contract. This court said: "In this case all of the facts and circumstances, including the contract under which the service was performed and the performance thereunder, establish that the relationship between Bohy and the defendant was that of independent contractor."

We are, of course, aware that as of the time of the decision in Bohy v. Pfister Hybrid Co., *supra*, review by this court was de novo. However, it appears from the language used the court was saying that, under the undisputed facts, the relationship there was, as a matter of law, that of independent contractor. Similar situations and similar results were involved in Tretter v. Dart Transit Co., *supra*, and Bartle v. Travelers Ins. Co., *supra*. In the latter case the court held that where the claimant ex-

pressly convenanted that he was an independent contractor and not an employee and there were no vitiating factors, the claimant and those claiming under him were bound by the contract.

Let us now examine the evidence in the light of the criteria relevant in this case. Stephens, under the contract, furnished a truck and paid the expenses in connection therewith, save liability insurance while "bobtailing," a term for driving the tractor without a trailer. He had to procure his own liability insurance while "bobtailing" as well as his own collision coverage at all times if he desired such coverages. He was paid for his equipment and services by the loaded mile only. He received no compensation while moving from the place where one load was delivered to the place where another load was picked up. The record contains the clear inference that a great deal of such travel was involved. The contract provided no compensation for this travel and Stephens received none. Nonetheless, these moves were required in the interest of Celeryvale as well as Stephens.

Normally an employee is compensated while he works. An independent contractor's compensation, on the other hand, usually depends upon whether he makes a profit from the contract. Stephens was clearly operating to turn a profit and not for a mere wage. It is clear from his own statements previously mentioned that he considered he was working for himself.

The regulations enforced, or which could be enforced by Celeryvale under the agreement, appear to have been of two general types. First are those necessary to comply with I.C.C. regulations. Such compliance would be required whether or not Stephens' status was employee or independent contractor. The second type were those regulations which assured performance of the contract in accordance with its implied terms, viz., prompt pickups from

shippers and on-time delivery to receivers. Celeryvale exercised no control over the actual operation of the truck, nor precise routes to be traveled. In fact, at the time the accident occurred, Stephens was clearly operating on a route selected by him.

In this case, compensation was paid in a form consistent with that of independent contractor status, and there was no withholding of taxes or social security as would be required by law in the case of an employee.

It is clear Stephens could satisfy the contract by substituting the services of another for his own and that he was, in fact, engaged in so doing when the accident occurred. It is clear from the terms of the contract the provision pertaining to workmen's compensation insurance required Celeryvale to pay the premium on compensation insurance which Stephens would be required to have for his employees and that the premium was an item for which Stephens was to be reimbursed.

We hold that where, as here, a written contract exists which not only denominates the relationship as that of independent contractor but also describes that type of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes.

REVERSED AND DISMISSED.

IN RE ESTATE OF MINA SNIGLER, DECEASED.
PATRICIA MCINTYRE TURNBOUGH ET AL., APPELLANTS,
V. MINA BOLTE ET AL., APPELLEES.

285 N. W. 2d 836

Filed December 11, 1979. No. 42490.

1. **Decedents' Estates.** If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation.
2. **Nebraska Probate Code: Statutes.** Issue of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code. § 30-2209, R. R. S. 1943.
3. **Decedents' Estates.** If the issue of grandparents are all the same degree of kinship to the deceased, they will share equally in the intestate estate, but if of unequal degree, then those of more remote degree take by representation.

Appeal from the District Court for Hall County: L. W. KELLY, JR., Judge. Reversed and remanded with directions.

John R. Hall and McDermott & Hall, for appellants.

Philip M. Martin, Jr., of Higgins & Martin, for appellees.

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

WHITE, J.

This is an appeal from an order of the District Court for Hall County affirming a decree of the county court of Hall County finding that the sole and only heirs at law of Mina Snigler, deceased, who died intestate, were three living first cousins of the deceased, namely, Jane Tabke, Lillie Snider, and Mina Bolte, to the exclusion of appellants, who are

children of deceased brothers and a sister of the designated heirs. We reverse and remand.

Mina Snigler died December 13, 1977, after the effective date of the new probate code, section 30-2201 et seq., R. R. S. 1943.

Prior to the effective date of the code, the determination of the trial court would have been correct. See, § 30-102, R. R. S. 1943, repealed; L.B. 354, Laws 1974, effective January 1, 1977. Douglas v. Cameron, 47 Neb. 358, 66 N. W. 430. However, section 30-2303, R. R. S. 1943, made a significant change in the laws relating to intestate succession. Subsection (4) of that section provides: "(4) if there is no surviving issue, parent or issue of a parent, *but the decedent is survived by one or more grandparents or issue of grandparents,* half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, *or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation;* and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half." (Emphasis supplied.)

Section 30-2209, R. R. S. 1943, subsection (23), provides: "Issue of a person means *all his lineal descendants of all generations,* with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code." (Emphasis supplied.)

The comment to section 30-2303, R. R. S. 1943, reinforces this holding: "This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, *and grandparents and collateral relatives descended from grandparents*;

and, if there are none of the above, by the decedent's next of kin.

"In general the principle of representation (which is defined in section 30-2306) is adopted as the pattern which most decedents would prefer." (Emphasis supplied.)

"(Section 2-103 (4)) If the issue of grandparents are all the same degree of kinship to the deceased, they will share equally in the intestate estate, but if of unequal degree, then those of more remote degree take by representation. * * *" 1 Wellman, Uniform Probate Code Practice Manual (2nd Ed.), Part 1, p. 63. See, 9 Creighton L. Rev., p. 478.

We note that the parties each assumed and argued the applicability of subsection (5) of section 30-2303, R. R. S. 1943. Because there were surviving issue of a grandparent, this newly enacted paragraph of the Uniform Probate Code has by its terms no applicability to the factual situation involved in this case.

The District Court erroneously concluded that the first cousins once removed of a decedent who died intestate do not take the share of their deceased parent when there are living first cousins. The judgment must be reversed and the cause remanded to enter a decree of heirship in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

TRANSPORT WORKERS OF AMERICA, LOCAL 223, AFL-CIO, APPELLEE, V. TRANSIT AUTHORITY OF THE CITY OF OMAHA, DOING BUSINESS AS METRO AREA TRANSIT, APPELLANT.

286 N. W. 2d 102

Filed December 11, 1979. No. 42512.

1. **Commission of Industrial Relations: Jurisdiction.** Where the Commission of Industrial Relations has no jurisdiction in the sub-

ject matter of the action, all proceedings in such action are void.

2. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is not a court and is in fact an administrative body performing a legislative function.
3. **Administrative Law: Jurisdiction.** An administrative agency cannot enlarge its own jurisdiction nor can jurisdiction be conferred upon the agency by parties before it. Accordingly, it is held that deviations from an agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver of estoppel.
4. **Commission of Industrial Relations: Labor and Labor Relations: Jurisdiction.** A uniquely personal termination of employment does not constitute an industrial dispute over which the Commission of Industrial Relations has jurisdiction.
5. **Commission of Industrial Relations: Public Policy: Statutes.** The public policy of the Commission of Industrial Relations is expressed in section 48-802, R. R. S. 1943, of the act and points out that the act is intended to provide public employees who do not otherwise have the right to strike an opportunity to mediate and arbitrate matters of employment which have not yet been agreed to by the employer.
6. **Commission of Industrial Relations: Labor and Labor Relations: Breach of Contract: Jurisdiction.** The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter.
7. **Administrative Law: Powers: Constitutional Law: Legislature.** As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts.

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

Soren S. Jensen of Swarr, May, Smith & Andersen, for appellant.

John P. Grant of Robert E. O'Connor & Associates, for appellee.

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

KRIVOSHA, C. J.

This is an appeal by the Transit Authority of the City of Omaha, doing business as Metro Area Transit (MAT), from an opinion and order of the Court of Industrial Relations, now the Commission of Industrial Relations (CIR), resolving an alleged industrial dispute between MAT and the Transport Workers of America, Local 223, AFL-CIO (Union), pursuant to section 48-801 et seq., R. R. S. 1943 (the Act). The plaintiff Union represents employees of MAT in the Omaha metropolitan area. Collective bargaining agreements between the parties were in effect during the period from 1973 to 1977, and the alleged industrial dispute involved in this appeal grows out of those agreements. For reasons more particularly detailed hereinafter, we find that the CIR was without jurisdiction in this matter. We therefore reverse the order of the CIR and remand the cause to the CIR with directions to dismiss the petition.

Union instituted these proceedings before the CIR by filing a petition which in summary alleged that Union and MAT had executed a collective bargaining agreement which was in full force and effect; that by Article XIII of said agreement MAT agreed to provide a short-term disability benefit for all participating employees; and that MAT now refused to pay the short-term disability benefit for all participating employees. Union therefore prayed that the CIR conduct a hearing and declare the rights, duties, and obligations of the parties under their agreement and, upon completing such declaration, order MAT to render an accounting of all amounts due and owing to participating employees under the agreement.

The parties stipulated in writing: "Insofar as the Court is required to resolve the industrial dispute be-

tween the parties, the only issue which is to be submitted to the Court for decision is whether employees who are receiving workmen's compensation benefits are also entitled to receive short term disability benefits *as provided in the relevant collective bargaining agreements.*" (Emphasis supplied.)

On September 6, 1978, the CIR entered an opinion and order in which it found that the provisions of the contract were clear and unambiguous and did not require interpretation in that the contract required payment for short-term disability for either work-related or nonwork-related accidents from the first day. In essence, the CIR declared the rights, duties, and obligations of the parties under the agreements, finding that MAT had breached its contract with Union. It then ordered that an accounting be had between the parties as to the claims payable under the determination made by the CIR. The order specifically provided that it was "in the nature of instructions to the parties" and "shall not be considered a final order of the court."

Thereafter, on November 13, 1978, the CIR vacated its order of September 6, 1978, and entered a new opinion and order which was identical in all respects to the previous order except it did not contain the final paragraph which made the opinion and order instructive and not a final order. Simply stated, the dispute involved in this case was a question of whether MAT had breached its contract with Union and, if so, what damages were due and owing to the alleged injured parties by reason of the breach.

MAT maintains the order of the CIR was erroneous in several respects. However, the first issue which must be decided before proceeding to consider the various assignments of error raised by MAT, and a matter of first impression, is whether the CIR had jurisdiction to declare the rights, duties, and obligations of the parties under an existing agreement and to order an accounting in connection

therewith. If, in fact, the CIR is without jurisdiction to declare the rights, duties, and obligations of the parties under an existing agreement and thereafter grant equitable relief in the form of an accounting, we need not consider any assignment of error claimed by MAT.

We have earlier held that where the CIR has no jurisdiction in the subject matter of the action, all proceedings in such action are void. Nebraska Dept. of Roads Employees Assn. v. Department of Roads, 189 Neb. 754, 205 N. W. 2d 110. The fact that the parties may have agreed that the CIR could take jurisdiction does not change the result.

We have heretofore said the CIR is not a court and is in fact an administrative body performing a legislative function. American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1.

An administrative board has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629; Slosburg v. City of Omaha, 183 Neb. 839, 165 N. W. 2d 90; City of Schuyler v. Cornhusker P. P. Dist., 181 Neb. 704, 150 N. W. 2d 588.

"An administrative agency cannot enlarge its own jurisdiction nor can jurisdiction be conferred upon the agency by parties before it. Accordingly, it is held that deviations from an agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver or estoppel." 2 Am. Jur. 2d, Administrative Law, § 331; Bair v. Blue Ribbon, Inc., 256 Iowa 660, 129 N. W. 2d 85.

The authority of the Commission of Industrial Relations is carefully circumscribed. Its procedures are prescribed by statute. Its jurisdiction is clearly defined and is limited to what are clearly legislative

concerns. University Police Officers Union v. University of Nebraska, 203 Neb. 4, 277 N. W. 2d 529.

If the CIR has authority to hear cases involving an alleged breach of contract, declare rights, duties, and obligations of parties and grant equitable relief such as an accounting, that authority must be found in the Constitution and statutes creating and authorizing the CIR. We are unable to find such authority.

While it is true that section 48-801 (7), R. R. S. 1943, defines an "industrial dispute" to include "any controversy concerning terms, tenure or conditions of employment," a reading of the entire Act, as well as our earlier decisions, discloses that not every controversy concerning terms, tenure, or conditions of employment is indeed an industrial dispute under the Act giving jurisdiction to the CIR. A uniquely personal termination of employment may in fact involve a controversy concerning terms, tenure, or conditions of employment, yet we have heretofore held that such uniquely personal termination of employment does not constitute an industrial dispute over which the CIR has jurisdiction. Nebraska Dept. of Roads Employees Assn. v. Department of Roads, *supra*. Likewise, a reading of the pertinent statutes concerning teachers discloses that a teacher under contract to a school district, who is thereafter discharged in alleged breach of her contract, may not seek enforcement of that contract or damages for breach thereof by filing an action in the CIR even though the controversy may concern terms, tenure, or conditions of employment. See, §§ 79-1254 and 79-1259, R. R. S. 1943; Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N. W. 2d 335; Witt v. School District No. 70, 202 Neb. 63, 273 N. W. 2d 669.

The public policy of the CIR is expressed in section 48-802, R. R. S. 1943, of the Act and points out that the Act is intended to provide public employees who do not otherwise have the right to strike an opportunity to mediate and arbitrate matters of em-

ployment which have not yet been agreed to by the employer.

By providing for a forum in which a public employer and a public employee may discuss future wages, hours, and conditions of employment or terms of employment without interruption of necessary public service, the Legislature has sought to protect "its citizens from any dangers, perils, calamities, or catastrophes which would result" from interruption or termination of public service. § 48-802, R. R. S. 1943.

It is the public interest in having uninterrupted public service that is principally sought to be protected by the creation of the Act and not the creation of a specialty forum for the trying of breach of contract cases by public employees.

That the authority of the CIR is limited to disputes between a public employer and a public employee absent an agreement is made even clearer when we examine the provisions of sections 48-818 and 48-819, R. R. S. 1943. Section 48-818 specifically limits the findings and orders of the CIR to establishing or altering "the scale of wages, hours of labor, or conditions of employment, or any one or more of the same." Specifically, section 48-818 provides: "In making such findings and order or orders the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to 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." The mandate language of section 48-818 does not lend itself to any suggestion that the CIR could alter or modify the terms of an existing agreement during the life of the agreement, any more than either party could unilaterally do so.

Likewise, under the provisions of section 48-819, R. R. S. 1943, the CIR has no authority to enforce its

own orders, such orders only being enforceable in an appropriate proceeding in courts of this state. It would indeed be an anomaly if the CIR had jurisdiction to find that one of the parties had breached the agreement but could not order the necessary remedy occasioned by the breach.

Section 48-819, R. R. S. 1943, provides that orders, temporary or final, entered by the CIR are enforceable in appropriate proceedings in the courts of this state. What would be an appropriate proceeding to be brought in the District Court to collect money ordered paid by the CIR as damages for breach of contract? Certainly, mandamus would not be. Public officials, in the absence of a specific law, are not required to pay judgments so as to entitle a citizen to seek a writ of mandamus. § 25-2156, R. R. S. 1943. See, also, State v. Merrell, 43 Neb. 575, 61 N. W. 754. Nor could an execution against public property be levied. Obviously, before one can attempt to collect damages from a governmental subdivision, one must obtain a judgment in an appropriate court of competent jurisdiction and file a claim with the appropriate public body. §§ 24-329, 14-804, 14-813, 15-840, 15-841, 16-726, 16-727, R. R. S. 1943.

The balance of section 48-819, R. R. S. 1943, offers no further help. That portion provides that contempt shall be in a District Court for a failure to comply with an order of the CIR if a similar failure to comply with an order of a District Court would constitute a contempt of the District Court. Yet the failure to pay a money judgment resulting from a breach of contract is not grounds for contempt in the District Court. It appears to us that the Act has not in any manner attempted to grant the CIR powers to resolve breach of contract cases even if the breach concerns itself with terms, tenure, or conditions of employment. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a

competent court having jurisdiction of the matter.

A second and equally material reason requires our action in this case. The CIR has no authority to grant either declaratory or equitable relief such as an accounting.

As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts. 73 C. J. S., Public Administrative Bodies and Procedures, § 36. See, also, Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322. Likewise, the Constitution of the State of Nebraska firmly establishes that the judicial power in Nebraska is vested solely in the courts. Art. II, § 1, and Art. V, § 1, Constitution of Nebraska. As an administrative body the CIR may not exercise judicial functions.

"Nebraska's Constitution contains an absolute prohibition upon the exercise of the executive, legislative and judicial powers by the same person or the same group of persons. It has remained a part of the Constitution unchanged since 1875. It is more certain and positive than the provisions of the federal Constitution and those of some of the states, which merely definitely divided the three powers of government." Laverty v. Cochran, 132 Neb. 118, 271 N. W. 354.

The entering of a declaratory judgment and the ordering of an accounting are clearly judicial functions. See, § 25-21,149 et seq., R. R. S. 1943; Cook v. Wilkie, 181 Neb. 596, 150 N. W. 2d 124; 1 Am. Jur. 2d, Accounts and Accounting, § 44; 22 Am. Jur. 2d, Declaratory Judgments, § 2.

If we were to hold that the Legislature had in fact granted to the CIR judicial powers, we would be

compelled to find that such delegation violated the Constitution of the State of Nebraska and was invalid.

It is a long-recognized principle of statutory construction that where a statute is susceptible of two constructions, one of which renders it constitutional, and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, would render it valid. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63; Anderson v. Tiemann, *supra*.

The CIR performs an important and vital function in resolving impasses in the public sector. It is not, however, a substitute for the District Court with regard to existing and agreed terms, tenure, and conditions of employment. It has not been made a court by the Legislature. The proper forum to resolve this dispute is the courts.

The order, therefore, is reversed and the cause remanded to the CIR with directions to dismiss the petition of Union. In view of the basis for our disposition of the matter, we need not consider any of the assignments of error raised by MAT.

REVERSED AND REMANDED WITH DIRECTIONS.

NANCY HAYNES, DECEASED, APPELLEE, V. EDWARD L. HAYNES, APPELLANT, NADINE BARRETT, INTERVENOR-APPELLEE.

286 N. W. 2d 108

Filed December 11, 1979. No. 42530.

1. **Divorce: Parent and Child: Appeal and Error.** Though the determination of the trial court with respect to awarding or changing custody is subject to review, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

2. **Divorce: Parent and Child: Minors.** While the wishes of a child under the age of 14 years are not controlling where in conflict with what the courts regard as the minor's best interests, still, even though an infant is under the age of 14, if he has reached an age sufficient to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian.
3. _____: _____: _____. The primary consideration in matters involving child custody, whether arising as a part of the proceeding for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child.
4. _____: _____: _____. While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent.

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

David L. Herzog, for appellant.

Richard M. Fellman and Fellman & Ramsey, for intervenor-appellee.

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

KRIVOSHA, C. J.

The instant appeal presents to the court one of the most difficult tasks a court faces — determining the physical custody of minor children. Unfortunately for us, we possess neither the wisdom of Solomon nor his child-sharing sword and must therefore attempt to arrive at some solution as best we can.

The trial court awarded custody of the minor children to intervenor, Nadine Barrett (Grandmother), and ordered the appellant, Edward L. Haynes (Father), to pay child support in the amount of $27.50 per week per child. We affirm the judgment.

Father is the natural father of two children, born October 12, 1966, and March 31, 1968. The marriage

of the parents of the children was dissolved by court decree on July 24, 1975, with custody of the children awarded to the wife.

Immediately after the dissolution of the marriage, the wife and the minor children resided with Grandmother who was the wife's natural mother. Thereafter, and until her death on July 27, 1978, the wife and minor children lived next door to Grandmother. Upon the wife's death the children moved in with Grandmother and have remained with her ever since.

Some 3 months after the wife's death, Father filed an application seeking custody of the minor children. Shortly thereafter, Grandmother also filed an application seeking the legal custody of the minor children who were then in her physical custody.

Hearing was thereafter held by the trial court, at which evidence was adduced, and which in the main established that both Father and Grandmother were fit and proper persons to have custody of the minor children. With the consent of the parties, the trial court interviewed the children in camera, outside the presence of counsel and without a court reporter. While this practice may put the children more at ease and is therefore commendable, it does in fact deny to this court the information with which the trial court was provided. We must, nevertheless, presume that the information so provided to the trial court played a role in its decision; and while we consider the appeal de novo, we must give weight to the fact that the trial court saw and observed the witnesses and the attitude of the parties at trial and, likewise, had the opportunity to hear the witnesses and weigh their testimony. Fleharty v. Fleharty, 202 Neb. 245, 274 N. W. 2d 871.

Furthermore, though the determination of the trial court with respect to awarding or changing custody is subject to review, the determination of the trial court will not ordinarily be disturbed on appeal

unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. McCurry v. McCurry, 202 Neb. 235, 274 N. W. 2d 865; Greenfield v. Greenfield, 200 Neb. 608, 264 N. W. 2d 675; Contreras v. Alsidez, 200 Neb. 773, 265 N. W. 2d 452.

While the wishes of a child under the age of 14 years are not controlling where in conflict with what the courts regard as the minor's best interests, still, even though an infant is under the age of 14, if he has reached an age sufficient to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian. Gray v. Hartman, 181 Neb. 590, 150 N. W. 2d 120; State, ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677.

While we have already indicated that both parties appear to be fit and proper persons to have custody of the minor children, there are some distinctions. Father has, during the years for whatever reason, failed to fulfill his financial obligation to his minor children. Although it appears from the evidence that Father has always had adequate employment and sufficient income, he virtually failed to provide for his children as ordered by the court. The records indicate that between 1975 and 1978 he failed to pay more than $4,500 in child support. That is hardly the type of behavior one would expect from a concerned father.

Father maintains that he made payment directly to the wife prior to her death. Yet, the record shows that on September 3, 1976, Father was found by the District Court for Douglas County, Nebraska, to be in arrears $1,560. At the rate of $18.71 per child per week, Father had not, at the time of that hearing in September of 1976, paid for almost 42 weeks.

Likewise, it was 3 months after his former wife's death that he made any attempt to assert claim to the children even though Grandmother had no legal basis for retaining custody as against Father.

We have many times said that the primary consideration in matters involving child custody, whether arising as a part of the proceeding for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child. Liebsack v. Liebsack, 199 Neb. 266, 258 N. W. 2d 130; Bigley v. Tibbs, 193 Neb. 4, 225 N. W. 2d 27; Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617.

While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543.

Our examination of all the evidence in light of the prevailing circumstances convinces us that the children have suffered sufficient trauma for the time being and that a period of certainty, tranquility, and security would indeed be in the children's best interests. After examining all the evidence and speaking with the children, the trial court apparently reached the same conclusion. We therefore affirm the judgment which placed the custody of the children for the present with Grandmother and ordered Father to make child support payments.

One final word may be of value. Unquestionably, the welfare and interests of the children are always paramount. Not only does the court recognize this fact but each of the parties must do so likewise. Hopefully, they can work together in a spirit of cooperation and mutual interest. On the one hand, Father should, as a minimum, promptly make child support payments and, in addition, do what further he is inclined to do for the comfort and welfare of his children. And on the other hand, Grandmother

should do everything in her power to encourage the children to develop a relationship with their father. The placement of legal custody with Grandmother should not prevent Father from having full and free rights of visitation with his children. As is always true in cases of this nature, the matter of custody is always open for further review and change as the circumstances change and warrant a modification. Hopefully, both parties will cooperate and provide the children with a full family relationship.

AFFIRMED.

WHITE, J., dissenting.

I dissent. The majority has neither found the father to be unfit nor to have abandoned his children.

In Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543, we said, in an action involving a contest between the father and the paternal grandparents: "The courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation, or has forfeited that right."

The majority has overruled Williams v. Williams, *supra,* while appearing to approve it. I would reverse.

CLINTON, J., joins in this dissent, except as to the conclusion that Williams v. Williams, *supra*, has been overruled.

BILL J. WOODWARD, APPELLANT, V. DOROTHY LOUISE WOODWARD, APPELLEE.

285 N. W. 2d 838

Filed December 11, 1979. No. 42536.

Appeal from the District Court for Hall County: L. W. KELLY, JR., Judge. Affirmed.

John A. Wagoner, for appellant.

Thomas L. Anderson, for appellee.

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

CLINTON, J.

This is an action for dissolution of marriage by the petitioner husband against the respondent wife. The court dissolved the marriage, made an order dividing the property of the parties between them, and further ordered the husband to pay to the wife "in lieu of further property or support," the sum of $6,000, payable at the rate of $100 per month beginning January 1, 1979. It was ordered that delinquent payments bear interest at the legal rate. The husband has appealed to this court and complains that the wife was awarded too much. We affirm.

The parties were married in September 1951. Five children were born to the marriage, four of whom were emancipated at the time of hearing. The youngest child, a daughter, 17 years of age, resided with her father. At the time of the hearing, the husband was 48 years of age and the wife was 43 years of age.

The wife has cancer of the lymph glands and has undergone chemotherapy and other treatments for that disease which was first diagnosed in about 1975. Sometime in 1977, she left the family home and moved to Colorado to be near a sister. At the time of hearing she was drawing social security disability payments of $114.95 per month and was receiving medicaid and medicare benefits. Since moving to Colorado she has received training and been licensed as a cosmetologist, but she is not employed. She did work during the course of the marriage, but the extent thereof is not shown.

The husband has a net monthly income from two sources of about $985. He is in good health.

During the course of the marriage the parties acquired a home; household furnishings; a 1976 Pacer automobile; a boat, motor, and trailer; a motor-

cycle; a couple of old cars; a savings account of $400; and the tools of the husband's trade as an auto body finisher, valued at about $1,500.

The court found the home to be valued at $40,000. It has encumbrances in the form of a mortgage of $11,600 and a paving assessment of $1,039. The court awarded the husband the home, the household goods, and other personal property described, and directed him to pay certain installment obligations in the amount of $5,887. The court further directed the husband to pay the wife $13,650 within 30 days for her equity in the home and directed that if he did not exercise that option, the home be sold and the net proceeds be divided between the parties equally.

The husband's complaints are not stated with any degree of precision, but we draw the inference that he objects mainly to the payments "in lieu of support," mentioned in the first paragraph of this opinion.

The husband's complaints do not seem meritorious to us. The judgment is affirmed and the wife is awarded the sum of $500 for the services of her attorney in this court, as well as the costs of appeal.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LLOYD WALKER, APPELLANT.

285 N. W. 2d 839

Filed December 11, 1979. No. 42620.

1. **Trial: Evidence.** Error in the admission of evidence may be harmless if the fact is established by other evidence.
2. **Criminal Law: Forgery.** The crime of forgery is established by proving the false making or material altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.
3. **Criminal Law: Evidence.** Essential elements of a crime may be proved by circumstantial evidence.

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 Terry R. Schaaf, for appellee.

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

HASTINGS, J.

Defendant was convicted by a jury of the crime of forgery and has appealed to this court. He assigns as error the reception into evidence of exhibit 1, the forged instrument, and the insufficiency of the evidence as a matter of law to sustain the conviction. We affirm.

Sheryl Larson identified exhibit 1 as a personalized check in her business name of Kenesaw Cafe, drawn on the Adams County Bank of Kenesaw, Nebraska. She testified the signature of Sheryl Larson, which appeared on the instrument as maker of the check, was not her signature nor had she authorized anyone to sign her name, and that defendant, who was named on the check as payee, had never worked for the cafe and had done nothing that would require her to make any payment to him. She further testified the cafe ceased operating in April of 1972, and the bank account was closed at that time. The remaining blank checks and other business papers were moved to the Larson house in Omaha, which was just across the street from Walker's home. Two of defendant's brothers were dating the Larson daughters during a time which included a 4-day period in May of 1978 when Mrs. Larson was in the hospital. Samples of Mrs. Larson's signature were received in evidence which on their face appeared sufficiently dissimilar from the one appearing on exhibit 1 to justify the jury in finding that the check was forged.

Linda Criner, the only other witness to testify, stated she was employed as a cashier at Baker's Supermarket on June 9, 1978, where defendant was also employed. According to Miss Criner, defendant presented exhibit 1 to her for cashing. Exhibit 1 was dated June 9, 1978, in the amount of $250, and contained the name of defendant as payee. During the course of this transaction defendant mentioned he had this second job at the Kenesaw Cafe. Defendant endorsed the check in the presence of the witness, who then paid over the sum of $250 to defendant. Again, the handwriting which named Lloyd Walker as payee and the endorsement of the defendant are sufficiently similar to have justified the jury in finding that the names were written both times by defendant.

Defendant's objection to exhibit 1 was that it was stamped "Returned Not Paid," with a box checked indicating "Account Closed," and a blank filled in showing "No Account," all of which was hearsay. Were it necessary to rely upon the return stamp to establish the nonexistence of the particular account, defendant's objection would be well taken. However, this information had been testified to by the former owner of that account, Mrs. Larson. There was clearly no prejudice to the defendant. State v. Huffman, 185 Neb. 417, 176 N. W. 2d 506 (1970).

In this case there was believable evidence that the signature of the purported maker was not that of Sheryl Larson; that her apparent signature was placed on the check without her authority; and that it was done by defendant with the intent to defraud, and by offering the check in this manner and receiving cash therefor, the party cashing the forged instrument was thereby defrauded. The crime of forgery is established by proving the false making or material altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.

Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N. W. 2d 292 (1960). The fact that some of the elements of the crime were established by circumstantial evidence is of no consequence. State v. Fox, 192 Neb. 424, 222 N. W. 2d 121 (1974). The jury did believe the evidence offered by the State, and it is not within the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, or weigh the evidence. State v. Huffman, *supra*.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD L. REED, APPELLANT.

286 N. W. 2d 111

Filed December 11, 1979. No. 42630.

1. **Criminal Law: Escape.** Threat of future injury does not constitute a defense to a charge of escape.
2. **Motions, Rules, and Orders: Mistrial.** A motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution.
3. **Criminal Law: Indictments and Informations.** The District Court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused had his preliminary examination.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, for appellant.

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

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

WHITE, J.

The defendant, Ronald Reed, was charged with the offense of escape and convicted after trial to the court. The defendant appeals. We affirm.

An understanding of the facts is necessary to a discussion of the issues raised in the appeal. The defendant was serving a sentence of 10 to 25 years in the Nebraska Penal and Correctional Complex for the offense of entering a bank with unlawful intent and shooting with intent to kill, wound, or maim. The approximate earliest date defendant was eligible for release was December 30, 1985. While incarcerated, the defendant became embroiled in a conflict with a guard, John Hawkins, and the prison administration. Hawkins allegedly engaged in homosexual relations with a prisoner, Robert Brooks, and as a consequence was removed from his regular duty at the prison. Brooks had informed the prison officials of this relationship and further implicated Hawkins by alleging the guard smuggled drugs into the prison for him. Hawkins asked Reed to talk to Brooks to ascertain the information Brooks was conveying. Defendant stated that Brooks denied having a sexual relationship with the guard but said that his desire to be released from the institution at an earlier date prompted his statements against the guard. The defendant then contacted John Meyers, the president of the guard union, and told him he had information that would exonerate Hawkins. Deputy Warden Watson, hereafter Watson, became aware of the defendant's role. Reed informed Watson that Brooks had fabricated his story about Hawkins but that Brooks said he had a homosexual relationship with Watson.

On August 25, 1976, Reed was granted an extension of the limits of his confinement to allow him to participate in the educational release program. Defendant asserted this release was a result of an agreement with Watson. According to the defend-

ant, Watson agreed that Brooks would receive an early parole and the defendant would be placed on the educational release program if the defendant would assure Watson that Brooks would not testify as to any relations between Brooks and Watson. After approximately 2 months on the educational release program, the defendant informed Watson that he would no longer take responsibility for Brooks. Allegedly this news angered Watson. The defendant testified that during a telephone conversation on October 26, 1976, between 6 and 7 p.m., Watson threatened to "eliminate" the defendant. Reed was scheduled to be at the Selleck Quadrangle Building Learning Center from 6 to 8 p.m., that evening. Officer Zierke, the on-duty supervisor at the Lincoln work release center, went to the university to check the defendant's class schedule and could not locate the defendant anywhere on campus. The defendant claims he returned to his assigned tutoring session after the telephone conversation with Watson and was informed by a university employee that some guards were looking for him. The defendant called the work release center and spoke with Officer Zierke. Zierke told Reed to return to the center that evening at approximately 9:50 p.m. The defendant did not return.

The defendant fled, traveling first to Omaha, then to Denver, and finally to Los Angeles where he was apprehended on February 3, 1977. The defendant did not voluntarily surrender himself to the authorities. After arrest in California, the defendant requested to be placed in another penal institution if he was brought back to Nebraska. This request was denied. He made the same request of Judge Cheuvront in Nebraska, which was denied. Reed was subsequently extradited to Nebraska on August 17, 1977, and held in the county-city jail in Lincoln pending trial on the charge of escape.

The defendant waived his right to trial by jury and stipulated the case should be submitted on certain

exhibits. The defendant does not contend the waiver was not voluntarily and intelligently given. The defendant testified the waiver was part of a plea bargain whereby he would waive his right to a jury trial if Watson would submit to a polygraph examination. The defendant took a polygraph examination on November 22, 1978, and Watson submitted to a polygraph examination on December 10, 1978. Part of the agreement included that both parties would be asked essentially the same questions, including the question of whether Watson and the defendant had discussed the Hawkins-Brooks affair. Defendant protested that the examiner's questions to Watson were asked in a significantly different form and asked leave to withdraw his waiver of a jury trial. This request was granted. Following this motion, the State requested permission to file an amended information alleging defendant to be an habitual criminal. The court granted permission to amend. The defendant again waived a jury trial. The court found the defendant guilty.

The defendant assigns three errors: The evidence did not show beyond a reasonable doubt that the defendant committed the act because the defense of duress, necessity, or choice of lesser evils was applicable; the defendant was twice put in jeopardy; and the court erred in permitting the State to file an amended information charging defendant with being an habitual criminal. While we agree that the trial court could find that the duress or necessity by threat defense was shown not to exist beyond a reasonable doubt, we shall discuss the extent that such defenses exist in Nebraska.

There are no cases in this state dealing specifically with duress or necessity as a defense to the charge of escape. However, this court has discussed the defense of justification for violent assault. In State v. Graham, 201 Neb. 659, 271 N. W. 2d 456 (1978), the defendant testified that as a result of assaults upon

him while in prison and fear for his life, he attempted escape by assaulting a prison nurse. The trial court refused to instruct on the defense of justification. This court affirmed the trial court, quoting from State v. Schroeder, 199 Neb. 822, 261 N. W. 2d 759, in interpreting section 28-836, R. R. S. 1943: " 'The present statutory requirement is that the actor believe such force is immediately necessary to protect himself against the use of unlawful force by the other person on the present occasion.' " The court explicitly specified an immediacy requirement. "* * * for the choice of evils justification * * * to be available as a defense, it must first be shown that the defendant's conduct was necessitated by specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged." The concurrence by Clinton, J., suggests the defense was not applicable to an assault on an innocent person. State v. Graham, *supra*, does not support defendant's proposition that the defense of necessity or duress should be available in escape cases. Graham concerned the use of violent force against a prison nurse to justify an unlawful act. The court did not, nor does it now, decide the availability of the duress or necessity defense in a prison escape.

The general rule is that a prisoner's alleged fear of violence at the hands of a prison guard or officials does not justify an escape. In State v. Alberigo, 109 Ariz. 294, 508 P. 2d 1156 (1973), the prisoner's fear that numerous police officers would retaliate for his striking a police officer at the time of his arrest did not excuse an escape. See, also, Matthews v. State, 288 So. 2d 712 (Miss., 1974), where fear of death threats by a prison guard was not a defense to the charge of escape. See, generally, Annotation, Duress, Necessity, or Conditions of Confinement as Justification for Escape from Prison, 69 A. L. R. 3d

678. In State v. Milum, 213 Kan. 581, 516 P. 2d 984 (1973), in discussing the defense, the court pointed out the death threats made against the prisoner by the deputy warden were aimed at some indefinite time in the future. The defense was not allowed because the threats were not sufficiently "imminent."

Closely related to a prisoner's fear of violence at the hands of prison officials is the fear of impending death or serious bodily injury at the hands of other prisoners. However, the immediacy requirement is still necessary. A leading case is State v. Green, 470 S. W. 2d 565 (Mo., 1971). An escapee was told during the noon hour by a group of four or five inmates that they would be at his cell that night and unless he submitted to their homosexual advances, they would kill him. The court held that since defendant had several hours in which he could have reported threats and names of those making threats to authorities in charge of the center, the defense of necessity was not available and the court did not err in refusing his offer of proof. Quoting from State v. St. Clair, 262 S. W. 2d 25 (Mo., 1953), the court said: "[T]o constitute a defense to a criminal charge, the coercion must be present, imminent, and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. Threat of future injury is not enough."

This court does not reject the possibility that the defense of necessity or duress may be available in some circumstances. Even if this court adopts the defense, we would still reject the defense in Reed's case because he does not meet the preconditions for the defense. Until 1974, when People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110, was decided, no court had reversed a conviction for the crime of escape because of threats of death or great bodily harm. The California Court of Appeals for the Fourth District became the first appellate court to

hold that a prison escape induced by threatened, imminent homosexual assault by other inmates may be justified as a matter of necessity so long as the inmate does not resort to violence in the escape and reports to proper authorities when he has attained a position of safety from the immediate threat. The Lovercamp court set out the standards required for the defense. First, the prisoner must be faced with a specific threat of death or substantial bodily injury in the immediate future. Second, there must be no time for a complaint to the authorities or there must exist a history of futile complaints. Third, there must be no opportunity to resort to the courts. Fourth, there must be no evidence of force or violence used toward prison personnel or other innocent persons in the escape. The final condition requires that the prisoner must report immediately to the proper authorities when he attains a position of safety from immediate threat. Clearly, under the Lovercamp criteria, Reed would not be entitled to the defense of necessity since at least four and possibly five of the Lovercamp criteria have not been met.

The defendant raises two other issues. The defendant claims he was subjected to double jeopardy by the commencement of a second trial against him. By reviewing the procedural events in the instant case, it is evident that defendant's double jeopardy claim is without merit. The defendant voluntarily waived his right to a jury trial. Reed then withdrew his waiver of a jury because he was dissatisfied with the way the polygraph examinations were conducted. The court granted defendant's motion and the defendant's case was reset for trial before the next convened jury panel. Subsequently, the defendant again waived a jury and agreed to a trial by stipulation. To analyze defendant's claim of double jeopardy, it must be noted that the first trial was terminated by a motion made by the defendant. The

United States Supreme Court has said: "* * * motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, * * *." United States v. Jorn, 400 U. S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). According to that decision, the defendant would have to show prosecutorial or judicial overreaching to come outside the general rule that termination of trial granted on the defendant's own motion removes any double jeopardy violations. The defendant is unable to point to anything in the record to justify the claim of judicial or prosecutorial overreaching or bad faith. The double jeopardy claim is without merit.

Finally, the defendant claims the court erred in permitting the county attorney to file an amended information charging defendant with being an habitual criminal. The defendant contends the only reason for the requested amendment was vindictiveness. This claim is without merit. This court has said: "The district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused had his preliminary examination." Losieau v. State, 157 Neb. 115, 58 N. W. 2d 824 (1953). In the same case, citing Jones v. State, 147 Neb. 219, 22 N. W. 2d 710 (1946), this court said: "The charge that one is an habitual criminal is not the charge of a distinct offense or crime." Without an affirmative showing of prosecutorial vindictiveness, which has not been made, the defendant's claim is without merit.

Finding no error, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN WILLIAM MCDANIEL, APPELLANT.

285 N. W. 2d 841

Filed December 11, 1979. No. 42682.

1. **Criminal Law: Convictions.** A determination of guilt of the crime charged and the imposition of a sentence constitute a conviction.
2. **Statutes: Intent.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than the literal meaning that would have the effect of defeating the legislative intent.
3. **Criminal Law: Convictions.** A person can be said to be charged with a crime as well after conviction as before. The conviction simply establishes the charge conclusively.

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

Herbert M. Sampson III, Box Butte County Public Defender, 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, appellant in this court, John William McDaniel, was charged and convicted after a trial to the court for failure to appear for sentence in violation of section 29-908, R. R. S. 1943. The defendant was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex, consecutive to a sentence currently being served. On June 5, 1978, the defendant appeared in the District Court for Box Butte County and pled guilty to a charge of receiving stolen property. Defendant was sentenced to a term in the Nebraska penal complex. The execution of the sentence was delayed and the defendant was released on a bond of $3,000. The bond was a bind-over bond from the county court of Box Butte County but was continued up to and after the date of

June 27, 1978, on which date the defendant was sentenced. The defendant, at the date of sentence, was ordered to surrender himself to the sheriff of Box Butte County on July 25, 1978, at 10 a.m. Defendant did not surrender himself on that date or within 3 days thereafter. The defendant maintains the court erred in several respects. All of the assignments of error involve the same question. For reasons discussed herein, we affirm the judgment of the District Court.

Section 29-908, R. R. S. 1943, provides, in pertinent part: "Whoever *is charged with a felony and is released from custody under bail, recognizance, or a conditioned release and willfully fails to appear before the court granting such release when legally required or to surrender himself within three days thereafter, shall be guilty of a felony,* and shall, upon conviction thereof, be imprisoned in the Nebraska Penal and Correctional Complex * * * for not more than three years, in addition to any other penalties or forfeitures provided by law." (Emphasis supplied.)

The defendant argues that the words "charged with a felony" mean that the defendant stands accused of the commission of a crime and is not yet convicted and the phrase does not include a defendant who has been convicted and sentenced. Essentially, the defendant argues that there is no criminal statute covering the conduct in which he engaged and that the State is left to whatever civil remedy it might have with respect to the defendant's failure to appear to begin the service of his sentence.

The defendant argues that penal statutes may not be extended by implication and that a person cannot be punished for an offense which is not made penal by the plain import of the words upon the pretense that he has offended its spirit. He cites numerous cases, including State v. Mosley, 194 Neb. 740, 235 N. W. 2d 402 (1975). We are persuaded otherwise. The

legislative intent, as exhibited by testimony offered by the bill's sponsor, recites as follows: "Our primary reason for introducing this is that so we can get the approval and the support of district judges, county judges, and municipal judges in instances when we think someone should be qualified for release on their own recognizance. But it is recognized that while they may be released without having to post a money bail, they are also required . . . . . In case they do not appear, do not show up when they are scheduled to appear *either for the trial or subsequent appearance,* there is a separate and distinct penalty provided for." (Emphasis supplied.) Proceedings of the Judiciary Committee of the Eighty-second Legislature, February 2, 1971.

In State v. Mosley, *supra*, this court said that a determination of guilt of the crime charged and the imposition of a sentence constitute a conviction. A person to be convicted of a crime must also have had the constituent and earlier element of being charged with a crime. "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." State v. Nance, 197 Neb. 257, 248 N. W. 2d 339 (1976).

The defendant concedes that in extradition cases the person convicted of a crime is considered to have been charged with the crime for the purposes of jurisdiction to order the defendant returned to the requisitioning state. As said in Drinkall v. Spiegel, Sheriff, 68 Conn. 441, 36 A. 830 (1896): "A person can be said to be charged with a crime as well after conviction as before. The conviction simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a 'charge,' within

the true intent and meaning of the Constitution. An indictment on affidavit merely presents the charge, while a conviction proves it."

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. WILLIAMS, APPELLANT.

287 N. W. 2d 18

Filed December 18, 1979. No. 42235.

1. **Criminal Law: Trial: Evidence.** Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses.
2. **Criminal Law: Trial: Evidence: Intent.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
3. **Criminal Law: Trial: Evidence.** Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible.
4. **Criminal Law: Trial: Evidence: Homicide.** If a photograph illustrates or makes clear some controverted issue in a homicide case, proper foundation having been laid, it may be received in evidence even if it is gruesome. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court.
5. **Criminal Law: Trial: Evidence: Homicide: Intent.** In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.
6. **Criminal Law: Venue: Judgments.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown.
7. **Criminal Law: Trial: Evidence: Confessions.** The admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made.
8. **Criminal Law: Trial: Judgments: Confessions.** A finding by the

trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.

9. **Criminal Law: Trial: Discovery.** The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not affect "materiality" in the constitutional sense.
10. _____: _____: _____. In a criminal case the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion.
11. **Criminal Law: Juries: Instructions: Mental Health.** It is not error to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity.
12. **Criminal Law: Indictments and Informations: Evidence: Verdicts.** It is only where 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 a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
13. **Criminal Law: Statutes: Sentences: Words and Phrases: Death Penalty.** In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.
14. **Criminal Law: Statutes: Supreme Court: Homicide: Time.** Under L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973.
15. **Criminal Law: Death Penalty: Supreme Court: Homicide.** Where a death sentence has been imposed, and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

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

Dennis R. Keefe, Lancaster County Public Defender, Thomas L. Hagel, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

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

MCCOWN, J.

Robert E. Williams pleaded not guilty by reason of insanity or mental derangement to two counts of murder in the first degree and one count of first degree sexual assault. He was found guilty by a jury on all three counts and sentenced to death on each of the two murder counts and to imprisonment for not less than 8⅓ years nor more than 25 years on the sexual assault count.

In the late afternoon of August 11, 1977, the bodies of Patricia A. McGarry and Catherine M. Brooks were found in the McGarry apartment in Lincoln, Nebraska, after a search was instituted when neighbors found the 5-year-old daughter of Catherine Brooks wandering in the neighborhood looking for her mother.

The naked body of Catherine Brooks was found lying face down in the center of the living room floor. A pool of blood surrounded her head. There was a nonfatal bullet wound in her back and two bullet wounds behind her left ear. Later medical examination revealed spermatozoa in the vagina and in the rectal tract. The pathologist testified that the spermatozoa would have had to be deposited within an hour of her death.

The body of Patricia McGarry was lying in the dining room, face up, clad in a blue housecoat. She had also been shot three times, once under her right ear and twice in the neck. There was a bloody trail on the carpet from the living room into the dining room to the spot where Patricia's body lay.

The police found an empty beer bottle with latent fingerprints on a chair. Later examination estab-

lished the fingerprints as those of the defendant. The police also found a full box of .22 caliber long rifle shells on the coffee table in the living room and another unfired .22 caliber shell on the sofa. The casing of a .22 caliber shell was found on the floor of the living room. There was a bullet hole in the wall between the living and dining rooms, and a spent bullet was found in the entryway between the two rooms. Later investigation established that on August 10, 1977, at approximately 7:15 p.m., a model K-22 Smith & Wesson .22 caliber revolver and five boxes of .22 caliber long rifle shells were purchased by the defendant at a store in Lincoln.

Evidence at trial established that on August 11, 1977, at approximately 9:30 a.m., the defendant appeared at the apartment of another young woman in Lincoln, Nebraska. She had been acquainted with the defendant for approximately 6 months and he had been a babysitter for her 2-year-old daughter on occasion. The defendant told the woman that his car was broken down and asked to use her telephone. She admitted him and he then told her he needed to stay in her apartment for a while. She suggested that he stay in the storage room area of the apartment complex instead. The defendant then drew a revolver and demanded that she have sexual relations with him. She tried to lock herself in the bathroom but the defendant forced the door open and broke off the lock. He struck her in the chest and on the side of the head with the gun and threatened to blow her head off, and then raped her. The defendant remained in the apartment for several hours and raped the woman repeatedly.

At approximately 4 p.m., the defendant ordered the woman to bring her 2-year-old child and go to his car with him. As they approached the curb he told her she was free to go. She immediately went to a neighbor's home and called the police.

The woman testified that during the time the de-

fendant had been with her, he drank one beer and smoked a joint of marijuana but appeared normal and did not appear to be intoxicated. Other witnesses who had been with the defendant on August 10, and one as late as 1:30 a.m., on August 11, 1977, testified that on those occasions the defendant appeared normal in speech and actions and did not appear to be intoxicated, although he had been drinking.

The evidence at trial established that defendant left the woman's apartment in Lincoln about 4 p.m., August 11, 1977, and about an hour later was seen at a service station in Fremont, Nebraska, some 50 miles away, where he stopped and purchased gasoline. The station attendant testified that the defendant's speech and coordination appeared to be normal, although he smelled alcohol on the defendant's breath.

At approximately 10:15 p.m., on August 11, 1977, a deputy sheriff observed and checked the defendant's car at a park and rest area in Cherokee County, Iowa, and checked it periodically thereafter through the night. At 6:15 a.m., the deputy had the car towed away. Upon examination of the car, the deputies discovered a packaging box for a Smith & Wesson K-22 revolver; a box of .22 caliber long rifle cartridges from which six cartridges had been removed; a bag of marijuana; and some gas cans with negroid hairs on them.

Shortly after 6 a.m., on August 12, 1977, Mrs. Jack Montgomery, who lived 1½ miles west of the park and rest area in which defendant's car had been found, discovered that her car was missing from the garage. There was a blanket in the car and another blanket was also missing. She also found a checkbook with the name of the defendant imprinted on the checks lying in the driveway in front of the garage. At approximately 10 o'clock the same morning the Montgomery car was found abandoned in a

ditch about 20 miles northeast of the Montgomery farm.

A little after 7 a.m., on the same morning, Elbert Bredvick was standing in his farmyard approximately 5 miles southwest of the point at which the Montgomery car had been abandoned. Bredvick observed the defendant approaching carrying two blankets draped over his shoulder. The defendant asked for directions to the nearest town. Bredvick gave the defendant directions which led defendant past the Wayne Rowe farmhouse one-half mile to the west, and the defendant departed in that direction.

On the morning of August 12, 1977, Mrs. Wayne Rowe left the farm home at 7:45 a.m., for an appointment at her hairdresser. Wayne Rowe left the house about 8:15 a.m., and returned shortly after noon, expecting his wife to be home. He observed that his wife's car was gone and when he entered the house he saw his wife's purse on the chair and the morning mail on the table. About that time an Iowa state trooper arrived and Rowe and the trooper went upstairs and found Mrs. Rowe's naked body on the bed. There was a shotgun wound in her side and another in her back, and there was a wound in her neck from a .22 caliber bullet. Later examination established that she had also been sexually assaulted.

Negroid hairs were found in her hand and on the bedspread which compared favorably in diameter, coloration, pigment distribution, scale patterns, and medullation to samples taken from the defendant and the hairs found on the gas cans in his car. A .22 caliber bullet was found in the fibers of the bedspread which matched the bullets recovered from the bodies of Catherine Brooks and Patricia McGarry. A shotgun which had been kept in the Rowe home was missing and the telephone line had been cut.

In the bushes behind the Rowe garage officers

found the blankets which were identified by Bredvick as the blankets that had been draped over the defendant's shoulder earlier that morning. The Rowe car was found later in St. Paul, Minnesota. Inside the car was a live round of .22 caliber ammunition and a misfired cartridge with a firing pin impression which matched a casing found at the murder scene.

On August 13, 1977, at approximately 1:30 p.m., in a suburb of St. Paul, Minnesota, the defendant confronted Walter Behun at gunpoint in the Behun yard and ordered Behun to drive him to St. Paul. They drove around for some time, ending at a railroad freight yard, where the defendant tied Behun up with belts and a sweat shirt, gagged him, and left him in a caboose. Behun testified that the defendant did not appear to be intoxicated.

About 3 p.m., on August 13, 1977, a young woman was returning to her car in a parking lot in St. Paul, Minnesota. She opened the car door and placed her purchase on the floor. The defendant came up behind her and ordered her to get into the car or he would shoot her. Before she had time to do so, he shot her once in the arm and again later behind her left ear. The defendant pushed her into the car, demanded the keys, and drove to a remote country area where he raped her. After the assault, the defendant tied her hands and legs and drove off in her car. She managed to untie herself, got to a farmhouse and was taken to the hospital, where she ultimately recovered.

The evidence indicates that after August 13, 1977, the defendant went to Chicago, Illinois, and then back to Lincoln, Nebraska, where he was arrested in the railroad yards on the early morning of August 18, 1977.

The defendant made a statement to the police which was admitted in evidence, and also testified at trial. Essentially, the defendant admitted shooting

both Catherine Brooks and Patricia McGarry at the apartment in Lincoln, but denied raping Catherine Brooks. He testified that he was heavily under the influence of drugs and liquor at the time of the shootings and that his recollection was consequently very vague and confused.

On the issue of insanity raised by the defendant's plea, two psychiatrists testified for the prosecution, and both testified that although the defendant suffered from a personality disorder, he was not insane at the time of the murders and assault. Two psychiatrists for the defense testified that at the time of the crimes the defendant suffered from a paranoid state beyond that of a personality disorder. One testified that the defendant's perception of reality and his judgment were seriously impaired, but the doctor could not say the defendant did not know that what he was doing was wrong. The other doctor testified that the defendant's thinking process was distorted and that he would know his actions were wrong only if he took time to think. At the conclusion of the trial the jury found the defendant guilty on all three counts. A three-judge panel sentenced him to death on each of the two murder counts and to imprisonment for not less than 8⅓ years nor more than 25 years on the sexual assault count, and this appeal followed.

The defendant contends that the trial court erred in admitting evidence of crimes other than those with which the defendant was charged, and that the evidence of such crimes was inadmissible and prejudicial. The defendant argues that none of the evidence of subsequent crimes was needed to prove any of the elements of the crimes charged, and that there is no legal connection between such subsequent crimes and the crimes with which the defendant was charged. He relies on the general rule that evidence of other crimes is not admissible to prove the defendant guilty of the particular crime with

which he is charged. As an exception to that rule, this court has repeatedly held that evidence of other crimes similar to that charged is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Casados, 188 Neb. 91, 195 N. W. 2d 210. In sexual assault cases evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses. State v. Walker, 200 Neb. 273, 263 N. W. 2d 454.

Section 27-404 (2), R. R. S. 1943, provides: "(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See State v. Nielsen, 203 Neb. 847, 280 N. W. 2d 904.

Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. Evidence which is not sufficiently related is excluded on the ground that the probative value is outweighed by the risk of undue prejudice. The question of probative value depends upon many considerations, including proximity in point of time and place, the character of the evidence, and all the surrounding circumstances. See Annotation, 92 A. L. R. 3d 545.

Sexual crimes have consistently been classified as a class of crimes in which evidence of other sexual crimes has been recognized as having independent relevancy. Recent cases recognize that the problem cannot generally be solved by virtue of a mechanical rule of relevancy but, instead, is one of balance.

McCormick on Evidence (2d Ed.), § 190, p. 447, at p. 453, states: "[T]he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility."

The trial court noted that in this case the crimes charged must, of necessity, be proved by circumstantial evidence and inference because of the lack of an eyewitness or a complete detailed statement of the defendant. The trial court's ruling on the defendant's motion in limine to exclude evidence of other crimes specifically stated: "The issue of mental competency bearing on the intent of the defendant in committing the alleged crimes, the marked similarity of design and motive of the other crimes and the closeness of the time period make the admissibility of the other crimes strongly relevant and overcome the prejudice and accumulation of evidence which results therefrom.

"The court further finds that the evidence of the various stolen automobiles is necessary to trace the course the defendant followed between the alleged other crimes which in the court's judicial discretion are admissible."

Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Nielsen, *supra*. The evidence of other crimes in the case now before us constituted a continuous chain of evidence detailing the course of defendant's flight, and the patterned course of criminal conduct which was an

integral part of it. The evidence of other crimes was relevant to prove motive, opportunity, and intent, and that relevance is greatly strengthened by the fact that all the other crimes occurred within a period of less than 72 hours after the crimes with which the defendant was charged. Not only was the evidence relevant on the issue of motive and intent, but it established plan, preparation, and a method of operation substantially similar, including the use of the same gun and the similar wounds in the neck and near the ear of the victims.

There was no abuse of discretion on the part of the trial court in admitting the evidence of other crimes here. The prejudicial effect on the defendant of the admission of the evidence of other crimes is clearly outweighed by the relevance of that evidence to prove the crimes with which the defendant was charged.

The defendant next contends that the photographs taken at the McGarry apartment in Lincoln and the Rowe farm in Iowa should not have been admitted because they were inflammatory, gruesome, and prejudicial, and that whatever relevance they may have had was outweighed by their prejudicial effect. We disagree.

Of the 22 photographs taken in Lincoln at the scene of the crimes charged, the majority of them were exterior and interior scenes showing only inanimate objects, and the defendant did not object to their admission. The defendant objected to the admission of seven photographs, only some of which might be said to be gruesome. Three of the photographs were of Catherine Brooks; one of the back of her head and showing a blood stain beneath it; the second was of her upper torso and back; and the third was a view of her entire body, partially obstructed by a chair. Two photographs of Patricia McGarry as found at the scene were admitted into evidence; one of the upper torso showing the blood-stained carpet and

book beneath her head; and the other of her entire clothed body. Two post mortem photographs of her, one a right view and the other a left view, were also admitted to show the location of wounds. Some cumulative photographs were not received into evidence and only three of the challenged seven photographs might reasonably be said to be gruesome.

The photographs of the Iowa crime scene are substantially similar in nature to those taken at the scene of the Nebraska crimes. The majority are exterior and interior scenes, showing only inanimate objects and are not gruesome. There were three photographs showing three different views of the victim's body. One showed the wound on her wrist, one showed the wounds on the left side of her head, and one showed the body as it was found, with the shotgun wound in the side. The three photographs showed the condition of the body and the nature and extent of the wounds. One additional photograph of the victim's body was excluded.

The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. State v. Freeman, 201 Neb. 382, 267 N. W. 2d 544. Although it is true that the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Partee, 199 Neb. 305, 258 N. W. 2d 634. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich, 191 Neb. 475, 215 N. W. 2d 637.

The photographs admitted here were relevant and of direct probative value in establishing the various elements of the crimes charged. The court did not abuse its discretion in admitting the photographs into evidence.

The defendant next contends that the trial court erred in refusing to sustain a motion for a change of venue. The defendant contends that because of extensive publicity in the news media, virtually all the residents of Lancaster County had knowledge of the case, and many had formed opinions as to the guilt or innocence of the defendant. The defendant therefore argues that he could not receive a fair trial, nor could possible prejudice be cured by extensive voir dire examination.

The trial court held a hearing on the motion for change of venue prior to trial, at which time the results of an opinion survey conducted by two professional poll researchers and other evidence as to the nature and extent of pretrial publicity were introduced. The trial court reserved ruling on the motion pending the final selection of the jury. Extensive voir dire on jury selection extended over a period of 5 days, and the trial court then denied the defendant's motion for change of venue.

The record establishes that 11 of the 12 jurors recalled little about the publicity they had heard or read, and none had formed an opinion on the issue of the defendant's guilt. The twelfth juror at first indicated an opinion concerning some elements of the case, but also indicated confusion as to the voir dire questions and later responded that she did not have any opinion one way or the other. Upon questioning by the court she stated that she did not have a fixed opinion and that she could set aside any impressions she may have gotten from publicity and decide the case fairly on the evidence given in the courtroom. All the jurors indicated that they believed they could be fair and impartial jurors.

The defendant takes the position that extensive pretrial exposure of jurors to information and news accounts as to the crimes with which the defendant was charged is sufficient, standing alone, to deprive him of due process. That conclusion is unfounded. See Murphy v. Florida, 421 U. S. 794, 95 S. C. 2031, 44 L. Ed. 2d 589.

The burden of showing essential unfairness must be sustained by the one who claims such injustice and seeks to have the result set aside. As the United States Supreme Court stated in Irvin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751: "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

In this state a motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821. While there was extensive pretrial publicity in the case now before us, we believe the record supports the action of the trial court in denying the motion for a change of venue and there was no abuse of discretion.

Defendant next contends that the trial court erred in failing to sustain defendant's motion to suppress all statements, admissions, and comments obtained from the defendant by law enforcement officers. Essentially the argument centers upon the fact that the Miranda rights were not included on the tape recording of the defendant's statement, and the defendant testified that the Miranda rights were never read to him, and that he requested the presence of his attorney.

Two police officers specifically testified that the Miranda rights were read to the defendant prior to the statement, that he responded affirmatively to each of them, and that the defendant did not request a lawyer and consented to give the statement at that time. The defendant's argument is that because the giving of the Miranda rights was not included on the tape recording, the absence from the recording is conclusive evidence that the rights were not given. Two police officers not only testified affirmatively that the Miranda rights were given, but explained why the tape recorder had not been turned on at the outset of the interrogation.

In this state the admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made. See State v. Davis, 180 Neb. 830, 146 N. W. 2d 220, cert. den., 386 U. S. 998, 87 S. Ct. 1320, 18 L. Ed. 2d 348. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Medina, 189 Neb. 765, 204 N. W. 2d 785. The trial court's finding of voluntariness is supported by the record and is not erroneous.

The defendant asserts that he was denied a fair trial and due process of law because of the State's prejudicial misconduct in withholding evidence favorable to the defendant in direct violation of the trial court's order concerning discovery and disclosure. In response to defendant's pretrial motions for disclosure and discovery, the trial court ordered the State to provide to the defendant for inspection and copying or photographing: (1) The defendant's statement; (2) the defendant's prior criminal record, if any; (3) the names and addresses of all witnesses on whose evidence the charge is based, including any witnesses which the prosecution intends to use in rebuttal; (4) the results and reports of

physical and mental examinations, and of scientific tests or experiments made in connection with this particular case; and (5) documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the State.

Defendant complains of violations which involve documents under paragraph 5 of the order and center around 18 police investigative reports which contained, in many instances, summaries of statements of witnesses as well as inferences or conclusions of officers as to the validity and veracity of portions or all of the witnesses' statements. The defendant asserts that if the testimony of a witness at trial differed in any respect from the statement as reported in the police report, the State should have delivered the police report to the defendant prior to trial. Such a conclusion is wholly unwarranted. At the hearing on defendant's motion for new trial, the alleged violation of the discovery order was raised and evidence introduced, and the trial court, on this issue, specifically found: "Nothing in the exhibits appears to be materially at odds with the testimony given at the trial. Those who testified were subjected to cross-examination at length by defendant's counsel or were called as witnesses for the defendant. No showing is made that information in the police reports could have been used to impeach any witness." The record fully supports that conclusion, and also establishes without serious question that the information in the police reports was not exculpatory or a mitigation of the degree of the offenses which would have been required to have been disclosed by the prosecution.

The defendant's position is that if a defendant has made a general motion for discovery and disclosure which has been granted in the sense that it covers documents of whatsoever kind or nature which could be used as evidence by the State, the State is re-

quired to produce for the defendant anything which might aid in his defense. We can find no support for such a contention. In Moore v. Illinois, 408 U. S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706, the United States Supreme Court said: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." In a similar vein, this court said: "We have not yet reached the point in this state where the county attorney is required to give his entire work product to the defense." State v. Williams, 183 Neb. 257, 159 N. W. 2d 549.

In United States v. Agurs, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342, the United States Supreme Court said: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

In State v. Isley, 195 Neb. 539, 239 N. W. 2d 262, this court said: "In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion." There was no abuse of discretion here.

The defendant assigns as error the trial court's refusal to instruct the jury with regard to the consequences of an acquittal by reason of insanity. The recent case of State v. Reitenbaugh, 204 Neb. 583, 284 N. W. 2d 19, has determined the issue adversely to the defendant. In that case we held: "It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity."

Defendant also assigns as error the trial court's failure to dismiss or to direct a verdict in favor of the defendant as to the first degree sexual assault count. For almost a century it has been the rule in this state that: "It is only where 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 a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." State v. Webb, 197 Neb. 662, 250 N. W. 2d 625.

While the evidence in this case may be entirely circumstantial as to the sexual assault charge, there can be no real doubt that it was more than sufficient to go to the jury, and the trial court did not err in overruling the motion for directed verdict.

Finally, the defendant contends that the sentence of death is excessive relative to the facts of the case under the applicable statutory considerations.

Following the introduction of evidence at a sentencing hearing, the three-judge panel specifically found that the following aggravating circumstances were present: (1) That defendant had been previously convicted of another crime involving the use of threat or violence to the person, and had a substantial history of serious assaultive criminal activity; (2) that the murder of Catherine M. Brooks was committed in an apparent effort to conceal the identity of the perpetrator of a crime, but that the murder of Patricia McGarry was not; (3) that both murders were especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence and totally without any regard for human life; and (4) that at the time the murder was committed the defendant also committed another murder.

The sentencing panel found as the single mitigating circumstance that the defendant possesses an antisocial personality which, with his intoxication from the use of alcohol and drugs and emotional disturbance at the time he committed the murders, did, in some manner, diminish the defendant's capability to conform his conduct to the requirements of the

law, but not to such an extent as to excuse him for the legal consequences of his conduct in the commission of the crimes.

The sentencing panel further found that the aggravating circumstances outweighed any mitigating circumstances. The panel then imposed the death penalty on each count of first degree murder.

The procedures of the sentencing panel complied fully with the statutory standards and specific procedures applicable to trial courts in cases of conviction for murder in the first degree. See Chap. 29, art. 25, R. R. S. 1943, and R. S. Supp., 1978.

Chapter 29, article 25, includes the provisions contained in L.B. 711, Laws of 1978, now codified as sections 29-2521.01 et seq., R. S. Supp., 1978, which apply primarily to the method of imposition of death sentences in the trial court and review of such sentences by the Supreme Court. The expressed purpose of L. B. 711 is to apply scrupulous standards of fairness to the imposition of the death penalty to insure that the death penalty should be applied uniformly and not arbitrarily.

Sections 29-2521.02 and 29-2521.03, R. S. Supp., 1978, provide that the Supreme Court shall, within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973, and that the Supreme Court, upon appeal, shall determine the propriety of the sentence in each case involving a criminal homicide "by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous

cases are applicable only in a case where a sentence of death has been imposed.

A primary foundation, basic to the review of the statutory provisions referred to, is the fact that in this state first degree murder is the only crime for which the penalty of death can be imposed. The provisions of Chapter 29, article 25, dealing with sentencing, apply only to a conviction for first degree murder under section 28-303, R. S. Supp., 1978. See §§ 29-2519 and 29-2520, R. S. Supp., 1978. The Nebraska act, L.B. 711, Laws of 1978, was patterned after the Georgia act which requires the Georgia Supreme Court to review death sentences and determine: "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 27-2537, Georgia Code. That identical language appears in section 29-2522 (3), R. S. Supp., 1978, which applies primarily to initial sentencing in the trial court. The Georgia Supreme Court has restricted its review and comparison of "similar" cases to cases involving crimes for which the death penalty is permissible. It should be noted also that in Georgia the death penalty is permissible for more than one specific crime. The review and comparison by the court has been restricted to cases involving the identical crime—felony murder against felony murder, rape against rape. Coley v. State, 231 Ga. 829, 204 S. E. 2d 612. The Georgia cases reflect the obvious fact that it is a practical impossibility to make any meaningful comparison of a death sentence in a first degree murder case with any sentence imposed for another crime for which the death sentence is not authorized.

There is language in at least two sections of L.B. 711, Laws of 1978, directing the Supreme Court to review and analyze "all criminal homicides." If the language be interpreted to extend beyond first degree murder convictions, problems relating to the exercise of prosecutorial discretion in homicide

cases and the exercise by juries of the decisional power of determining guilt or innocence or fixing degrees of culpability in homicide cases are all involved. To interpret that language of L.B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues.

For all these reasons L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, will be construed to require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. Where a death sentence has been imposed, and this court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

Our review and analysis includes first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. Thirty-two cases are included in that review in addition to the case now before us. Twenty-one cases have been before this court previously on appeal. Eight cases were not appealed. Three additional cases are now pending in this court on direct appeal. Seven death sentences are now pending including the case now before us. The remaining twenty-five cases involve life sentences. The cases reviewed and analyzed are set out in the addendum to this opinion.

Analysis of all these cases indicates that a callous, coldblooded, and cruel disregard for human life, coupled with convictions for previous crimes involving violence to the person, has tended to be given great balancing weight as aggravating circumstances, and that extreme youth, coupled with the absence of any substantial record of previous crimi-

nal conduct, has tended to be given great balancing weight as mitigating circumstances. In all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors. The case now before us also fits that pattern, and, in addition, is the only death sentence case now pending which involves multiple first degree murders.

It would be virtually impossible to find two murder cases which are the same in all respects. We find no case in which a life sentence was given which involves the same or similar circumstances to that of the case at bar. Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending establishes that the death sentence in the case now before us is not excessive or disproportionate to the death penalties imposed in the other death penalty cases. If sufficient aggravating circumstances existed in those cases to justify the imposition of the death penalty, then the merciless, callous murder of two defenseless women in this case provided ample justification for the death penalty here.

The defendant's remaining assignments of error are without merit, and the convictions and sentences are affirmed.

AFFIRMED.

ADDENDUM

First degree murder cases analyzed and reviewed as of November 1, 1979.

CASES APPEALED AND REPORTED

State v. Casper, 192 Neb. 120, 219 N. W. 2d 226.
State v. Wilson, 192 Neb. 435, 222 N. W. 2d 128.
State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776.
State v. Russell, 194 Neb. 64, 230 N. W. 2d 196.
State v. Harris, 194 Neb. 74, 230 N. W. 2d 203.

State v. Lytle, 194 Neb. 353, 231 N. W. 2d 681.
State v. Ell, 196 Neb. 800, 246 N. W. 2d 594.
State v. Sims, 197 Neb. 1, 246 N. W. 2d 645.
State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849.
*State v. Rust, 197 Neb. 528, 250 N. W. 2d 867.
*State v. Holtan, 197 Neb. 544, 250 N. W. 2d 876.
State v. Simants, 197 Neb. 549, 250 N. W. 2d 881.
State v. Record, 198 Neb. 530, 253 N. W. 2d 847.
*State v. Peery, 199 Neb. 656, 261 N. W. 2d 95.
State v. Beans, 199 Neb. 807, 261 N. W. 2d 749.
State v. Scott, 200 Neb. 265, 263 N. W. 2d 659.
State v. Simpson, 200 Neb. 823, 265 N. W. 2d 681.
State v. Prim, 201 Neb. 279, 267 N. W. 2d 193.
State v. Fuller, 203 Neb. 233, 278 N. W. 2d 756.
State v. Nielsen, 203 Neb. 847, 280 N. W. 2d 904.
State v. Bennett, 204 Neb. 28, 281 N. W. 2d 216.

CASES NOT APPEALED TO SUPREME COURT

State v. Jimmie Ray Anderson Sentence 7/26/73.	Dawson County - District Court Case No. 14391
State v. Kelvin Anderson Sentence 9/25/78.	Douglas County - District Court Doc. 102, p. 85
State v. Brown Sentence 3/25/74.	Douglas County - District Court Doc. 88, p. 625
State v. Floyd Sentence 5/16/78.	Hamilton County - District Court Doc. 24, p. 196
State v. Hatcher Sentence 4/14/78.	Douglas County - District Court Doc. 101, p. 321
State v. Marshall Sentence 3/13/78.	Lancaster County - District Court Doc. 48, p. 262
State v. Rowert Sentence 12/8/77.	Platte County - District Court Case No. 2805
State v. Schaeffer Sentence 9/30/77.	Hall County - District Court Doc. 28, p. 279.

CASES PENDING ON APPEAL IN SUPREME COURT NOVEMBER 1, 1979.

*No. 42204 - State v. Otey Sentence 6/20/78	Douglas County - District Court Doc. 101, p. 489
*No. 42301 - State v. Anderson Sentence 8/24/78	Douglas County - District Court Doc. 99, p. 392
*No. 42302 - State v. Hochstein Sentence 8/24/78	Douglas County - District Court Doc. 99, p. 394.

*Death sentence pending.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

With all due respect to my brothers who make up

the majority in this case, I must in part dissent from their decision in this case. I wholeheartedly concur in all the conclusions reached by the majority, including its analysis and interpretation of how we are to apply L.B. 711, Laws 1978, except as to its single conclusion that the death penalty should be imposed in this case. My review of those cases included in the majority's addendum compels me to reach a contrary conclusion. I would modify the judgment of the trial court by declaring that the defendant be sentenced to a term of life imprisonment rather than be sentenced to execution.

So that there be no confusion with regard to the matter, let me clearly and unequivocally state that my decision is not based upon any conviction that in no case should the death penalty be imposed. Quite to the contrary, I am of the mind that in an appropriate case under the law as it presently exists, the imposition of the death penalty would be both lawful and appropriate. It is just that I conclude in this case the law does not authorize the imposition of the death penalty.

I totally reject the contention made by some that the imposition of the death penalty is either immoral or unethical when imposed by a society pursuant to its criminal code and subject to the further requirement that the defendant be afforded due process of law. We find the imposition of capital punishment in an appropriate case provided for as early as the Mosaic Code and perhaps even before. I have difficulty concluding that that which is embodied in the Mosaic Code can be either unethical or immoral.

It is true that some societies, through the ages, have discriminated in the manner in which capital punishment has been administered or have imposed it in a barbaric manner. Neither of those actions can be condoned. But the mere fact that a society prescribes the imposition of the death penalty in an

appropriate case does not cause it to be either immoral or unethical.

I, likewise, reject the contention made by some that the imposition of the death penalty serves as a deterrent to future crime. The evidence with regard to that matter is either totally lacking or, if available, is so inconclusive that it is not reliable. Except in rare instances, the crime itself for which the penalty is imposed is of such a nature that few, if any, give much thought to the ultimate consequences.

My rationale for recognizing the right of a society to impose capital punishment in an appropriate case is, rather, based upon a view that a civilized society has a right to assign to that crime or crimes, which it considers to be the most heinous, the most severe penalty it can inflict. That is to say, a society may declare in advance what crime or crimes it considers to be of the highest order and the worst offense to mankind by providing for a penalty which likewise is of the highest order and the most severe. In so doing, the society has clearly and unequivocally announced to its members that this crime for which the ultimate penalty is imposed is a crime separate and apart from all other crimes which can or may be committed within the society. It is an attempt by the people, through their legislative body, to issue a pronouncement with regard to the nature of the crime. It is on that basis that I find the Legislature of this state may appropriately ascribe, as an alternative penalty for the commission of the most heinous crime (first degree murder), the imposition of the death penalty. It should therefore be clear then that my disagreement with the majority today is not based upon any notion that capital punishment is never appropriate.

My difficulty arises by reason of my analysis of the 32 cases reviewed by the majority in reaching its conclusion that the imposition of the death penalty in

this case is appropriate. The majority notes that "in all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors * * * any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending, establishes that the death sentence in the case now before us is not excessive or disproportionate to the death penalties imposed in the other death penalty cases." With that statement I agree. But it is my belief that the fact that this case squares with the seven other cases in which the death penalty has been imposed does not answer the question. I am more concerned, as I believe L.B. 711, Laws 1978, requires me to be concerned, as to how this case squares with the remaining 25 cases where the death penalty was not imposed.

It was noted by this court in State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849, "Following the issuance of the opinion of the United States Supreme Court in Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Nebraska Legislature, in an effort to conform with the requirements for validity of death penalty statutes set forth in Furman, revised Nebraska's statute, and in 1973 enacted L.B. 268, R. R. S. 1943, which now appears as sections 29-2519 to 29-2546, R. R. S. 1943." L.B. 268, Laws 1973, prescribed a series of aggravating circumstances and mitigating circumstances which were to be considered by the trial court in determining whether to impose the death penalty. We early concluded that the fact that there was a list of aggravating circumstances and a list of mitigating circumstances did not mean that one was to simply add up the aggravating circumstances and add up the mitigating circumstances and subtract one from the other.

Again, in State v. Stewart, *supra*, we said, " 'It

must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' "

We further went on in State v. Stewart, *supra*, to quote from the Florida decision of Alvord v. Florida, 322 So. 2d 533 (Fla., 1975): " 'There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See State v. Dixon, supra. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.' " It therefore seems quite clear from what we have heretofore said that while L.B. 268, Laws 1973, prescribed aggravating and mitigating circumstances, they were intended to serve as a guide and not as an absolute. Some latitude was still left with the courts as to when the death penalty was to be imposed. Were

nothing more involved in this case than L.B. 268, Laws 1973, I might be able to agree with the majority. I must, however, continue my analysis of this case in light of the fact that after adopting L.B. 268, Laws 1973, our Legislature saw fit to adopt L.B. 711, Laws 1978. I must, therefore, presume that the Legislature intended L.B. 711, Laws 1978, to serve as either an addition to or a modification of L.B. 268, Laws 1973. Otherwise, there would have been little purpose or sense in adopting that second act. I believe that a reading of L.B. 711, Laws 1978, discloses that the Legislature intended to add to L.B. 268, Laws 1973.

Under the provisions of L.B. 711, Laws 1978, we are now not only required, before imposing the death sentence, to consider aggravating and mitigating circumstances but we are further required, under the provisions of section 29-2521.03, R. S. Supp., 1978, to "determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." What constitutes a "circumstance" is not spelled out. Likewise, L.B. 711, Laws 1978, imposes on the trial court in the first instance, and this court on appeal, a duty before ordering the death penalty to consider (1) whether sufficient aggravating circumstances exist to justify imposition of a sentence of death, (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances, or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Subsection (3) was added to L.B. 268, Laws 1973, by L.B. 711, Laws 1978. The Supreme Court is authorized to reduce any sentence it finds not to be consistent

with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524, R. S. Supp., 1978. All of that makes it seem clear to me that not only is this court required to examine aggravating and mitigating circumstances, but in addition to that we are supposed to in some manner place each first degree murder case one on top of the other to see whether or not they all conform. While I may be the first to concede that imposing such a duty upon the court is at best difficult and perhaps impossible, nevertheless, I cannot find how I can ignore that requirement. I do not by saying this suggest that the majority has ignored that requirement. They have reached a different conclusion by reason of making a significant distinction in the circumstances. For me, however, once the act of intentionally killing another is established, I find the other circumstances to be of less significance and therefore the distinctions much more difficult to make. It is in this area where I differ with the majority. It is simply a fact that when I place the cases one on top of the other, I do not reach the same conclusion as reached by the majority. For me, factors such as the age of the defendant or the previous record of the defendant are not nearly as significant as the circumstances under which the murder was committed.

Of the remaining 25 cases where life sentences have been imposed in lieu of death, I find the following to be true. In State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776, the defendant pleaded guilty to one count of first degree murder for the killing of Wilma Hoyt and one count of second degree murder for the killing of Edwin Hoyt. The facts disclosed that the defendant shot and killed the couple, dismembered their bodies with a butcher knife, wrapped the pieces, and placed them in a freezer. Later the frozen pieces were removed from the freezer and thrown into a lake. The defendant was given a life sentence.

In State v. Sims, 197 Neb. 1, 246 N. W. 2d 645, the defendant was convicted of first degree murder. The facts disclose that prior to the shooting the deceased had been driving his automobile. The defendant and the deceased were involved in a near accident which resulted in the defendant having words with the deceased. After a brief conversation the defendant returned to his automobile. A short time later the defendant returned to the area where the deceased was parked. A passenger in the defendant's automobile stepped out of the car and fired a pistol in the air. The defendant removed a shotgun from the car and walked rapidly in the direction of the deceased who was standing against his car. The defendant stopped when he was about 10 feet away from the deceased and fired one shell which struck the deceased in the abdomen, causing his death. The defendant was sentenced to life imprisonment.

In State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849, the evidence discloses that the defendant, though only 16 years of age, was engaged in the business of selling marijuana. He induced his suppliers to meet him so that he could "rip them off." The defendant, without provocation, shot the two dealers, hitting them in the back of the head, fatally shooting one who died instantaneously and wounding the other. The wounded one fell to the floor of the van and observed the defendant spreading gas in the van and igniting it in an effort to conceal the crime. The defendant was sentenced to life imprisonment.

In State v. Record, 198 Neb. 530, 253 N. W. 2d 847, the defendant and another were driving in an automobile when they decided to rob anyone who next came along. They drove to approximately 180th and Dodge Streets in Omaha and parked on a side road waiting for someone to drive by so that the defendant could shoot and rob someone. Approximately 3 a.m., a car driven by the victim passed their parked

car, proceeding east on Dodge Street. With one of the parties driving, the victim's car was pursued. As the car drove alongside it as if to pass, the defendant fired a shot, breaking the glass and killing the driver. The defendant was sentenced to life imprisonment.

In State v. Scott, 200 Neb. 265, 263 N. W. 2d 659, the defendant was charged with murder in the perpetration of or an attempt to perpetrate a robbery. The evidence discloses that the defendant entered the home of William and Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued and Mr. McCormic was shot twice and killed, and Mrs. McCormic was shot twice and wounded. Mr. McCormic was 92 years of age at the time. Mrs. McCormic, age 83, had impaired vision and could not describe her assailant with any specificity. The defendant was sentenced to life imprisonment.

In State v. Prim, 201 Neb. 279, 267 N. W. 2d 193, the defendant was charged with first degree murder, having shot and killed the defenseless operator of a gas station during the commission of a robbery. He was sentenced to life imprisonment.

Likewise, there are eight additional cases included in the addendum in which a life sentence was imposed for first degree murder and not appealed to this court. In State v. Anderson the defendant, though admittedly only 15 years old, had three previous felonies. During the course of a robbery committed by jumping into the victim's automobile, the defendant shot the victim in the head. He was sentenced to life imprisonment.

In State v. Hatcher the defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head. The defendant was sentenced to life imprisonment.

In State v. Brown the defendant killed his victim

during a robbery. He was sentenced to life imprisonment.

In State v. Jimmie Ray Anderson, the 34-year-old defendant and his wife resisted arrest by a patrolman and in the struggle in the police car the patrolman was shot and killed. The defendant was sentenced to life imprisonment.

In State v. Schaeffer, the defendant, a 16-year-old, together with a friend, forced the owner of the Ace Hardware Store in Grand Island into their car at gunpoint where, after robbing him, they shot him 17 times. The defendant was sentenced to life imprisonment.

In State v. Floyd, the defendant, 37 years old, shot and killed an unarmed gas station attendant during the course of a robbery. He was sentenced to life imprisonment.

In State v. Rowert, the 23-year-old defendant who had been drinking robbed another who also was intoxicated and who had a substantial sum of money on his person. The defendant determined to kill the victim so that the defendant could not be identified. The defendant lured the victim out of a bar and drove him out into the country where he took the money and then slit the defendant's throat and then decapitated him. He was sentenced to life imprisonment.

In State v. Marshall the defendant, a 20-year-old working in a flower shop in Lincoln, robbed the owner and in the course of the robbery struck the owner in the head several times with a metal bar from which the victim died. He was sentenced to life imprisonment.

In each of the cases I have referred to where a life sentence has been imposed, one can find distinguishing factors, to be sure, and in that regard I cannot quarrel with the majority in its conclusion. I'm simply unable to make such fine distinctions with regard to, on the one hand, the matter of killing and,

on the other hand, the imposition of the death penalty. I have difficulty seeing how the killing of a defenseless, faceless victim driving an automobile is any less heinous than the case at bar. Once the facts establish the totally unnecessary, meaningless, and wasteful but deliberate, intentional killing of another, I have difficulty significantly distinguishing the circumstances under which the crime was committed. It is my view that the Legislature, in adopting L.B. 711, Laws 1978, must have intended to further restrict the imposition of the death penalty as previously provided for in L.B. 268, Laws 1973, by directing us not to impose the death penalty if on previous occasions of cruel and senseless killings we have not imposed the death penalty.

My conclusions herein legitimately pose two questions: (1) If the death penalty is not appropriate in this case, when will it be appropriate, and (2) has the adoption of L.B. 711, Laws 1978, placed us into such a mold that we may no longer impose the death penalty under any circumstances where a single person has been given a life sentence under similar circumstances. With regard to the first question, let me simply say that I believe I will recognize an appropriate case when I see it. I have no doubt that given that appropriate case, based upon all the things we have done in cases heretofore, I will be able to conclude that the imposition of the death penalty is intended even in light of L.B. 268, Laws 1973, and L.B. 711, Laws 1978, and I will be able to affirm the imposition of that penalty. Unfortunately, I cannot in advance articulate how or under what circumstances that may be.

With regard to the second question, whether we are now in such a mold from which it may be difficult, if not impossible, to get out, I can simply say that that is a matter which must appropriately be considered by the Legislature. Too often, courts are accused of intruding into the legislative arena. I

choose not to do so. I believe the Legislature intended to limit situations in which the death penalty is imposed. If, in fact, the passage of L.B. 711, Laws 1978, has made the imposition of the death penalty difficult, if not impossible, then it is for the Legislature to reconsider its action.

Nothing I have said here should in any manner be misconstrued so as to permit one to conclude that I do not consider the commission of murder a heinous, appalling, and virtually unforgiving crime. Indeed I do. I hold no belief that one who commits such a crime is entitled to anything other than the most severe punishment. I am, however, constrained in my actions as a judge. On the one hand, I am obligated to impose a penalty required by law even in those instances where I may personally disagree. By the same token, I must likewise refrain from imposing a penalty where restrained by the law, even in those cases in which I may personally disagree. That is the situation in which I find myself in this case. The murder in this case was a terrible, horrible, unforgiving crime. Yet it is likewise, in my mind, no worse (if such comparison with regard to murder can be made) than the senseless and meaningless taking of lives for which we have heretofore imposed life sentences. It is for that reason that I would disagree with the majority in that one limited area, and I would modify the judgment herein to provide that the defendant should be confined in the Nebraska Penal and Correctional Complex for the remainder of his natural life.

STATE OF NEBRASKA, APPELLEE, V. HAROLD LAMONT OTEY, APPELLANT.

287 N. W. 2d 36

Filed December 18, 1979. No. 42204.

1. **Continuances: Time.** A motion for a continuance is addressed to the sound discretion of the trial court, and an order denying a continuance will not be disturbed in the absence of a showing of a clear abuse of discretion.
2. **Continuances: Evidence.** Where the purpose of a continuance is to obtain the testimony of witnesses who are absent from the jurisdiction, a showing should be made that the witnesses can be located, that they will testify, and that their testimony would be relevant.
3. **Criminal Law: Indictments and Informations.** The indorsement of the names of additional witnesses upon the information just before trial is a practice that should be avoided.
4. **Jurors.** When the disqualification of a juror is not discovered until after the jury has been sworn, the juror should be excused and an alternate juror seated.
5. **Criminal Law: Evidence.** The State is entitled to prove any fact or circumstance which tends to establish any element of the crime, even though the fact or circumstance may prove or tend to prove another crime.
6. **Criminal Law: Statutes: Death Penalty: Constitutional Law.** The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution.
7. **Criminal Law: Statutes: Sexual Sociopaths.** The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the law who are amenable to treatment, and confinement without treatment for those subject to the law but not amenable to treatment.
8. **Criminal Law: Sexual Sociopaths: Death Penalty.** A determination as to whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed.

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

S. J. Albracht of Lathrop, Albracht & Swenson, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

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

BOSLAUGH, J.

The defendant, Harold Lamont Otey, was convicted of first degree murder in the perpetration of a sexual assault in the first degree. He was sentenced to death and the case is here for review pursuant to section 29-2525, R. R. S. 1943. The assignments of error relate to the denial of a continuance requested by the defendant; the discharge of a juror by the trial court; the admission of evidence relating to a subsequent assault; and the imposition of the death penalty. The defendant also contends that he should have been declared a sexual sociopath and that the Nebraska death penalty statutes are unconstitutional. There is no contention that the evidence was not sufficient to support the finding of guilty beyond a reasonable doubt.

The murder was committed during the early morning hours of June 11, 1977, in Omaha, Nebraska. The defendant entered the apartment of the victim and took a stereo set which he placed behind a garage nearby. This stereo was later identified and traced back to the defendant.

The victim awakened when the defendant reentered the apartment. The defendant told the victim that he was going to rob her and that he would rape her. When she resisted he inflicted a knife wound across the top of her forehead. The defendant then sexually assaulted the victim. After the sexual assault the defendant and the victim went to the second floor of the apartment to get her money. There the defendant stabbed the victim a number of times inflicting deep wounds, struck her about the head with a hammer, and strangled her with a belt. The evidence shows that the victim died from the multiple wounds and strangulation inflicted upon her by the defendant.

The defendant was apprehended in Florida in January 1978. On January 28, 1978, he was interviewed there by two Omaha police officers and after proper warnings gave a voluntary statement which was a full confession. The statement was received in evidence and there is no contention here that the statement was not voluntary or should not have been received in evidence.

The information which was filed on February 1, 1978, listed only the name of a police officer at the time it was filed. The case was set for trial on April 5, 1978. On March 23, 1978, the county attorney notified the defendant that the State would ask leave to endorse the names of 44 additional witnesses upon the information. On March 31, 1978, the defendant moved for a continuance which was denied on April 5, 1978. The motion alleged that additional time was required to prepare for trial because the defendant was undergoing psychiatric evaluation and defense counsel had been unable to locate certain possible defense witnesses. There was no showing made as to names of any witnesses, other than a Donald Lawrence, or as to what their testimony would be. The trial court offered to allow defense counsel to disclose in camera what the nature of the testimony might be, but the offer was not accepted.

A motion for a continuance is addressed to the sound discretion of the trial court, and an order denying a continuance will not be disturbed in the absence of a showing of a clear abuse of discretion. State v. Newton, 193 Neb. 129, 225 N. W. 2d 562. Where the purpose of a continuance is to obtain the testimony of witnesses who are absent from the jurisdiction, a showing should be made that the witnesses can be located, that they will testify, and that their testimony would be relevant. There was no showing made in support of the continuance requested in this case.

There is some indication from the argument on

the motion that defense counsel was attempting to find evidence for a possible alibi defense, but counsel did not accept the trial court's offer to allow a showing to be made in camera. The defendant did not testify at the trial and no alibi evidence was produced. Also, there was no issue raised concerning the mental responsibility of the defendant.

The record does not show that the defendant was prejudiced by being brought to trial on April 6, 1978. The information had been on file for more than 60 days and, in the absence of a showing of special facts or circumstances, there is no basis on which to conclude that the defendant did not have a reasonable time in which to prepare for trial.

The indorsement of the names of additional witnesses just before trial is a practice that should be avoided. Here the defendant was given less than one week's notice before the trial commenced. However, the record shows that these were prosecution witnesses, most of whose names appeared in the police reports that had been furnished to the defendant or they are otherwise identified in the record. There is no claim of surprise and no showing of actual prejudice because of the late indorsement of names. Under the circumstances in this case, it was not an abuse of discretion to refuse a continuance on that ground. We conclude that the record fails to show an abuse of discretion in denying a continuance to the defendant.

After the jury had been sworn, but before the trial had commenced, one of the jurors approached the trial court and stated that he could not be a fair and impartial juror because the defendant, if convicted, might be sentenced to death. With the defendant present the trial court informed both counsel and offered to allow them to question the juror. After both counsel declined, the trial court questioned the juror in their presence and ascertained that the juror could not be fair and impartial. The juror was then

excused and an alternate seated. The defendant moved for a mistrial on the ground that the jury selection was tainted. Further examination of the juror by both counsel disclosed that the juror had not discussed his feelings concerning the death penalty with other members of the jury. The motion for a mistrial was overruled.

The procedure which was followed in this case was proper. The disqualification did not become known until the juror approached the trial court and stated that, after considering the matter overnight, he was unable to be a fair and impartial juror. The juror was then examined in the presence of the defendant and counsel and the fact of disqualification established. An alternate was seated by the procedure provided by statute. There was no reason to declare a mistrial. Banks v. United States, 204 F. 2d 666 (8th Cir., 1953).

Prior to trial the defendant filed a motion in limine to exclude from the trial any evidence relating to an assault by the defendant upon another woman on July 14, 1977. The motion was overruled and evidence relating to the July 14 assault was received at the trial.

The evidence shows that on July 14, 1977, the defendant accosted the victim as she was about to enter her home. The defendant placed his hand over her mouth and held a knife at her throat and started to pull her into a garage. When she screamed the defendant ran away. The defendant was driving an automobile owned by Randall J. Harris, which was stopped at a police roadblock shortly after the incident. Although the defendant escaped, he left the knife which had been used in the assault in the seat of the automobile. The knife was identified as belonging to the defendant. When the defendant was questioned in Florida he acknowledged that the knife which had been left in the seat of the Harris car following the July 14 assault was the knife

that had been used in the murder.

The evidence concerning the July 14 assault corroborated the defendant's statement and was admissible to show that the defendant had the murder weapon in his possession after the crime. It was admissible also to prove intent, motive, plan, identity, modus operandi, and absence of mistake or accident. The State is entitled to prove any fact or circumstance which tends to establish any element of the crime, even though the fact or circumstance may prove or tend to prove another crime. State v. Riley, 182 Neb. 300, 154 N. W. 2d 741.

After the verdict of guilty had been returned, the defendant moved to suspend further proceedings upon the grounds that sections 28-401 and 29-2519 et seq., R. R. S. 1943, were unconstitutional and that the defendant was a sexual sociopath. Both motions were overruled.

The Nebraska first degree murder statute and the procedural statutes relating to the determination as to whether a death sentence should be imposed were considered at length and held to be constitutional in State v. Simants, 197 Neb. 549, 250 N. W. 2d 881. That case is controlling here.

A determination as to whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed. The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the law who are amenable to treatment, and confinement without treatment for those subject to the law but not amenable to treatment. We have determined that sentencing is not to be delayed indefinitely where sexual sociopath proceedings have been instituted. State v. Shaw, 202 Neb. 766, 277 N. W. 2d 106. Since the death penalty has been imposed upon the defendant in this case, none of his contentions concerning the sexual sociopath law require further consideration in this appeal.

A three-judge panel was convened as provided in section 29-2520, R. R. S. 1943, to determine what sentence should be imposed on the defendant. After an evidentiary hearing, the panel found that the murder was committed "to conceal the identity of the perpetrator of a crime" and that "the murder was especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence." The panel found specifically that this latter aggravating circumstance existed in its entirety and to a great degree in this case. The panel found that none of the mitigating circumstances set out in section 29-2523, R. R. S. 1943, existed. The panel concluded that sufficient aggravating circumstances existed to justify the imposition of the death penalty. The defendant was then sentenced to death. In its order of sentence the panel discussed the evidence at length and set forth in detail why the sentence imposed was a proper sentence in this case.

It is unnecessary to set out the evidence again in this opinion. Our review of the record has convinced us that the findings of the panel are fully supported and that there are no mitigating circumstances in this case to weigh against the imposition of a sentence of death. We find no error or abuse of discretion in the sentence imposed upon the defendant in this case.

We have made the review and analysis of similar cases required by sections 29-2521.02 et seq., R. R. S. 1943, in accordance with the procedure and rules announced in State v. Williams, *ante* p. 56, 287 N. W. 2d 18. We find the sentence of death imposed in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J., concurring in part, and in part dissenting.

For the reasons more particularly set out in my opinion concurring in part and dissenting in part in State v. Williams, *ante* p. 56, 287 N. W. 2d 18, I likewise concur in this case in all of the majority opinion save and except that part which affirmed the imposition of the death penalty. As in State v. Williams, *supra*, I would order the defendant confined to the Nebraska Penal and Correctional Complex for the balance of his natural life.

STATE OF NEBRASKA EX REL. ROLLIN E. BLOME ET AL., APPELLEES, V. BRIDGEPORT IRRIGATION DISTRICT ET AL., APPELLANTS.

286 N. W. 2d 426

Filed December 18, 1979. No. 42352.

1. **Mandamus.** To warrant the issue of a peremptory writ of mandamus to compel the performance of a legal duty to act: (1) The duty must be imposed by law; (2) the duty must still exist at the time the writ is applied for; and (3) the duty to act must be clear.
2. **Waters: Property.** The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all the landowners within the district upon fair and equitable terms and conditions.
3. _____: _____. All water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied. An irrigation district has a duty to procure the necessary right-of-way and deliver water on fair and equitable terms and conditions to each tract of land subject to assessment.
4. **Waters: Administrative Law: Jurisdiction.** The Department of Water Resources has original and exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights.
5. **Waters: Property: Statutes.** An irrigation district has no power to cancel or terminate the water rights of a landowner, nor can it suspend delivery of water except for nonpayment of taxes and assessments as provided by statute and the by-laws of the district.

6. **Waters: Property.** An irrigation district has a duty to deliver water to each tract of land subject to assessment, and the determination of whether one or more than one point of delivery to a tract is required must be made on a case-by-case basis. The point or points of water delivery reasonably required on any given tract of land must be determined upon the basis of what is just and equitable under the facts and circumstances of each case.
7. **Mandamus: Appeal and Error.** An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the finding of the District Court will not be disturbed by this court on appeal unless clearly wrong.

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

Robert J. Bulger of Bulger & Jensen, for appellants.

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

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

MCCOWN, J.

In this action the plaintiffs sought a peremptory writ of mandamus to require defendant irrigation district to take the necessary action to deliver water to the highest point on plaintiffs' land so as to allow them to irrigate all the irrigable land in the acreage, some of which cannot now be irrigated from the present point of delivery. The District Court granted the writ and the irrigation district has appealed.

The land involved is a quarter section of farmland in Morrill County, Nebraska, except for a small triangular tract in the northeast corner. The land consists of approximately 146 acres and is included in the defendant Bridgeport Irrigation District. Irrigation district taxes have been assessed and paid at all times relevant here.

Plaintiff Rollin E. Blome's father purchased the land in 1946. Since the death of his father in 1950, the plaintiff, Rollin E. Blome, has farmed the land

by himself or with other members of his family, and is now the individual record owner of the land. In 1946 the land was not irrigated, sand had blown up in piles, and most of the land showed the effects of severe wind erosion. At some former time two irrigation ditches connected the land on its southern boundary to an irrigation lateral of the defendant district designated as lateral No. 15. The easterly irrigation ditch entered the Blome land through a siphon under the county road at a point approximately in the center of the south boundary of the land. The westerly irrigation ditch and siphon entered the land approximately 600 feet to the west. The two ditches connected to lateral No. 15 approximately 600 feet south of the center of the south boundary of plaintiffs' land. Immediately to the north of the siphon on the east ditch on the south boundary of plaintiffs' land is the present high point of the land after leveling. The high point prior to leveling was near the southwest corner of the land.

Between 1950 and 1961 the land was farmed by dryland summer fallow methods or placed in the soil bank. In 1961 Blome began making plans to bring the land back into production, including plans for leveling the land a little at a time as it could be afforded. Prior to beginning the leveling, Blome consulted the defendant irrigation district about delivery of water to the land and was told that the district could deliver water through the siphons on the southern boundary of the Blome land, and that it would deliver water to those points. Blome then had a survey made of the west 100 acres of the land to determine how it should be leveled so as to allow it to be irrigated from the two points on the southern boundary of the land. The survey did not extend to the east portion of the land at that time, since it was then thought to be too rough.

The leveling program began in 1962 when 55 acres were leveled on the west side of the land and approx-

imately 25 more acres were leveled in 1967. In that year Blome drilled a well and installed a pump at about the center of the south boundary of the land. The pump was originally installed for emergency use but Blome began use of the pump for irrigation purposes in 1968 when irrigation was commenced. For 2 days in 1968 plaintiff also took irrigation water from the box in lateral No. 15 through the east ditch and siphon that entered the Blome land at the center of the south boundary. That effort was abandoned when Blome could not hold the water in the ditches on his own land, although he had no trouble with the ditch or the siphon to the south of his land. Blome leveled another 39 acres to the east in 1969, but did not level the remainder of the eastern portion of the land until 1973.

In 1970 Blome met with two directors of the irrigation district and requested that water be delivered to his land at a point near the southeast corner from lateral No. 16 of the irrigation district which ran north and south along the east side of the land. Blome testified that he told the directors at the time of the request that he wanted the water for the east portion of his land but did not want to compromise his position on having water delivered at the center of the south boundary also. He testified that the directors made no objection to the request, although one of the directors testified that nothing was said about a delivery point on the south boundary.

The defendant irrigation district has delivered water from lateral No. 16 at or near the southeast corner of the land since 1970. In 1971 Blome built a concrete ditch along the south boundary of the land from the southeast corner to approximately the center of the south boundary. That point was approximately 50 feet east of, and approximately 2 feet lower than, the high point of the land. In 1973 the remainder of the eastern portion of the land was leveled. Since that time all the eastern portion of the

land has been irrigated with water delivered at the southeast corner of the land from lateral No. 16 through the concrete ditch along the south border.

Because of the elevation of the land Blome could not deliver water from the southeast corner any further west along the south line. To water any of the western portion of the land with water received at the southeast corner, Blome would have to build a curved ditch to the northwest from the west end of the concrete ditch on the south boundary. That method would leave approximately 12 acres in the southwest corner of the land which could not be irrigated from water delivered at the southeast corner.

Since 1968 the westerly portion of the Blome land has been irrigated from the irrigation well and pump installed by Blome. Blome constructed a concrete ditch along the west boundary of the land and pumped the well water to the south end of the concrete ditch to irrigate the western portion of the land.

In general the land leveling provides for the flow of irrigation water from west to east on the westerly portion of the land and from south to north on the easterly portion of the land with distribution designed to be made from the west and south boundaries.

At some time after the completion of the land leveling Blome requested the defendant irrigation district to deliver water to the high point at the center of the south boundary of the land from the box on lateral No. 15, 600 feet to the south. The district refused to procure a right-of-way for a ditch across that 600 feet and to deliver water to the plaintiff at that point.

Sometime prior to August 1976, the plaintiffs here filed a quiet title action against the landowners to the south and the irrigation district, attempting to establish a right-of-way by prescription in either the plaintiffs or the irrigation district on the basis of the

old prescriptive use. In August 1977, the District Court entered judgment finding that no prescriptive right-of-way existed since it had been lost by nonuser for more than 10 years. Among the specific findings of fact and conclusions of law in that case, the District Court found that the defendant irrigation district had not fulfilled its lawful obligation to deliver water to the Blomes by delivering water at only one point on the southeast corner of the Blome property.

This action in mandamus was filed in November 1977. On July 24, 1978, the District Court entered its peremptory writ of mandamus commanding the defendants to take the necessary action to deliver water to the highest point on the land of the plaintiffs "so as to allow the plaintiffs to irrigate all of said land by natural causes." The defendants have appealed.

The defendant irrigation district contends that the issuance of a writ of mandamus was improper in this case because the plaintiffs did not have a clear legal right to have water delivered to the highest point on their land.

Section 25-2156, R. R. S. 1943, provides in part: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station."

The writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed on him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear." State ex rel. Goetz v. Lundak, 199 Neb. 585, 260 N. W. 2d 589.

The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all the landowners within the district upon fair and equitable terms and conditions. State, ex rel. Clark v. Gering Irrigation District, 109 Neb. 642, 192 N. W. 212.

By statute the board of directors for the district has the power and duty to "establish equitable bylaws, rules and regulations for the distribution and use of water among the owners" of the lands in the district. See § 46-120, R. R. S. 1943.

It is expressly provided by statute that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied; that it shall be the duty of the directors to make all necessary arrangements for right-of-way for lateral "to each tract of land subject to assessment," including the exercise of the power of eminent domain; and to make such rules in regard to the payment for such right-of-way as may be just and equitable. See § 46-122, R. R. S. 1943.

The authorities establish that mandamus is a proper remedy in the present case, and that an irrigation district has a duty to procure the necessary right-of-way and deliver water to each tract of land subject to assessment on fair and equitable terms and conditions.

The defendants also contend that the plaintiffs have lost the water rights attached to the land involved here because they did not take any water from the irrigation district for a continuous period of more than 10 years prior to 1968. The only statutory ground upon which an irrigation district can provide for suspension of water delivery to land in its district is nonpayment of irrigation taxes for 2 years. See § 46-122, R. R. S. 1943.

The Department of Water Resources has original and exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and

other purposes, including jurisdiction to cancel and terminate such rights. See, § 46-209, R. R. S. 1943; Hickman v. Loup River Public Power Dist., 173 Neb. 428, 113 N. W. 2d 617.

The record in this case indicates that proceedings were initiated before the Department of Water Resources attempting to secure cancellation of plaintiffs' water rights. There is no evidence that the Department of Water Resources ever suspended or canceled any of the water rights of the plaintiffs. It is also obvious that during all the years in question the defendant irrigation district was appropriating water under the water rights of the plaintiffs for distribution to all the landowners in the district. There is no evidence whatever that the water rights of the plaintiffs have been canceled, nor that the appropriation rights of the defendant irrigation district have been affected in any way because of the plaintiffs' failure to take delivery of water for a period of years. The defendant irrigation district has no power to cancel or terminate the water rights of the plaintiffs, nor can it suspend delivery of water, except for nonpayment of taxes and assessments as provided by statute and the by-laws of the district.

The critical issue in this case is whether or not it is fair and equitable to require an irrigation district to deliver water at more than one point on a 146-acre tract of land within the district. The defendants contend that an irrigation district cannot be required to deliver water at more than one point, even though delivery from that point will not irrigate all the irrigable land in the tract.

At the present time water delivered by the irrigation district at the southeast corner of the Blome land is used to irrigate only the eastern portion of the land. The evidence establishes that by constructing a ditch on the Blome land running northwesterly from the south center of the land to the west boundary, water delivered at the southeast

corner could also be used to irrigate the westerly portion of the land, except for approximately 12 acres in the southwest corner. The evidence also establishes that all the westerly portion of the land, including the 12 acres in the southwest corner, could be irrigated by delivery in the center of the south boundary at the point requested by the plaintiffs. The evidence also establishes that the surveying and leveling of the westerly portion of the land was done upon an understanding with the district that water would be delivered at the point in the center of the south boundary.

The defendants contend that more than one outlet on any tract of land constitutes a multiplicity of outlets and is forbidden by section 46-258, R. R. S. 1943. That section does not prohibit multiplicity of outlets, even if the section were applicable, but states only that they should be avoided. In any event, it is not part of the irrigation district act and does not affect the duty of the district to furnish water. If applicable at all, it only prescribes upon whom the duty to construct outlets rests. State, ex rel. Clark v. Gering Irrigation District, 109 Neb. 642, 192 N. W. 212.

There can be no doubt that all appropriations of water for irrigation purposes since 1895 are inseparable from and appurtenant to the specific land. United States v. Tilley, 124 F. 2d 850 (8th Cir., 1941). Section 46-122, R. R. S. 1943, provides that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied. If the plaintiffs' rights to receive irrigation water attach to the tract of land, those rights should be effective as to all the irrigable land and not merely part of it. It is clear that the Legislature intended that only land which could be benefited by an irrigation district was to be included within the district. See §§ 46-107 and 46-108, R. R. S. 1943. The entire tract owned by plaintiffs is included in the district and irrigation taxes have been paid on all the land, includ-

ing the 12 acres which cannot be irrigated from the southeast corner by natural causes. Defendants' position is that the request by Blome for delivery of water at the southeast corner to irrigate the eastern portion of the land constituted a waiver of a right to have water delivered at any other point or points to irrigate the remainder of the land. Defendants cite no authority in support of that proposition and the evidence fails to establish any waiver, explicit or implied, or any intention to waive any rights by the plaintiffs.

An irrigation district has a duty to deliver water to each tract of land subject to assessment, and the determination of whether one or more than one point of delivery to a tract is required must be made on a case-by-case basis. The point or points of water delivery reasonably required on any given tract of land must be determined upon the basis of what is just and equitable under the facts and circumstances of each case. The traditional concept that each tract of land is different is particularly significant here. The size of the tract; the elevations of possible points of delivery; the topography and the nature of the soil; the location and availability of alternative or additional sources of water supply; and the comparative advantages and disadvantages to the landowner and the irrigation district should all be considered in determining what is just and equitable in each case.

In the case now before us the trial court personally viewed the premises and determined that it was just and equitable to require the defendant irrigation district to deliver water to the highest point on plaintiffs' land in the center of the south boundary, in addition to the delivery of water at the southeast corner of the plaintiffs' land. An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the finding of the District Court will not be disturbed by this

court on appeal unless clearly wrong. State ex rel. Goetz v. Lundak, 199 Neb. 585, 260 N. W. 2d 589.

The evidence in this case supports the findings of fact and conclusions of law of the trial court. The trial court's action in issuing the peremptory writ of mandamus was correct and is affirmed.

AFFIRMED.

STATE COLLEGES EDUCATION ASSOCIATION, APPELLEE, V. BOARD OF TRUSTEES OF THE NEBRASKA STATE COLLEGES, APPELLANT. CHADRON STATE COLLEGE TEACHING FACULTY BARGAINING UNIT, APPELLEE, V. BOARD OF TRUSTEES OF THE NEBRASKA STATE COLLEGES, APPELLANT, IMPLEADED WITH CHADRON STATE COLLEGE, APPELLEE.

286 N. W. 2d 433

Filed December 18, 1979. No. 42413.

1. **Commission of Industrial Relations: Jurisdiction: Colleges and Universities.** The Commission of Industrial Relations has jurisdiction in industrial disputes involving the Board of Trustees of the Nebraska State Colleges and its employees.
2. **Commission of Industrial Relations: Labor and Labor Relations.** The Commission of Industrial Relations, in determining an appropriate unit for bargaining and voting, is required to consider, among other proper criteria, the established bargaining units and established policies of the employer. The prior bargaining history to be considered includes even that which may not have taken place under the auspices of the commission.
3. **Commission of Industrial Relations: Jurisdiction: Labor and Labor Relations.** The Commission of Industrial Relations has no authority to enter declaratory judgments or exercise other judicial functions. Its fact-finding powers are to be confined to the area of its jurisdiction in resolving industrial disputes as that term is defined in Transport Workers of America v. Transit Auth. of City of Omaha, *ante* p. 26, 286 N. W. 2d 102.

Appeal from the Commission of Industrial Relations. Reversed and remanded.

George C. Rozmarin of Swarr, May, Smith & Andersen, for appellant.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellee State Colleges Education Assoc.

Wright & Simmons and John A. Selzer, for appellee Chadron State College Teaching Faculty Bargaining Unit.

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

CLINTON, J.

This is an appeal by the Board of Trustees of the Nebraska State Colleges from an order of the Court of Industrial Relations (now Commission of Industrial Relations, L.B. 444, Laws 1979), determining an appropriate unit for bargaining and voting pursuant to the provisions of section 48-838, R. R. S. 1943. Government of the four state colleges is vested in the Board by Article VII, section 13, of the Nebraska Constitution, which provides in part: "The general government of the state colleges as now existing, and such other state colleges as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled as designated by the Legislature, six of whom shall be appointed by the Governor, with the advice and consent of the Legislature, . . . and the Commissioner of Education shall be a member ex officio. The duties and powers of the board shall be prescribed by law . . . ."

Two separate petitions for a certificate election were consolidated and heard before the commission. The first petition was filed by the State Colleges Education Association (SCEA), one of the appellees, and prayed that the designated unit consist of teaching faculty at the four state colleges at Chadron, Kearney, Peru, and Wayne. The second petition was filed by the Chadron State College Teaching Faculty Bargaining Unit (CSCTFBU), the other appellee, and asked that a separate unit be designated

for the college at Chadron. After hearing, the commission determined: "The sole issue before the court, therefore, is whether there should be a single unit for all teaching faculty of the four colleges governed by the Board, or a separate campus unit for the faculty at Chadron." The commission then entered an order establishing a unit for the Chadron campus. Because there was no issue before the commission as to representation at the other three colleges, either separately or as a group, no bargaining unit or units for those campuses were designated.

The Board makes the following assignments of error: (1) The commission erred in assuming subject-matter jurisdiction over the Board of Trustees of the Nebraska State Colleges. (2) The order of the commission is contrary to law. (3) The order of the commission is contrary to the evidence and is not supported by substantial evidence.

The issue raised by the first assignment has been decided by this court in Retail & Professional Emp. Union v. Board of Trustees, 203 Neb. 829, 280 N. W. 2d 656, where we said that the issue was governed by University Police Officers Union v. University of Nebraska, 203 Neb. 4, 277 N. W. 2d 529, and held that the Commission of Industrial Relations has jurisdiction in industrial disputes involving the Board of Trustees of the Nebraska State Colleges and its employees.

The second and third assignments of error will be discussed together because, although one involves an issue of law and the other issues of fact, the two assignments are interwoven in that an error of law may have affected the fact-findings of the commission to a degree which we cannot determine.

A brief introductory description of the nature of the connection between the error of law and the fact-findings of the commission may be helpful in following the more detailed development of that matter in

the balance of this opinion. The commission discounted to some degree the prior bargaining history between the Board and its employees because the commission had, in an earlier case, declared void certain labor contracts between the Board and its employees. In so doing, it acted beyond its jurisdiction. The prior bargaining history should have been given full weight. However, since we do not review fact-findings of the court de novo, we cannot resolve the issue as a matter of law and the case must be reversed and remanded for rehearing under a proper criterium.

In the case of American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1, we pointed out that the provisions of section 48-812, R. R. S. 1943, directing that this court review de novo findings of fact of the commission, was unconstitutional because it purported to delegate to this court an exercise of legislative power. See cases there cited on page 272. We then established, in part at least, the appropriate standard of review in the following language: ". . . 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."

Of particular importance in this case is the portion of the standard, "whether it acted within the scope of its statutory authority." Implicit in the portion of the standard quoted are the principles that the commission may not exceed its jurisdiction and that it is not free to disregard statutory standards governing the exercise of its power.

Having made the foregoing introductory statement, we now develop our consideration of the second and third assignments. On one point the posi-

tions of the Board and SCEA seem to be in agreement. The Board and the SCEA contend the commission misapplied the standards of section 48-838, R. R. S. 1943, in its findings that the teaching faculty at Chadron State College should be in a bargaining unit separate and apart from the teaching faculties at Wayne, Kearney, and Peru State Colleges.

Section 48-838(2), R. R. S. 1943, provides in part: "The court shall also determine the appropriate unit for bargaining and for voting in the election, and *in making such determination the court shall consider established bargaining units and established policies of the employer.*" (Emphasis supplied.) Although this is the only specific consideration mentioned in the statute, it is evident the Legislature did not intend that it be the sole consideration, for if it were there would be nothing for the commission to determine in cases where there existed no prior bargaining history.

In American Assn. of University Professors v. Board of Regents, *supra*, we said: "The considerations set forth in section 48-838 (2), R. S. Supp., 1974, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate. . . . A basic inquiry in bargaining unit determination is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. . . . In determining whether a particular group of employees constitutes an appropriate bargaining unit where an employer operates a number of facilities, relevant factors include prior bargaining history; centralization of management, particularly in regard to labor relations; extent of employee interchange; degree of interdependence of autonomy of the facilities; differences or similarities in skills or functions of the employees; geo-

graphical location of the facilities in relation to each other; and possibility of over-fragmentation of bargaining units."

In its opinion in this case, the commission discussed the various relevant factors mentioned above, made specific findings pertaining to each factor, and, with reference to prior bargaining history, said: "[T]his factor constitutes the primary difference between the *Board of Regents* case and this one. There was no history of bargaining in that case, but there is in this one. The significance of this factor, however, *is somewhat diminished by the decision of this court in* (emphasis supplied) *Vathauer, et. al., v. HEAN (Higher Education Association of Nebraska) and Board of Trustees, Nebraska State Colleges*, 3 CIR 215-1 (1977), where this court determined that the agreement between HEAN and the Board for the year 1977-1978 was unenforceable and void, ..."

From 1970 until 1977, faculty of the four campuses was represented by a labor organization called Higher Education Association of Nebraska (HEAN). This group was the bargaining unit for faculty members and negotiated three contracts with the Board during that time period.

The commission's opinion in No. 215, referred to in the second preceding paragraph, was offered and received in evidence at the hearing in this case. The introductory paragraph in opinion No. 215 is as follows: "This action is one praying for a declaratory judgment that the contracts between the Board of Trustees of the Nebraska State Colleges and Higher Education Association of Nebraska and Chadron State College Education Association for the years 1976-77 and 1977-78 are void and unenforceable. We find that we have jurisdiction of the parties and of the subject matter." The commission then went on in that opinion to declare labor contracts between CSEA and the Board of Trustees and between HEAN

(a predecessor to CSEA) unenforceable and void. That opinion was entered on September 26, 1977.

Section 48-838, R. R. S. 1943, was first enacted in 1972 as section 4 of L.B. 1228, Laws 1972. It is clear from the context of that statute that prior bargaining history, whether it occurred under the auspices of the Court of Industrial Relations or not, was to be considered, for if that were not so, section 48-838(2), R. R. S. 1943, could not have had any initial application. The statute contains no indication whatever that this was intended. This is also clear from the fact that the last sentence of section 48-838(2), R. R. S. 1943, contains the provision that in the case of certain governmental entities "with no previous history of collective bargaining" that units of less than departmental size shall not be appropriate. The reference to no previous bargaining history would not have had any meaning unless it included bargaining history other than under the act. This conclusion is also apparent from the historical development of the jurisdiction of the commission.

Until the enactment of L.B. 15, Laws 1969, jurisdiction of the commission, insofar as governmental employees were concerned, could not be invoked other than on a voluntary basis, except in "industrial disputes involving governmental service in a proprietary capacity." L. B. 537, Laws 1947, c. 178, § 10, p. 590; L. B. 875, Laws 1967, c. 305, § 1, p. 828. L. B. 15, Laws 1969, permitted governmental employers to recognize, negotiate collectively with, and enter into contracts with employee organizations. It also provided a method for certification of employee organizations and granted them the right to bargain collectively. In 1972, the certification procedure was greatly amplified. Elections to determine bargaining representatives were included. The provision of section 48-838(2), R. R. S. 1943, previously quoted, to wit, "the court shall consider established bargaining units and established policies of the em-

ployer," came into law for the first time. L. B. 1228, Laws 1972.

It is quite clear that under our recent holding in Transport Workers of America v. Transit Auth. of City of Omaha, *ante* p. 26, 286 N. W. 2d 102, the commission has no authority to enter declaratory judgments or exercise other judicial functions. Its fact-finding powers are to be confined to the area of its jurisdiction in resolving industrial disputes as that term is defined in Transport Workers of America v. Transit Auth. of City of Omaha, *supra*. Its declaration of invalidity of the HEAN contract in No. 215 should not have been given any weight by the commission in its consideration of prior bargaining history in this case. It is apparent from the commission's opinion that it, to some extent, discounted or disregarded that bargaining history. This it was not free to do. Had it fully considered prior bargaining history, it may be that its finding would have been different.

The commission, in its opinion, noted that "the agreement between the Board and HEAN apparently did not contain all the applicable terms and conditions, inasmuch as the wages were left to be determined separately by each of the four individual institutions." That observation by the commission was, of course, a pertinent portion of the prior bargaining history and was a consideration which the commission could properly take into account and apparently did.

We have examined the record in this case. We will not summarize the evidence. The commission's findings on all the points it considered is supported by substantial evidence. However, the error of law requires reversal.

The order of the commission is reversed and the cause is remanded for rehearing.

REVERSED AND REMANDED.

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

286 N. W. 2d 437

Filed December 18, 1979. No. 42441.

1. **Judgments: Appeal and Error.** The decision of a trial judge has the effect of a jury verdict and will not be set aside or disturbed on appeal unless it is clearly wrong.
2. **Judgments: Evidence.** In determining the sufficiency of the evidence to sustain a judgment, the evidence is required to be considered most favorably to the successful party. Each controverted fact must be resolved in favor of that party and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence.
3. **Insurance: Contracts.** Insurance contracts will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and a reasonable construction should be given so as to effectuate the purpose for which it was made. In cases of doubt, the policy is to be liberally construed in favor of the insured.
4. _____: _____. Where an insurance contract is reasonably susceptible to two or more interpretations, the one most favorable to the insured will be adopted.
5. _____: _____. If the language used in an insurance policy is ambiguous, it should be construed most strictly against the insurance company which is responsible for the language.
6. **Attorney's Fees: Statutes.** Under the mandatory language of section 44-359, R. R. S. 1943, a successful litigant is entitled to receive a reasonable attorney's fee for in-house counsel actually engaged in the preparation and trial of the litigation to the same extent as outside counsel.

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

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

James J. Holmberg (Columbus) and George A. Padgett, for appellee.

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

KRIVOSHA, C. J.

The appellant herein, Federal Insurance Company

(Federal), appeals from a judgment in favor of Dale Electronics, Inc. (Dale) in the amount of $242,265.53, plus prejudgment interest of $54,119.59 and attorney's fees of $39,560 and other costs of $15,453.14, entered by the trial court sitting in place of a jury. The principal issues raised by the appeal are whether at the time of the crash in question there was coverage under the policy issued by Federal to Dale, and whether the awarding of attorney's fees and costs in the amounts allowed was appropriate. For reasons more particularly set out herein, we find that the conclusion of the trial court sitting as a jury to the effect that there was coverage at the time of the accident involved herein was correct, but that the awarding of the amount of attorney's fees and costs was excessive and should be modified. For that reason the judgment of the trial court is affirmed in part and in part modified.

On January 31, 1975, an airplane owned by Dale and identified as N399T crashed while landing at the Executive-Johnson County Airport (EJCA), just south of Kansas City in Olathe, Kansas. It was daylight at the time of the crash and the plane was being flown by Dale's employee pilot. He was alone at the time of the fatal crash, and it is admitted there was no copilot aboard the plane. It was agreed by the parties that at the time of the fatal crash weather conditions at EJCA consisted of a 400-foot ceiling and 1-mile visibility.

At approximately 1:32 p.m., CST, the pilot, then being about 7 miles from EJCA and at an altitude of 2,600 feet, received final turn and approach clearance from the Kansas City approach control. At approximately 1:33 p.m., CST, the pilot contacted EJCA's tower via radio and was given clearance to land.

Shortly prior to the time of the accident the air traffic controller saw the plane break out of the overcast at approximately 400 or 500 feet over the

Very High Frequency Omni Directional Range Station located at the south, or approach, end of runway 35 of EJCA. The plane proceeded to descend at a level attitude, turning slightly to the right, and then approximately 30 or 40 degrees right, continuing down until it crashed, killing the pilot.

The accident resulted in the total loss of the plane, except for its salvage value. The stated insured value of the plane was $250,000. Dale received $10,000 for the plane's salvage value and incurred costs of $2,265.53 to protect the plane as required under the terms of the policy.

The record reflects that the plane left Oklahoma City on the day of the crash at approximately 12:22 p.m., CST. The Dale flight log for the plane, dated January 31, 1975, showed that after stopping at EJCA the pilot planned to continue on to his final destination at Columbus, Nebraska, the home base of Dale and the airport at which the plane was kept when not otherwise in flight. The pilot had flown from Columbus, Nebraska, to Oklahoma City on January 28, 1975, for routine maintenance.

The record further reflects that the pilot had been contacted early in the day on January 31, 1975, by a Mr. Ira Gates, Dale's vice president of sales and marketing. Mr. Gates was in the Kansas City area visiting a manufacturer's sales representative of Dale at his residence in Johnson County, Kansas. The sales representative was having some difficulty with alcohol, and Mr. Gates was trying to persuade him to be admitted to an alcoholic rehabilitation center located in Kansas. Mr. Gates had asked the pilot, who was a personal friend of the sales representative, if he might not stop at Olathe, Kansas, on his return flight to Columbus, Nebraska, so that they might discuss the sales representative's situation and see if the pilot might be able to convince him that he should have himself admitted for treatment.

Following the fatal crash, Federal denied cover-

age on the basis that the terms of the policy had not been met. The face of the policy provided in part as follows: "Item 5. Pilots. The coverage afforded by this policy shall not apply while the aircraft is operated in flight by other than the following pilots: Any person having a certificate from the Federal Aviation Administration designating him a commercial pilot, airplane category with multi-engine land and instrument ratings and who has a minimum of 2,500 total logged flying hours, including at least 750 hours as pilot in command of multi-engine aircraft. *And see Endorsement No. 5.*" (Emphasis supplied.) No issue was raised about the pilot's qualifications as called for by the policy.

Endorsement No. 5 was a typewritten endorsement attached to the policy and contained a number of specific terms and conditions apparently negotiated between Federal and Dale. In any event, they were not part of Federal's standard policy of insurance and were contained in a specific typewritten document. Item 4 of endorsement 5 related to several specific airplanes, including N399T. Subparagraph C of item 4 of endorsement 5 amended item 5 of the policy to require a two-man crew consisting of a captain and a copilot in the operation of the covered aircraft. Subparagraph D of item 4 of endorsement 5 provided as follows: "D. Item 5- Pilots of the Declarations is extended to include the following: Only while the aircraft is operated under daylight Visual Flight Rules conditions for the purpose of maintenance or Ferry Flights, the requirement for a co-pilot shall not apply." Federal maintained that at the time of the crash the plane was not being operated for either a maintenance or ferry flight and further that it was not then being operated under daylight Visual Flight Rules conditions. The trial court in rendering a judgment for Dale and against Federal obviously held to the contrary.

Before proceeding to make an investigation of the

trial court's judgment, it might be well to review certain basic principles by which this court reviews a determination of a trial court sitting without a jury in a law action. We have frequently said that the decision of a trial judge has the effect of a jury verdict and will not be set aside or disturbed on appeal unless it is clearly wrong. Weiss v. Union Ins. Co., 202 Neb. 469, 276 N. W. 2d 88; Omaha Paper Stock Co. v. California Union Ins. Co., 200 Neb. 31, 262 N. W. 2d 175. Furthermore, we have said that in determining the sufficiency of the evidence to sustain a judgment, that evidence is required to be considered most favorably to the successful party. Each controverted fact must be resolved in favor of that party and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence. Weiss v. Union Ins. Co., *supra*; Burgess v. Curly Olney's, Inc., 198 Neb. 153, 251 N. W. 2d 888; McBride v. Fort Kearney Hotel, Inc., 185 Neb. 518, 176 N. W. 2d 911. Unless we can say as a matter of law that the decision of the trial court sitting as a jury was clearly wrong and not supported by the evidence viewed most favorably to Dale, we are obligated to affirm the decision of the trial court even though had we been sitting as the trier of fact we might have decided otherwise.

Unfortunately, neither the phrase "maintenance or ferry flights" nor "daylight Visual Flight Rules conditions" as used in the policy is defined in the policy. While each party maintains that the language is clear, their disagreement as to the "clear meaning" of the policy makes it apparent that there is a difference of opinion and that the language is not all so clear. We are therefore required in reviewing this matter to keep certain basic rules of interpretation in mind. Insurance contracts will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and a reasonable construction should

be given so as to effectuate the purpose for which it was made. In cases of doubt, the policy is to be liberally construed in favor of the insured. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co., 200 Neb. 46, 262 N. W. 2d 183; Neal v. St. Paul Fire & Marine Ins. Co., 197 Neb. 718, 250 N. W. 2d 648; Shipley v. American Standard Ins. Co., 183 Neb. 109, 158 N. W. 2d 238.

Where an insurance contract is reasonably susceptible to two or more interpretations, the one most favorable to the insured will be adopted. Townley v. Whetstone, 190 Neb. 541, 209 N. W. 2d 350; American Standard Ins. Co. v. Tournor, 186 Neb. 585, 185 N. W. 2d 267; Waak v. National Bankers Life Ins. Co., 180 Neb. 129, 141 N. W. 2d 454; Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245. If the language used in an insurance policy is ambiguous, it should be construed most strictly against the insurance company which is responsible for the language. Niemeyer v. Estate of Tichota, 191 Neb. 484, 215 N. W. 2d 885. With these various rules of construction in mind we turn first to the question of whether at the time of the fatal crash the plane was being operated for the purpose of a maintenance or ferry flight.

It is undisputed that the plane had been earlier taken to Oklahoma City, Oklahoma, for routine maintenance and, but for the stopover at EJCA, was being returned to Columbus, Nebraska, its home base. The more direct question then is whether the intended stopover at EJCA during the return flight from Oklahoma City, Oklahoma, to Columbus, Nebraska, destroyed the ferry flight nature of the trip.

As we have previously noted, the policy did not define "ferry flight" nor designate how the term was to be interpreted. It is by its very nature a term uniquely related to the flying of aircraft and not a word of common parlance.

Dale maintained that the term was an industry-

defined term and offered as evidence of its meaning both the testimony of an expert witness and the Airman's Information Manual, Part I, Basic Flight Manual and ATC Procedures (1977), published by the U. S. Department of Transportation, Federal Aviation Administration.

The manual defines "ferry flight" to mean: "A flight for the purpose of: (1) returning an aircraft to base; (2) delivering an aircraft from one location to another; or (3) moving an aircraft to and from a maintenance base." As earlier noted, but for the planned stopover at EJCA, the flight from Oklahoma City, Oklahoma, to Columbus, Nebraska, was a ferry flight covered by the policy and required only one pilot on board.

Federal argues, however, that the pilot was flying to EJCA for the sole purpose of taking the sales representative to an alcoholic rehabilitation center.

A jury sitting as reasonable people, and in this case the trial court sitting in place of the jury, could reasonably find from the evidence that the pilot was returning the plane to its base in Columbus, Nebraska, and was therefore on a ferry flight. The momentary stopping at EJCA did not change that purpose. There was no evidence introduced that following the arrival of the plane at EJCA, the sales representative would board and the pilot would fly to Norton, Kansas, or anywhere else except Columbus, Nebraska. It was not unreasonable for the trial court to conclude that indeed the pilot intended to continue on to Columbus, Nebraska, after his brief stopover at EJCA. We cannot say as a matter of law that the evidence does not support the trial court's conclusion insofar as it must have determined that the purpose of the ill-fated flight was for ferry purposes. Applying the rules of construction earlier set out in this opinion as we are required to do, we must affirm the trial court's conclusion in that regard.

Having reached that result, we must next examine the record to see if there is sufficient evidence upon which the trial court could reasonably find that at the time of the crash the plane was then being operated under Visual Flight Rules *conditions*. In this regard it is necessary that we recognize a distinction between operating a plane under Visual Flight Rules (VFR) themselves and simply operating a plane under Visual Flight Rules "conditions." The former require absolute compliance while the latter only require the existence of certain weather *conditions*. For purposes of this case, the distinction is significant.

Dale offered, without objection, the testimony of several expert witnesses to the effect that at the time of the crash the pilot was operating the plane under VFR conditions, to wit: a 400-foot ceiling and 1-mile visibility. Federal argues that the conclusion is wrong because first, a 400-foot ceiling and 1-mile visibility is a "special VFR" and not VFR, and second, the pilot had not obtained a clearance from the air tower controller to land under a special VFR. The difficulty with this argument is due to Federal's unwillingness to recognize the fact that the policy does not specify which VFR conditions are to apply and that it is only VFR *conditions* which are required to be met.

Both parties seem to agree that the meaning of VFR conditions required in the policy must be found by examining the appropriate section of Title 14, Code of Federal Regulations, entitled Special Federal Aviation Regulations. The appropriate sections are 91.105, 91.107, and 91.109. All three sections are grouped together under a general heading entitled Visual Flight Rules. Section 91.105 is entitled *Basic* VFR *weather* minimums; section 91.107 is entitled *Special* VFR *weather* minimums; and section 91.109 is entitled VFR cruising altitude or flight level and appears not to be involved in this matter. The gen-

eral heading of Visual Flight Rules therefore consists of two subparts, one "basic" and one "special," both of which are nevertheless Visual Flight Rules.

What language in the policy or what rule of construction requires us to read the term "Visual Flight Rules" of the policy to mean "basic" and not to also mean "special?" Nothing to support that position has been cited to us and we know of no rule of construction which would require it. Quite to the contrary, we are compelled to hold that both "basic" and "special" are included in the policy term "Visual Flight Rules" just as they are both included in the federal regulations.

Federal further argues, however, that even if the special VFR applies, the pilot was not operating the plane under such conditions because he had not received an appropriate clearance from the air traffic controller. Dale, on the other hand, maintains that the policy language refers to "weather conditions" and not strict flight operations. The trial court obviously agreed with Dale on that point and again we cannot say as a matter of law that the trial court was wrong. Sections 91.105 and 91.107 specifically provide in their titles that they are "weather minimums." Substituting the title to section 91.107 for the policy language would give us the following: "Only while the aircraft is operated under daylight Special Visual Flight Rules weather minimums conditions * * *." The evidence was to the effect that the plane was at the time of the crash operating free of clouds at least 400 feet from the ground and with 1 mile of visibility. The existence of conditions equal to 400 feet with regard to clouds and 1 mile with regard to visibility meets "Special Visual Flight Rules weather minimums conditions" and is within the policy requirements. We again cannot say as a matter of law that the trial court was clearly wrong. That being the case, we must affirm the findings of fact made by the trial court and therefore affirm the

judgment insofar as it found that, at the time of the crash, Dale met the policy conditions and was entitled to recover.

With regard to the matter of attorney's fees and costs, we have a slightly different situation. The trial court allowed attorney's fees in the amount of $39,560 and costs in the amount of $15,453.14. In support of Dale's request for attorney's fees and costs, it filed various affidavits. The order of the court allowing these two items does not detail what was considered and what was disregarded. It is clear, however, that some items must have been disregarded because the amount claimed is not identical to the amount allowed.

With regard to the allowance of attorney's fees, Federal maintains that no such fees should be allowed because counsel for Dale was salaried in-house counsel and therefore Dale did not incur any expenses for attorneys in this case. We do not believe that the requirements of section 44-359, R. R. S. 1943, intend to disregard in-house counsel. Had counsel not been engaged in this case, he could have been otherwise engaged. Under the mandatory language of section 44-359, R. R. S. 1943, a successful litigant is entitled to receive a reasonable attorney's fee for in-house counsel actually engaged in the preparation and trial of the litigation to the same extent as outside counsel. We believe the mandatory language of section 44-359, R. R. S. 1943, entitled Dale to the allowance of an attorney's fee even for in-house counsel. We do not, however, agree as to the amount allowed nor do we believe that a fee for Mr. James Holmberg should be allowed after suit was filed. Dale acknowledges, as does the record reflect, that Mr. Holmberg served as both counsel and witness. In its brief, Dale notes, "Foremost was the absolute need for Mr. Holmberg to appear as one of plaintiff's key witnesses at trial." Section 44-359, R. R. S. 1943, does not contemplate the al-

lowance of expert witness fees to lawyers simply because they are members of the bar. Likewise, see Canon 5 of the Code of Professional Responsibility, and in particular, EC 5-9 and EC 5-10.

We have reviewed Dale's affidavit and conclude an attorney's fee in the amount of $18,075 is appropriate in this case.

Likewise, with regard to the costs allowable under section 25-1708, R. R. S. 1943, we believe the trial court erred in allowing certain of the costs. Again, we cannot determine which of the requested costs were allowed and which were disallowed. We have, however, examined the record in detail and conclude an allowance of $3,871.83 for costs is proper.

The order of the trial court is therefore modified to provide for the allowance of an attorney's fee in the amount of $18,075 and the allowance of costs in the amount of $3,871.83. In all other respects the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion in this case which holds that the issues presented questions of fact rather than law and that the landing at Olathe, Kansas, was a part of a ferry flight.

ROBERT KURZ, APPELLEE, V. DINKLAGE FEED YARD, INC., A NEBRASKA CORPORATION, APPELLANT.

286 N. W. 2d 257

Filed December 18, 1979. No. 42493.

1. **Rules of Evidence: Statutes.** Under section 27-407, R. R. S. 1943, evidence of subsequent measures is admissible to show "feasibility of precautionary measures, if controverted."
2. **Rules of Evidence: Statutes: Words and Phrases.** Feasibility as used in section 27-407, R. R. S. 1943, means more than capable of being done. It includes effectiveness and practicality.

3. **Trial: Testimony.** The length and form of a hypothetical question is a matter within the discretion of the trial court.

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

Wright & Simmons, for appellant.

J. A. Lane and R. Kevin O'Donnell of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellee.

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

BOSLAUGH, J.

The plaintiff, Robert Kurz, operates a dairy farm near Sidney, Nebraska. The defendant, Dinklage Feed Yard, Inc., operates a large commercial feedlot approximately 2½ miles northwest of the plaintiff's farm. On March 27, 1975, during a severe snowstorm and blizzard a large number of feeder cattle escaped from the defendant's feedlot and traveled to the Kurz farm where they broke down fences and sought shelter with the Kurz dairy cattle. In addition to damaging the fences at the Kurz farm, the defendant's cattle consumed and destroyed feed stored there and prevented the plaintiff from milking his cattle until March 29, 1975, when the defendant's cattle were removed from the plaintiff's farm. This action was brought to recover the damages caused by the defendant's cattle during and following the storm.

The amended petition alleged that the defendant was negligent in failing to erect fences that were sufficient to contain its cattle; in failing to erect windbreaks; in failing to exercise reasonable care and supervision of its cattle; and in failing to retrieve its cattle within a reasonable time. The answer alleged that any damage sustained by the plaintiff was caused by an act of God and the negligence of the plaintiff in failing to exercise reasonable care in the supervision of his cattle. The answer further al-

leged that the plaintiff failed to mitigate his damages by failing to round up his cattle within a reasonable time after the storm; in failing to obtain veterinary services for his cattle; and in failing to properly treat his cattle following the storm.

The issues were submitted to a jury which returned a verdict for the plaintiff in the amount of $18,496.10. The defendant has appealed and contends the trial court should not have submitted to the jury the specifications of negligence alleged in the amended petition.

The evidence shows that the fences which were erected at the defendant's feedlot were adequate to contain the feeder cattle under normal conditions, but during a heavy snowstorm the snow would drift around the fences, which permitted the cattle to escape over the top of the fences. There was evidence that this condition should have been anticipated and could have been avoided by constructing higher fences and erecting windbreaks and snow fences.

There was also evidence from which the jury could find that the defendant could have removed its cattle from the plaintiff's farm approximately 24 hours before they were actually removed. The evidence in regard to these matters was in conflict but it was sufficient to permit the jury to find that the defendant was negligent in the particulars alleged.

With respect to damages, the evidence shows that in addition to the damage to the plaintiff's fences and feed some of the plaintiff's cattle died and some of the wet cows developed mastitis, largely as a result of the plaintiff's inability to milk them while the defendant's feeder cattle were crowded in among them. The plaintiff attempted to treat these cattle but the treatment was not successful and it was necessary to dispose of them as meat animals. The evidence as to damages was somewhat in conflict but it was sufficient to permit the jury to return the verdict which it did.

The plaintiff was allowed to introduce evidence over objection that the defendant's cattle escaped from its lot during a 1977 storm and that sometime prior to trial the defendant erected snow fences at its lot. The evidence as to the escape of the cattle in 1977 had some relevance to the plaintiff's contention that storms of the magnitude of the 1975 blizzard were not unusual and should have been anticipated by the defendant.

Evidence in regard to the snow fences erected by the defendant after 1975 was admissible on the issue of the feasibility of snow fences as a precautionary measure. Under section 27-407, R. R. S. 1943, evidence of subsequent measures is admissible to show "feasibility of precautionary measures, if controverted."

The defendant's manager testified that snow fences would not have been effective to prevent the escape of the cattle and that such fences were dangerous and impractical. Feasibility as used in section 27-407, R. R. S. 1943, means more than capable of being done. It includes effectiveness and practicality. See, Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N. E. 2d 749; 35 C. J. S., Feasible, p. 964. Evidence that the defendant erected snow fences after the 1975 storm was admissible as tending to show that the testimony of the defendant's manager was untrue and that snow fences were feasible as a precautionary measure.

The plaintiff called a veterinarian as an expert witness who was allowed to testify by means of a lengthy hypothetical question that in his opinion the plaintiff's wet cows were suffering from mastitis after the March 27, 1975, storm. The defendant's objection that the question was too long and unintelligible was overruled.

The question was approximately 5 pages in length and included much of the evidence in the case, some of which was probably irrelevant. Under the new

rules of evidence such questions are unnecessary and should be avoided. However, the length and form of a hypothetical question is a matter within the discretion of the trial court. Kresha Constr. Co., Inc. v. Kresha, 184 Neb. 188, 166 N. W. 2d 589. As we view the record, the trial court did not abuse its discretion. The evidence objected to was to some extent cumulative and there was no prejudice to any substantial right of the plaintiff.

The defendant requested an instruction to the effect that the jury could consider evidence of the custom and approved methods of prudent operators in the same business in connection with all the other evidence in determining whether the defendant was negligent. The instruction was refused and the refusal is assigned as error.

The defendant's manager testified over objection that there was no customary height for feedlot fences but they ordinarily did not exceed 5 feet in height and the defendant's fences were equal to the custom in the industry. The issue, of course, was what was prudent for an operator under the particular circumstances in this case. Evidence as to what fences might be satisfactory in other locations had little or no relevance to the issue in this case. We think the requested instruction was properly refused.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA ET AL., RESPONDENTS.

286 N. W. 2d 729

Filed December 28, 1979. No. 42862.

1. **Constitutional Law: Taxation.** The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is applicable to state tax legislation and imposes restraint upon state taxing power.
2. **Taxation: Property.** The requirement of uniformity in taxation is applicable not only to the valuation of property, but also to the rate of taxation thereon.

Original action. Judgment for relator.

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

Clarence A. H. Meyer, for respondents.

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

BRODKEY, J.

This is an original action brought by the relator, the Attorney General of this State, against respondents, the State Board of Equalization and Assessment, the Governor, the Secretary of State, the State Auditor, the State Treasurer, and the State Tax Commissioner, challenging the constitutionality of an amendment to Article VIII, section 1, of the Constitution of the State of Nebraska. Respondents filed an answer admitting the facts alleged in relator's petition, but denying relator's conclusions drawn from those facts. Additional facts were stipulated to between the parties. Relator then moved for summary judgment. We sustain relator's motion.

The amendment giving rise to this litigation resulted from action taken during a special session of

the Eighty-fifth Legislature, which convened on June 8, 1978. This special session was called by the Governor for the purpose of considering and, if deeming it advisable, enacting legislation relating to the following subjects: (1) To extend the operative date of section 328, L.B. 38, Eighty-fifth Legislature, First Session, 1977 (the Nebraska Criminal Code), to January 1, 1979. (2) To enact spending limitations on government budgets. During the special session, the Legislature adopted Legislative Resolution 1, which proposed an amendment to add the following language to Article VIII, section 1, of the Nebraska Constitution: "[W]hen a political subdivision authorized to levy a tax or cause a tax to be levied lies in two or more counties, and one or more of such counties have not completed a general reappraisal of all land and improvements within two years of one another, the State Board of Equalization and Assessment shall fix separate and distinct tax levies so that the county which has most recently completed a general reappraisal of all lands and improvements shall provide the same percentage of the political subdivision's budget as it provided prior to such reappraisal. For all tax years commencing on or after January 1, 1981, the State Board of Equalization and Assessment shall not be empowered to fix separate and distinct levies but shall annually review and equalize assessments of property among counties." The proposed amendment was submitted to the electorate at the November 1978, general election, adopted by them, and proclaimed by the Governor to be in "full force and effect as part of the Constitution of the State of Nebraska" on December 5, 1978. Relator, following leave granted by this court, instituted this original action on June 25, 1979. The State Board of Equalization and Assessment held hearings during July and August of 1979, and on August 6, 1979, ordered the equalization of tax assessments of property in various counties

in the state. On motion of the relator, this court, on August 21, 1979, entered a restraining order against the respondents prohibiting them from enforcing the provisions of the constitutional amendment in question during the pendency of the action. Respondents made no objection to the entry of the restraining order.

Under Rule 2 (b) of this court, the procedure in original actions, when commenced after leave to do so has been granted, shall be the same as in the District Court except as otherwise ordered. The rules relating to the granting of summary judgments in this state are well established and need not be repeated in detail. Section 25-1332, R. R. S. 1943, provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The facts involved herein have been admitted and stipulated to, and are not in dispute. It is clear, therefore, that relator's motion must be granted if his position in this litigation is correct as a matter of law.

Relator's argument against the validity of the amendment rests on two principal grounds. First, relator contends that the action of the Legislature in adopting Legislative Resolution 1 was void and in violation of Article IV, section 8, of the Nebraska Constitution, in that the submitting of such a constitutional amendment to the electors was not included in the purposes for which the special session of the Legislature was convened, as set forth in the Governor's proclamation calling them into special session; and that said amendment was therefore not adopted in conformity to law, and is of no force and effect. Second, relator contends that the amendment in question is violative of several provisions of the United States and Nebraska Constitutions relat-

ing to due process and equal protection of the laws. We shall examine these contentions in reverse order.

In this connection, relator contends that the amendment in question is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is generally held that the Equal Protection Clause of the Fourteenth Amendment is applicable to state tax legislation and imposes considerable restraint upon state taxing power. 71 Am. Jur. 2d, State and Local Taxation, § 157, pp. 479, 480; 16A C.J.S., Constitutional Law, § 520, p. 382; Allied Stores of Ohio v. Bowers, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959); Kahn v. Shevin, 416 U. S. 351, 94 S. Ct. 1734, 40 L. Ed. 2d 189 (1974); Hillsborough v. Cromwell, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946); Sioux City Bridge v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923). The amendment in question being an amendment to Article VIII, section 1, of our Nebraska Constitution, it is therefore necessary that we examine the amendment in question in light of the federal Constitution.

The effect of the Equal Protection Clause on the "uniformity" provision of Article VIII, section 1, was discussed in Sioux City Bridge v. Dakota County, *supra,* where the court stated: "[W]here it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." The court held in that case: "[T]he right [under the Fourteenth Amendment] of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute." The same rules requiring uniformity of taxation apply to rate of taxation as well as valuation.

This court has frequently interpreted the language

of Article VIII, section 1, of the Nebraska Constitution. In Gates v. Howell, 204 Neb. 256, 282 N. W. 2d 22 (1979), we stated: "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." (Emphasis supplied.) To the same effect, see, State ex rel. Meyer v. Peters, 191 Neb. 330, 215 N. W. 2d 520 (1974); Grainger Brothers Co. v. Board of Equalization, 180 Neb. 571, 144 N. W. 2d 161 (1966); Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489 (1954); State v. Back, 72 Neb. 402, 100 N. W. 952 (1904).

Recapitulating, therefore, it is clear that Sioux City Bridge v. Dakota County, *supra*, which specifically considered the provision of the Nebraska Constitution requiring uniformity in taxation, established the principle that a failure to do so would be a violation of the Fourteenth Amendment to the federal Constitution. Likewise, Nebraska cases cited above clearly establish the rule that the requirement of uniformity referred to is applicable not only to the valuation of property, but also to the rate of taxation thereon. We must therefore examine the facts admitted and stipulated to by the parties, as well as the clear language of the amendment itself, to determine whether the rate of taxation imposed under the provisions of said amendment would be uniform and proportionate upon property in the same taxing district.

An examination of the legislative history of Legislative Resolution 1, which gave rise to the submission of the amendment in question to the electorate, will be helpful in this regard. During the floor debates on the resolution, Senator Warner, the introducer of the resolution, was questioned by one of the senators with regard to differing rates of taxation within the same taxing district. The discourse be-

tween the two was as follows: "Senator Lamb: Okay, you have two counties side by side, say they have a school district which overlaps those counties A & B, okay, so you adjust the mill levy in County A to reflect the lack of reappraisal in County B. Okay, County A also has a school district on the other side which is County C and which has a school district which overlaps County A and County C. Therefore you are going to have to have a different mill levy to reflect the reappraisal of County C or the lack of reappraisal. Will you not have to have a number of different mill levies in the same county to reflect the differences in the bordering counties?

"Senator Warner: I think that the answer to your question is yes. But, let me point out that the uniformity that we are trying to approach here, let me go back to the comment that I made earlier. It would be my position that the requirement for uniformity of assessment and mill levies that is now in the Constitution is essentially based upon the same . . . there shall be a uniformity of dollars paid by the individual tax payer [sic] on like property within the same taxing jurisdiction. What this amendment proposes is a continuation of that uniformity of dollars until all counties have reappraised and it would be true that if you have three counties and two different school districts with one county being in both, yes, *you could conceivably have different levies.* I do not see that a problem at all in terms of calculation because the known valuation of every taxing district is there and a proportionate share of the value between the two counties in a single taxing district is a readily available figure there is no problem about that." (Emphasis supplied.) This interchange demonstrates that even the sponsor of the resolution recognized that the rate of taxation might not be uniform in the same taxing district.

The stipulation of facts entered into between the parties is also helpful in demonstrating that the ap-

plication of the amendment in question in multicounty taxing districts would necessarily result in a lack of uniformity of taxation and would hence constitute a violation of the Fourteenth Amendment to the U. S. Constitution, and would also constitute nonuniform taxation as prohibited by Article VIII, section 1, of the Nebraska Constitution. Although the stipulation of facts sets out numerous examples of actual fact situations in multicounty taxing districts, we shall discuss only one of the situations referred to therein, as clearly illustrative of the resulting lack of uniformity from the application of the amendment. The fact situation and illustration stipulated to by the parties involved Gage, Pawnee, and Johnson Counties, portions of each being in the same school district. It appears that in 1977, the respective percentages of the budget for that school district furnished by the aforementioned counties were 7.3, 45.3, and 47.4. Gage County reappraised its property in 1978. It also appears that territory was added to the multicounty school district in 1978 as a result of the dissolution of a separate school district in Gage County. As a result of the reappraisal and the increase in territory, the percentage of the budget of the multicounty school district furnished by the respective counties changed. In 1978, Gage County furnished 23.55 percent, Pawnee County furnished 48.2 percent, and Johnson County furnished 28.03 percent of the budget. It is further stipulated by the parties that under the constitutional amendment, 1977 would be the base year for the determination of the percentage of the budget to be provided by the counties in the multicounty school district. It follows, therefore, that Gage County, which should be furnishing 23.55 percent of the budget from property located in the multicounty school district, would, in fact, only furnish 7.3 percent of the budget for 1979. Such a result clearly contravenes the principles of taxation we have adopted in this state, and

is violative of the Equal Protection Clause of the federal Constitution because of the obvious and apparent lack of uniformity in taxation.

The colloquy between the court and counsel for the respondents during oral argument with reference to the question of the uniformity, or lack thereof, which would result from the implementation of the amendment in question is also of interest and helpful in the resolution of this problem. The court inquired of counsel: "Say we have two counties side-by-side and you have a multidistrict between the two counties. In one year County A provided 60 percent of the budget for this taxing multidistrict taxing entity, and County B provided 40 percent. During the year there was a great deal of growth in County B, so that based upon valuations in County B it should now be paying 60 percent of the budget based upon the values that were there. But it doesn't reappraise. Doesn't this require that notwithstanding that fact County A has to continue paying 60 percent of the budget?"

Counsel: "Your honor, now you said two things, one that there has been a great growth in the one county in valuation. Now remember we assess as of January 1st."

Court: "Well make it whatever 12-month period you want but ultimately that fact will come into play won't it?"

Counsel: "I see no reason why the Legislature by implementing this amendment couldn't take care of that problem."

Court: "By saying that they'll not carry out the Constitution?"

Counsel: "There isn't anything in the Constitution that specifically requires that the particular manner be followed. It doesn't say * * *."

Court: "It says that County A shall pay 60 percent of the budget because they paid 60 percent of the budget before."

Counsel: "Let me point out, your honor, that the rule in this state is that the Legislature has unlimited power in the field of taxation unless limited by the Constitution."

Court: "Which says that the taxation shall be equal and proportionate among the counties."

Counsel: "That is correct."

We can see no manner in which the foregoing situation could possibly result in anything other than nonuniform and disproportional taxation. While other situations could be and were argued by the relator with regard to the lack of uniformity necessarily engendered by the implementation of the amendment, we do not deem it necessary at this point to discuss in detail the other examples and fact situations referred to by him, as we believe the foregoing examples clearly illustrate the deficiencies in the amendment in that regard.

We next comment on relator's contention that the amendment in question deprives the taxpayers in the multicounty districts of their procedural due process rights under the United States Constitution and the Nebraska Constitution, specifically the failure of the amendment to provide for an opportunity to the taxpayer to be heard in connection with a change in the amount of his levy. This court has long adhered to the rule that a taxpayer is not deprived of his property without due process of law if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings. See, Hacker v. Howe, 72 Neb. 385, 101 N. W. 255 (1904); County of Douglas v. State Board of Equalization & Assessment, 158 Neb. 325, 63 N. W. 2d 449 (1954); and Frye v. Haas, 182 Neb. 73, 152 N. W. 2d 121 (1967). The amendment involved herein does not in any manner provide for an opportunity for the taxpayer to be heard. Such failure to provide for a hearing also illustrates the de-

ficiencies in the amendment and is a further reason for finding the amendment to be in violation of the United States Constitution and the Nebraska Constitution.

We wish to make it perfectly clear that we consider and pass upon the constitutionality of the amendment in question in the form in which it was adopted and as presented to this court in the original action brought by the relator. Although the respondents argue that any constitutional defects existing in the amendment could be cured by supplementary legislation, assuming for the moment that the amendment could be interpreted as not being self-executing in nature, nevertheless we have no way of knowing the nature and provisions of any subsequent legislation which may be enacted, or, for that matter, if and when such may ever be adopted; those items are entirely conjectural. We might add that although it is conceivable some of the obvious procedural deficiencies in the amendment, such as the lack of notice to the taxpayer and an opportunity to be heard, might be cured by subsequent legislation, nevertheless it is difficult to conceive how any of the substantive constitutional shortcomings could be remedied by further legislation, as such legislation would of necessity violate the constitutional provision itself. The Legislature could not direct the ignoring or violation of any provision of the Constitution, including the amendment in question. We also add that if it were considered a defense to a constitutional attack that any constitutional deficiencies could be corrected by further legislation, the same argument might equally be applied to a constitutional attack upon a statute adopted by the Legislature, which reasoning, of course, is obviously fallacious. We therefore conclude that we must in this case consider only the constitutionality of the amendment itself, keeping in mind also that by the terms of the amendment the provisions for equaliza-

tion by means of adjustment of levies in multicounty districts are self-executing, at least with respect to the expiration date of the amendment, which is December 31, 1980.

With the foregoing in mind, and based upon a study of the applicable law and the facts stipulated to by counsel for the parties in this action, we therefore conclude that the amendment in question violates the Equal Protection and Due Process Clauses of the United States Constitution and hence is invalid.

In view of the decision we reach here, we need not examine the other matters raised by relator bearing upon the invalidity of the amendment. The question arises, however, as to the wisdom of engrafting provisions which are of very short duration, such as the instant amendment, upon the permanent Constitution of this state. While we do not believe that this should be done, we fully realize that the matter is properly within the discretion of both the Legislature and the people. We only hold here that the purported amendment involved herein is unconstitutional and void. We therefore sustain relator's motion for a summary judgment and enter a verdict for relator in this action.

JUDGMENT FOR RELATOR.

BRODKEY, J., concurring.

Obviously I agree with the conclusions of the majority opinion, so far as it goes. In the majority opinion, however, the court chose to ignore, and did not comment upon, the contention of the relator that the amendment in question is void for the reason that the resolution for such amendment, adopted by the Legislature at a special session convened by the Governor, was not included in the Governor's proclamation calling the Legislature into session. I am in full agreement with the parties to this action, and believe that the matter should be forthrightly discussed. It cannot be ignored.

It has long been recognized in this state that the self-imposed limitations on the power of the people to amend their fundamental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed. State v. Winnett, 78 Neb. 379, 110 N. W. 1113 (1907). That proposition notwithstanding, it is also true that where the Constitution prescribes certain procedures with regard to the amendment of that document, there must be substantial compliance with those requirements in order to effect either a valid submission or adoption of the attempted amendment. State, ex rel. Hall v. Cline, 118 Neb. 150, 224 N. W. 6 (1929).

Relator contends that the amendment was not submitted to the voters in substantial compliance with the provisions of the Constitution. Specifically, relator claims that the amendment was not within the purposes for which the Legislature was convened in special session. In support of this position, he directed the attention of this court to Article IV, section 8, of the Constitution, which provides: "The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together."

The two purposes for which the special session of the Legislature was called were: (1) To extend the operative date of the criminal code; and (2) to enact spending limitations on government budgets. That the scope of LR 1 is not within the purpose of extending the operative date of the criminal code is clear. I likewise do not believe that the substance of LR 1 can fall within the purview of enacting spending limitations.

"It is well established that the Legislature while in special session can transact no business except that for which it was called together. Chicago, B. & Q. R. R. Co. v. Wolfe, 61 Neb. 502, 86 N. W. 441. The proclamation may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation." Arrow Club, Inc. v. Nebraska Liquor Control Commission, 177 Neb. 686, 131 N. W. 2d 134 (1964).

Respondents contend that the preamble to LR 1 would cause it to fall within the second announced purpose for calling the special session of the Legislature, that of enacting spending limitations on government budgets. The language to which they refer undoubtedly is: "Whereas, to insure that the budget of any political subdivision which has multicounty assessment is not excessive and does not provide undue fluctuation, * * *." I do not believe that this general language causes LR 1 to come within the scope of the call.

"Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight." Stahmer v. State, 192 Neb. 63, 218 N. W. 2d 893 (1974). See, also, Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236 (1972). The expressed purpose for the amendment was "to recognize that political subdivisions which cross county lines may result in property tax inequities if reappraisals are not accomplished in a consistent and timely manner in the counties where such a situation exists." In explaining the purpose of the resolution, Senator Warner, the introducer of LR 1, stated: "Now, the purpose of LR 1 is to address the problem of inaction by the Board of Equali-

zation now for nearly nine years; and it suggests that unusual means may be needed to work out the themes which we find ourselves in the state because of lack of the State Board of Equalization in that responsibility that they have both by statute and by the Constitution." Senator Warner also stated: "The constitutional amendment is aimed at a single problem and that single problem is the inequity, the injustice that occurs when counties reappraise at different times and multi-county taxing districts are involved. It's all that's aimed at addressing and is intended to be only for this interim period, which we all, I think, recognize we're going to be going through until that job is completed." It is clear from the above that the purpose of LR 1 was to force the State Board of Equalization and Assessment to promote and provide equality in taxation of property in multicounty districts. I do not believe that requiring the State Board of Equalization and Assessment to equalize taxation by the adjustment of levies in multicounty districts is sufficiently similar to enacting spending limitations on government budgets. While it is possible that the items may be tangentially related, it is clear that they deal with separate and distinct subjects in this case. I am firmly convinced that the subject matter of LR 1 does not fall within the scope of the call of the Governor.

However, the inquiry cannot be limited solely to Article IV, section 8, of the Nebraska Constitution. Respondents contend that the Legislature has the power to propose constitutional amendments at all sessions, regardless of whether the session is a special session or a general session. Article XVI, section 1, must be considered in connection with this contention. It provides as follows: "The Legislature may propose amendments to this Constitution. * * *" In this connection see, also, § 49-201, R. R. S. 1943. We have recognized that each and every clause

of the Constitution has been inserted for some useful purpose. Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to the rules of strict construction. Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322 (1967); School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752 (1972). The two provisions of the Constitution referred to must, therefore, be read together and must be liberally construed to reach a harmonious result, if possible. It is clear that such a reading is possible.

It is clear that the drafters of our Constitution only meant to allow the Legislature to transact that business for which it was called into special session and no other. This is made obvious by the remarks of Delegate Robinson during the debate on this particular provision of the Constitution at the 1871 Constitutional Convention. He stated: "It is well known that a Constitutional provision of this kind acts as an indication of the powers of the Legislature; and if the Constitution provides that no business of a certain character shall be transacted, it means what it says; and if business is transacted, it is treated as no business, whatever." 1 Nebraska Constitutional Conventions 190 (1906). I do not believe that the constitutional amendment in question is "alike, closely allied, or related to" the stated purposes of the call. Lost Creek Drainage Dist. v. Kring, 193 Neb. 450, 227 N. W. 2d 421 (1975). Not being germane to the call, it necessarily follows that Legislative Resolution 1 was not business before the Legislature, and thus was not properly submitted to the electorate. The general rule is stated in 16 C. J. S., Constitutional Law, § 9, p. 51, as follows: "It has been stated generally that a legislature may propose amendments at either a regular or special session. However, under constitutional provisions to the effect that the legislature, when convened in a special

or extra session, shall have no power to legislate on subjects not named in the call, amendments may be proposed at a special session if proposals for amendments to the constitution have been included in the proclamation of the governor calling the special session, *but not otherwise.*" (Emphasis supplied.) See, also, People v. Curry, 130 Cal. 82, 62 P. 516 (1900); State v. Schoonover, 146 W. Va. 1036, 124 S. E. 2d 340 (1962). Counsel for respondents relies on the case of Sweeney v. King, 289 Pa. 92, 137 A. 178 (1927), apparently holding to the contrary. However, a reading of that decision discloses a call of a special session of the Legislature by the Governor was not involved in any of the cases cited in that opinion. While it is true that a constitutional amendment may be proposed by the Legislature convened in a special session, I am firmly convinced that under our constitutional provisions, the subject matter of the amendment to be proposed must fall within the express purposes announced by the Governor in his proclamation calling the Legislature into special session. In my opinion this constitutes a valid additional ground for finding the amendment in question to be unconstitutional and that the contention of the Attorney General to this effect was absolutely correct.

CLINTON, J., concurring in part.

I concur in the opinion of the court insofar as it holds that the amendment to Article VIII, section 1, of the Nebraska Constitution, resulting from the proposal of Legislature Resolution 1, Eighty-fifth Legislature, First Special Session, 1978, subsequently adopted by the people in the election of November 1978, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. For reasons which I will state later, I do not concur in the balance of the opinion.

Before stating why I do not join in the court's opinion on the due process issue, I wish to add a few words of my own on the equal protection ground.

The opinion of the court sets forth one glaring example of the inequalities in taxation which would arise as a result of implementation of the amendment, viz., the school district located in parts of Gage, Pawnee, and Johnson Counties. The example is an accurate, although a rather complex, one. It might be useful to the general understanding of the court's opinion if a somewhat simpler example were used.

Before giving the simpler example, it will add clarity to restate the premise on which the amendment would operate. The proposed amendment operates on the assumption that equality in valuation of property between counties does not exist in certain instances. The amendment is designed to achieve uniformity in taxation by adjusting the levy to compensate for the lack of uniformity in value. It follows, of course, that in cases where uniformity in valuation exists for the taxable year in question, adjustment of the levy will result in the lack of uniformity.

Now the example. Motor vehicles are uniformly valued, as near as can be, throughout the state. § 77-1238 et seq., R. R. S. 1943. The levy on such vehicles is computed "at a rate equal to the ad valorem rate for all purposes for the preceding year in the several taxing units of the state" in which the vehicle has tax situs. § 77-1240.01, R. R. S. 1943. Under the amendment, equally valued motor vehicles would, because of the adjustment of the levy, be taxed at different rates within the same taxing district, e.g., the school district lying in more than one county, and so owners of property of identical value would pay unequal amounts of taxes for the same purpose.

Because the amendment assumes as a basic premise that inequality exists, it makes no provision for the cases where equalization between counties has been accomplished. If, e.g., the State Board of Equalization and Assessment has, in 1979, carried

out (as nearly as can be done) its statutory function of equalizing valuation between counties, then, despite that fact, implementation of the amendment because of the arbitrary imposition of a base year would almost completely unsettle the equalization presumably accomplished throughout the state.

Let us now turn to the due process question. If the amendment is unconstitutional under the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States, then it is, of course, unnecessary to consider the due process claim and I would not do so. On this point, however, I find the paragraph in the opinion referring to "the failure of the amendment to provide for an opportunity to the taxpayer to be heard in connection with a change in the amount of his levy," to be so vague as to cast doubt upon historic procedures pertaining to the fixing of the *levy*. I believe the statement may be read as saying something not intended, so in the hope of avoiding some future misunderstanding, I wish to say something about it.

Neither the Constitution of the United States nor of this state requires notice before *levy* of general taxes. Hansen v. County of Lincoln, 188 Neb. 461, 197 N. W. 2d 651; Frye v. Haas, 182 Neb. 73, 152 N. W. 2d 121; Nickey v. Mississippi, 292 U. S. 393, 54 S. Ct. 743, 78 L. Ed. 1323. Levy of taxes is a legislative matter. It is sufficient if there is an opportunity to challenge the *legality* of the tax before it is collected.

Under our statutory scheme, even notice of valuation changes is necessary only when such changes are made by the assessor. The pertinent statutes relative to notice do not apply to changes in valuations of classes of property or percentage changes made over a whole taxing district by the State Board of Equalization and Assessment. Hansen v. County of Lincoln, *supra*. We there said: "Plaintiff relies upon the provision of section 77-1315, R. R. S. 1943, requiring a notice to the taxpayer where his prop-

erty 'has been assessed at a higher figure than at the last previous assessment.' We hold that this provision pertains, obviously it seems to us, only to individual valuation changes made by the assessor. It does not and was not intended to apply to changes in classes of property or percentages which were over a whole taxing district made by the State Board of Equalization and Assessment. Nor do the constitutional requirements of due process make such notice mandatory. Frye v. Haas, 182 Neb. 73, 152 N. W. 2d 121."

In Frye v. Haas, *supra*, we said: "The rule is stated in Nickey v. State of Mississippi, 292 U. S. 393, 54 S. Ct. 743, 78 L. Ed. 1323, as follows: 'There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. Wells, F. & Co. v. Nevada, 248 U. S. 165; Bristol v. Washington County, 177 U. S. 133, 146; McMillen v. Anderson, 95 U. S. 37; see American Surety Co. v. Baldwin, 287 U. S. 156, 168.' "

In State ex rel. City of Omaha v. Lynch, 181 Neb. 810, 151 N. W. 2d 278, we said: " 'The levy of a tax is not a judicial function, nor is it merely the ministerial action of ascertaining the rate per cent; but it is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power.' "

I do not believe that the majority opinion was intended to place in question the foregoing fundamentals. I think what may be implied from the statement which I question is that changes in the levy under the proposed amendment are tantamount to valuation changes *in only a portion of a taxing district* and hence result in unequal taxation for the same purpose and in the same district, and hence

are unconstitutional. I do not believe the majority want to be understood as saying that the levy of a tax without notice is unconstitutional. If it were, none of us would be required to pay because none of us are given special notice of the levy prior to its setting.

BOSLAUGH, J., concurring.

I agree with Judge Clinton that the decision in this case should be based upon equal protection grounds.

While a lack of essential procedural provisions may prevent a constitutional amendment from being operative until legislation has supplied the necessary procedure, that alone should not be a basis upon which to declare the amendment invalid. Generally, it is desirable to supply procedural details by legislation, reserving the Constitution for more general statements of the fundamental law.

MARLYS KNIGGE, APPELLEE AND CROSS-APPELLANT, V. CURTIS L. KNIGGE, APPELLANT AND CROSS-APPELLEE.

286 N. W. 2d 445

Filed January 3, 1980. No. 42356.

Appeal from the District Court for Kimball County: ROBERT R. MORAN, Judge. Motions for rehearing and to retax costs overruled.

Winner, Nichols & Meister and Wright & Simmons, for appellant.

George P. Burke of Van Steenberg, Myers & Burke, for appellee.

Wright & Simmons and John A. Selzer, for appellant on motions for rehearing.

PER CURIAM.

Upon motions for rehearing and to retax costs, the

opinion previously adopted by this court, appearing at 204 Neb. 421, 282 N. W. 2d 581 (1979), is hereby modified by deleting therefrom at page 428, the last full paragraph commencing "Paragraph 8 of the decree . . .;" page 429, the second full paragraph commencing "Curtis Knigge shall be required . . .;" the fourth full paragraph commencing "In its decree the trial court . . ." and continuing on to page 430; and at page 430, the first full paragraph commencing "Paragraph 10 (d) of the decree. . . ."

The motions are overruled.

MOTIONS FOR REHEARING AND TO RETAX COSTS OVERRULED.

ROSEMARY HOWARD, APPELLANT, V. CLAYTON L. CHAMBERS, APPELLEE.

286 N. W. 2d 739

Filed January 3, 1980. No. 42431.

1. **Juries: Verdicts: Appeal and Error.** A jury verdict will not be set aside on appeal unless it is so clearly against the weight of the evidence as to be clearly the result of passion, prejudice, or mistake.
2. **Supreme Court: Evidence.** In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence.
3. **Trial: Witnesses.** The credibility of witnesses and the weight to be given their testimony are for the trier of fact.

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

Clayton H. Shrout and Jerome A. Merwald, for appellant.

Richard M. Dustin and William J. Tighe, for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL and KELLY, L. W., JR., District Judges.

KELLY, L. W., JR., District Judge.

This is a negligence action for personal injury as a result of an automobile accident. The matter was tried before a jury in the District Court for Dodge County, Nebraska. The jury returned a verdict in favor of the defendant and the plaintiff has appealed. We affirm.

No complaint is made by the plaintiff of the instructions given by the court to the jury nor is complaint made of any errors in the trial of the matter. The plaintiff complains that the evidence is not sufficient to support the finding of the jury.

The facts in this case insofar as they relate to the accident itself are generally not controverted. The facts indicate that on the 3rd day of March, 1975, at approximately 4:30 p.m., the plaintiff was a passenger in a vehicle operated by her husband on the streets of Fremont, Nebraska. While waiting behind a stopped vehicle at an intersection, the vehicle in which the plaintiff was a passenger was struck in the rear end and knocked into the rear end of the stopped vehicle in front. The plaintiff claims an injury to her back as a result of this accident.

The plaintiff was seen by a family physician on the 25th day of March, 1975. At that time she related to the physician that she had pain in her left buttock and down her left leg to the heel.

The family physician had treated the plaintiff since September of 1970. At that time she complained of pain in her back and cervical area and in her right leg. The plaintiff had had back surgery in 1964. Subsequently, in October of 1970, the family physician again saw her, at which time she complained of pain in both of her legs "from her heels to the top of her head." The family physician saw her on many occasions and each time in relation to pain in her back or to one or both of her legs. In 1973 the family physician saw the plaintiff, at which time she complained of pain from her right buttock down to

her right heel and stated that she had had that pain since surgery in 1964.

As a result of the consultation on March 25, 1975, the family physician continued to treat the plaintiff until July of 1975, during which time he began referring her to various specialists. His testimony was that the pains she related to him were no different from those which she had had prior to the accident.

A specialist in the area of rehabilitation medicine testified for the plaintiff. He related many of the same symptoms as given by the family physician. As a result of his consultations and treatment, the specialist came to the conclusion that the plaintiff had a lumbosacral strain. The physician also testified that this resulted in disability to the plaintiff. The plaintiff's family physician, testifying for the defendant, stated that in his opinion this diagnosis was compatible with the condition of the plaintiff prior to the accident.

This case is very similar to a prior case decided in this court, to wit, Batterman v. Richardson, 189 Neb. 303, 202 N. W. 2d 613. Our court held that a jury verdict will not be set aside on appeal unless it is so clearly against the weight of the evidence as to be clearly the result of passion, prejudice, or mistake.

Our court has further held that in a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Merten v. Pedersen, 199 Neb. 34, 255 N. W. 2d 869.

There is ample evidence to support the verdict of the jury and the judgment of the District Court is therefore affirmed.

AFFIRMED.

FOREMOST INSURANCE COMPANY, A CORPORATION, AS ASSIGNEE OF FOREMOST LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. ALLIED FINANCIAL SERVICES, INC., A CORPORATION, APPELLANT.

286 N. W. 2d 740

Filed January 3, 1980. No. 42448.

1. **Trial: Verdicts.** To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury, it being sufficient that there is none that ought *reasonably* to satisfy the jury that the fact sought to be proved is established.
2. **Trial: Payments: Proof.** The defense of payment is an affirmative defense and the burden of proving it is on the party alleging it.
3. **Trial: Pleadings.** 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. The trial court may exercise its discretion in granting an amendment to the pleadings at any stage of the proceedings, even after the parties rest.
4. **Trial: Testimony.** While it is true that improper comments and questions by the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony, yet a trial court may with propriety interrogate witnesses regarding a fact under investigation when the tendency is only to develop the truth, and is not calculated to influence the jury, save as the testimony will assist them to arrive at a correct conclusion on the questions of fact in issue.

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

Jeffrey A. Silver, for appellant.

Robert D. Mullin, Jr., of Boland, Mullin & Walsh, for appellee.

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

BRODKEY, J.

This is an action brought by Foremost Insurance Company, a corporation, hereinafter referred to as "Foremost," as assignee of Foremost Life Insurance

Company, a corporation, hereinafter referred to as "Foremost Life," against Allied Financial Services, Inc., a corporation, hereinafter referred to as "Allied," based upon an alleged breach of an agency contract entered into between Foremost Life and Allied, to recover premiums and unearned commissions allegedly due and owing to Foremost under the terms of the agency agreement referred to. At the close of the evidence at the trial, on motion of the plaintiff Foremost, the trial court directed a verdict on the question of liability and submitted only the issue of damages to the jury, which returned a verdict in favor of plaintiff Foremost in the amount of $28,220.68. We affirm.

It appears from the record that on June 1, 1972, Allied entered into an agency agreement with Foremost Life to act as a general agent for Foremost Life in the solicitation of credit life insurance from purchasers of mobile homes and recreational vehicles in several states. Although the original agency contract was entered into in the name of "Allied Insurers, Inc.," the record reveals that the parties in this litigation have treated Allied Financial Services, Inc., and Allied Insurers, Inc., as the same entity; and we shall likewise do so in this appeal. The insurance policies issued by Foremost Life from business generated by its general agent, Allied, as set forth above, obligated the insurer, Foremost Life, to pay off the obligation of the debtor on the item purchased in the event the debtor should die prior to the full payment of the amount due to the creditor on the purchase of the item. Premiums for such insurance policies were collected in full at the inception of the policy and covered the entire term of the contract.

According to evidence in the record, it appears that between 50 and 75 percent of all credit life insurance policies are canceled prior to reaching full term as a result of early payment of the obligation

by the debtor. When cancellation occurred, that portion of the premium corresponding to the unearned portion under the policy was rebated to the debtor. Prior to the cancellation of the agency agreement by Foremost Life on or about November 1, 1975, the rebate upon the early cancellation of a policy was usually made by Allied. A corresponding credit representing unearned premiums, previously transmitted by Allied to Foremost Life, was thereafter made to Allied's account by Foremost Life. In the event the debtor made a request directly to Foremost for a rebate of unearned premium, Foremost Life would make the rebate and would not credit Allied's account.

Under the terms of the agency agreement, it was required that Allied remit to Foremost Life the premiums collected on credit life policies which it had generated within 45 days after the end of the month in which the policy was issued. Allied was to receive a commission of 40 to 55 percent of the gross premiums collected on the policies solicited by it, depending upon which state the insurance policy was sold in. The agency agreement further provided that Allied could deduct the amount of its commissions from the gross premiums on the insurance prior to remitting the balance of the premiums to Foremost Life. It is clear that a portion of the unearned premium returned to the debtor upon early cancellation of the policy represented the commission which Allied had withheld, but which was, as yet, unearned. Of course, if the rebate was issued by Allied to the customer, as was normally true, no adjustment for unearned commissions in Allied's account with Foremost Life would be required. If, however, Foremost Life issued the rebate, a portion of the commission which Allied had retained would be unearned; and in that situation, Allied would be liable, under the terms of the agency agreement, to Foremost Life for that portion of the unearned com-

mission included in the premium which Foremost Life had remitted directly to the customer.

As previously stated, the agency relationship in question continued unchanged between Foremost Life and Allied until October 15, 1975, when Foremost gave written notice of termination under the terms of the agency agreement. This termination became effective on or about November 1, 1975. After that date, Allied did not solicit new insurance business on behalf of Foremost Life, although there was "business in the pipeline" still being processed with respect to policies sold prior to the termination of the agency agreement, and as to that business the agreement remained in effect.

In its written notice of termination, Foremost Life made demand on Allied for: "All monies due from the Company to you for commissions on insurance written before the date of termination of agreement and all monies due or hereafter becoming due from you to the Company for refunds of commissions and expense allowances by reason of premium refunds on cancellation or policies written before the date of termination of agreement shall be paid by the Company to you, or by you to the Company, as the case may be, notwithstanding the termination of the agreement." Allied tendered two payments, representing the amounts due under the September and October 1975, monthly billing statements. No further payments were tendered; neither were monthly statements issued by Foremost Life to Allied after January 1976.

In its petition filed in this action on December 13, 1975, Foremost Life alleged that Allied had withheld "premiums" due Foremost Life, contrary to the agency agreement. Nothing was stated in the original petition with reference to "unearned commissions." Just prior to trial on October 16, 1978, Foremost was permitted by the court to amend the pleadings to allege the withholding of "premiums and/or

unearned commissions."

There was little conflict in the evidence adduced at the trial, except as to the issues of which party was required to and did issue the rebates subsequent to the termination of the agency agreement on November 1, 1975, and whether Allied had remitted all of the premiums and unearned commissions due to Foremost Life.

On the question of who issued the rebates following the termination of the agency agreement, Foremost Life's employees testified that Foremost Life did so. This testimony was supported by computer accounting records reflecting rebates paid by Foremost Life, and more particularly by a letter from an employee of Allied, dated November 5, 1976, stating that from that date on all rebates would be the responsibility of Foremost Life. On the other hand, officers of Allied testified that it was the "general policy" of the company to handle all rebates, even those solicited under the terminated agreement. These witnesses also indicated that this policy was in effect at the time of the trial "to the best of their knowledge." However, they produced no records of Allied to corroborate this testimony; and, as a matter of fact, Allied's accountant testified at the trial that he had never checked Allied's records against the records of Foremost Life to determine whether Foremost Life's records were accurate and reflected the records of Allied in this matter.

Similar problems were encountered with regard to the repayment of unearned commissions and transmittal of premiums. Witnesses for Foremost Life gave testimony, corroborated by the computer business records of the company, that Allied was indebted to Foremost Life for repayment of unearned commissions and the payment of premiums never transmitted to Foremost Life. Allied's witnesses testified to the contrary.

As previously stated, the trial court directed a ver-

dict on the question of liability and submitted the question of damages to the jury, which returned a verdict for the plaintiff in the amount of $28,220.68.

As its first assignment of error on appeal, Allied contends that it was error for the court to direct a verdict in favor of Foremost Life on the question of liability. It is well settled law in this state that the party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that *reasonable* minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury. Stevens v. Kasik, 201 Neb. 338, 267 N. W. 2d 533 (1978); Clark Bilt, Inc. v. Wells Dairy Co., 200 Neb. 20, 261 N. W. 2d 772 (1978). It is also the rule that to justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury, it being sufficient that there is none that ought *reasonably* to satisfy the jury that the fact sought to be proved is established. Department of Banking v. Lawhead, 181 Neb. 722, 150 N. W. 2d 734 (1967); Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568 (1957). We have also held that clear, uncontradicted, self-consistent, and unimpeached business records of a party having initial production and persuasion burdens may suffice for a directed verdict in his favor. Watkins Products, Inc. v. Keane, 185 Neb. 424, 176 N. W. 2d 230 (1970). A review of the evidence in the record in this case convinces us that there is only one reasonable conclusion to draw therefrom, and that is that Allied did not remit unearned premiums to the insured, nor did Allied remit all premiums to Foremost Life or any unearned commissions to Foremost Life.

With regard to the issue of the unearned commissions, Allied's president acknowledged in his testi-

mony that the early cancellation of credit life policies would create unearned commissions which Allied would be required to repay. He further testified that Allied had "never paid back commissions to Foremost." The agency agreement provided that: "In the event of cancellation or reduction of premium, Agent shall be liable for return commission computed at the same rate on the return premium as Agent received on full written premium upon issuance of the policy." Allied made no payments to Foremost Life after January 1976, and yet recognized that policies were prematurely canceled following that date. The only reasonable conclusion that can be reached is that under the terms of the agency agreement Allied was indebted to Foremost Life for some amount or amounts because of its failure to remit unearned commissions to Foremost Life. The breach of contract by Allied was clearly shown to exist from the evidence adduced, and the amount of its liability for such breach was left by the court to the jury for determination.

We reach a similar conclusion on the question of premiums due under the agreement. Foremost Life introduced business records evidencing premiums that Allied had failed to transmit to Foremost Life as per the agency agreement. Allied's witnesses testified that their general practice was to transmit these premiums to Foremost Life within 45 days after the solicitation of the policies. However, Allied did not introduce any evidence which contradicted the business records of Foremost Life to any appreciable extent. The rule is that the defense of payment is an affirmative defense and the burden of proving it is on the party alleging it. Department of Banking v. Lawhead, *supra*. Under the evidence, Foremost Life established a prima facie case of breach of contract, which remained unrebutted by Allied. The conclusion is inescapable that Allied failed to remit all the premiums to Foremost Life as

it was required to do under the terms of the agency agreement; and we conclude that liability with reference to unpaid premiums was established by Foremost Life. We therefore reject Allied's claim that the trial court erred in directing a verdict for Foremost Life on the issue of liability.

Allied also contends that the trial court erred in instructing the jury that Foremost Life had established as a matter of law that Allied had breached the agency agreement and in directing the jury to determine only the amount of damages. This assignment of error is likewise without merit for the reasons previously stated.

The next three assignments of error all pertain to the action of the trial court in permitting Foremost Life to amend its pleadings just prior to trial. As previously indicated, in its original petition, Foremost Life had alleged Allied had withheld "premiums" and prayed judgment for the amount of the premiums wrongfully retained. Nothing was stated in the original petition with reference to unearned commissions due and owing. On September 26, 1978, Foremost Life was granted leave to amend its petition to update the amount of damages due as of September 30, 1978. The amended petition was filed on October 16, 1978, the date of trial. In the amended petition, Foremost Life alleged that Allied withheld *premiums* and/or unearned *premiums* due Foremost Life in violation of the agency agreement. However, in the prayer of the petition, Foremost Life prayed for a judgment in the amount of the premiums and unearned *commissions* due it by reason of Allied's breach of the agency contract. After both sides had rested, Foremost Life was permitted by the court to amend its amended petition to conform to the proof, as the case had been tried on the theory of commissions due and owing, as well as for premiums.

Allied contends that the court erred in permitting

the amendment, as the lateness of the amendment created a new issue substantially different from the issue of unpaid premiums, and that Allied was not prepared to defend against the issue of commissions. The right to amend pleadings rests within the sound discretion of the trial court and the allowing of the amendment will not be error unless prejudice resulted. Stungis v. Union Packing Co. of Omaha, Inc., 196 Neb. 126, 241 N. W. 2d 660 (1976); State Securities Co. v. Corkle, 191 Neb. 578, 216 N. W. 2d 879 (1974). Section 25-852, R. R. S. 1943, provides: "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." This court has likewise said that, in furtherance of justice, the trial court may exercise its discretion in granting an amendment at any stage of the proceedings, even after the parties rest. Swan v. Bowker, 135 Neb. 405, 281 N. W. 891 (1938). Amendments have even been allowed when the action was before this court on appeal. See, Lippire v. Eckel, 178 Neb. 643, 134 N. W. 2d 802 (1965).

The record reveals that Allied had knowledge of the extent of Foremost Life's claims as early as October 15, 1975, the date of the notice of the termination of the agency agreement. At that time, Foremost Life demanded payment of commissions retained by Allied under the agreement, which commissions subsequently became unearned due to early policy cancellations.

Allied further had knowledge that Foremost Life was bringing the action for breach of the agency agreement. This agreement included language with reference to remitting unearned commissions to Foremost Life. Further, Allied was advised through the process of discovery as to the amount of the re-

covery sought by Foremost Life. This amount was greatly in excess of the amount initially sought with respect to the claim for unpaid premiums. All the foregoing occurred more than one year prior to the date of trial. We think it is clear that Allied was aware of Foremost Life's claim against it, including a claim for unearned commissions due and owing it. Furthermore, Allied has not demonstrated that any prejudice resulted to it as a result of the court permitting the amendment to be made after the parties had rested. We therefore reject Allied's claim of error in this regard.

Finally, Allied has assigned two errors relating to purported prejudicial conduct on the part of the trial court, and cites as examples certain questions asked of the witnesses by the court, as well as certain comments made by the court during the trial, which it claims were prejudicial. We have held that in the trial of a cause before a jury, improper comments by the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony. Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854 (1954); Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168 (1944). Our latest statement of the principles involved is found in Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758 (1957), where this court stated: " 'We see no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist them to arrive at a correct conclusion on the questions of facts in issue.' Leo v. State, 63 Neb. 723, 89 N. W. 303. See, also, Buhrman v. Smollen, *supra*.

"However this right '* * * should be very sparingly exercised, and generally counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this

respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause.' Bartley v. State, 55 Neb. 294, 75 N. W. 832. See, also, Omaha Brewing Assn. v. Bullnheimer, 58 Neb. 387, 78 N. W. 728.

"However, '* * * the judge presiding at a trial must conduct it in a fair and impartial manner, he should refrain from making any unnecessary comments or remarks during the course of a trial which may tend to a result prejudicial to a litigant or are calculated to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial; * * *.' 64 C. J., Trial, § 91, p. 90, and cited with approval in Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, and Styskal v. Brickey, *supra*. See, also, 88 C. J. S., § 49, p. 124."

We have carefully examined all the alleged incidents of misconduct on the part of the trial judge referred to in Allied's brief on appeal, and conclude that they either were legitimate rulings upon evidentiary objections made during the trial or were efforts to clarify the evidence. We do not believe that any of the conduct complained of tended to magnify the evidence of witnesses for Foremost Life or diminished the credibility of the witnesses for Allied, nor in any way prejudiced the jury in making their decision upon the amount due for the breach of the contract, which was the only issue before them. We likewise reject this assignment of error.

No other errors being assigned or appearing of record, we therefore affirm the actions and judgment entered by the trial court.

AFFIRMED.

BRIAN D. SAMPSON ET AL., APPELLEES, V. STATE FARM MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.

286 N. W. 2d 746

Filed January 3, 1980. No. 42450.

1. **Insurance: Contracts.** Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used and, if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract.
2. **Insurance: Statutes: Notice.** Section 44-516, R. R. S. 1943, requiring notice of cancellation for nonpayment of premium, applies only to a cancellation by the unilateral action of the insurer before the end of the policy term. It does not apply to an automatic termination by expiration of the policy period.

Appeal from the District Court for Seward County: WILLIAM, H. NORTON, Judge. Reversed and dismissed.

Healey, Brown, Wieland & Kluender, for appellant.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellees.

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

MCCOWN, J.

This is an action to recover damages under the collision coverage provisions of an automobile insurance policy. The insurance company denied coverage for nonpayment of premium. The action was tried to the court, jury trial having been waived. The District Court entered judgment for the value of the automobile, less salvage, and an attorney's fee. The insurance company has appealed.

In March 1975, plaintiffs purchased an automobile insurance policy from an agent of the defendant insurance company. The policy included collision

coverage. The policy period was for 6 months, March 27, 1975, to September 27, 1975, and for succeeding policy periods of 6 months each thereafter if the required renewal premium was paid by the plaintiffs on or before the expiration of the current policy period. The insurance company agreed to renew the policy for each succeeding policy period at then current rates until it gave 30 days written notice before the expiration of a current policy period of its intention not to renew. Renewal agreements by the insurance company were void if the plaintiffs failed to discharge, when due, any obligations in connection with the payment of premium for the policy or any installment thereof. Plaintiffs were billed for renewal premium at 6-month intervals, and premiums were paid for succeeding periods to and including the policy period of March 27, 1976, to September 27, 1976. No new policies were issued.

Approximately 30 days before September 27, 1976, the stated expiration date of the current policy period, the insurance company sent a premium notice to the plaintiffs, which plaintiffs admitted was received. The notice stated that it was the only notice the plaintiffs would receive prior to the date the premium was due, and that payment of the premium by the due date would continue the policy in force. Three days after the expiration date an expiration notice was mailed to plaintiffs, advising them that coverage had expired but that if payment was made within 10 days after the expiration date the policy would be reinstated and there would be continuous coverage, but that if paid thereafter the plaintiffs would be advised if payment had been accepted for reinstatement. Plaintiffs also admitted receiving the expiration notice in early October 1976.

On October 15, 1976, the plaintiffs' automobile was demolished by collision while being driven by an employee. The value of the vehicle immediately before the accident was $5,000 and it was a total loss except

for $200 salvage value.

The plaintiffs transmitted a renewal premium payment to the insurance company in an envelope postmarked October 16, 1976. On October 20, 1976, the insurance company acknowledged receipt of the payment and advised plaintiffs that the policy had expired on September 27, 1976, for nonpayment of the premium. The letter also advised plaintiffs that since the remittance was postmarked October 16, 1976, the policy was reinstated effective October 17, 1976, at 12:01 a.m., and was therefore not in force for a period of 20 days. A refund check was enclosed for the 20-day period. The company denied coverage for the accident of October 15, 1976.

The trial court held that the contingent offer of the insurance company to continue coverage for the plaintiffs for a period of 10 days after the stated expiration date if the premium was paid in that time resulted in the reinstatement of the policy, even though the plaintiffs did not accept the offer by payment within the stated time. The court therefore determined that a notice of cancellation in the manner provided by law was required before coverage could be terminated. The District Court entered judgment for the amount of the loss and an attorney's fee, and the insurance company has appealed.

The insurance company contends that under the terms of the insurance policy, the policy expired on September 27, 1976, for nonpayment of premiums. The company also contends that its offer to reinstate the policy, contingent upon plaintiffs paying the premium within 10 days after September 27, 1976, was never accepted by the plaintiffs and had no effect on the rights of the parties under the policy. The plaintiffs, on the other hand, contend that the offer of reinstatement created an automatic renewal of the policy and that, even though the plaintiffs did not pay the premium within the time specified, the insurance company was required to give notice of can-

cellation or notice of intention not to renew under the statutory insurance provisions covering automobile insurance policies. We disagree.

By the express terms of the insurance policy involved here, the policy expired on September 27, 1976, due to nonpayment of premium by the plaintiffs. Plaintiffs tacitly concede that fact, but argue that defendant's offer to reinstate the policy if the premium was paid within 10 days after expiration constituted an automatic reinstatement of coverage, and brought into play statutory provisions requiring notice of cancellation or refusal to renew. The language of the policy is not ambiguous in any respect, nor was the language of the offer to reinstate. This court has held that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract. Cordes v. Prudential Ins. Co., 181 Neb. 794, 150 N. W. 2d 905.

Plaintiffs contend that under the Nebraska statutes requiring notice of cancellation for nonpayment of premium and notice of an intention not to renew an automobile insurance policy, the insurance company, by offering to reinstate the policy upon payment of the premium, became subject to the notice requirements of the statutes.

Section 44-516, R. R. S. 1943, requires at least 10 days notice of cancellation where the cancellation is for nonpayment of premium. That section, by its terms, does not apply to nonrenewal. There was no cancellation of the policy in this case. If no offer to reinstate the policy had been made, the policy would have expired by its own terms. Section 44-516, R. R. S. 1943, requiring notice of cancellation for nonpay-

ment of premium, applies only to a cancellation by the unilateral action of the insurer before the end of the policy term. It does not apply to an automatic termination by expiration of the policy period.

Section 44-517, R. R. S. 1943, provides that no insurer shall refuse to renew a policy unless it gives 20 days advance notice of its intention not to renew. The section, by its terms, does not apply if the insurer has manifested its willingness to renew nor in case of nonpayment of premium. Obviously, the section is not applicable here.

The plaintiffs rely upon the case of State Farm Mut. Auto. Ins. Co. v. Brown, 40 Cal. App. 3d 385, 115 Cal. Rptr. 213. The statutory language applicable there differs in degree from the Nebraska statutes, and we are not persuaded by the reasoning which supports that case.

The holding in Farmers Ins. Co. v. Hall, 263 Ark. 734, 567 S. W. 2d 296, which is almost on all fours with the case now before us, sets out the rules applicable here. The court said: "Appellant had no obligation to offer to renew the policy. The terms of the offer to renew were clear and unambiguous. They were not met. The 'grace period' provided by it passed without the offer having been accepted. There was nothing whatever to indicate that the grace period would be extended. There was nothing in the policy or the governing law to require a revocation of the offer. It expired by its own terms. The offer clearly stated that if the payment was not made within 15 days, i.e., by January 18, the insurance would expire as of the due date, i.e., January 3. This is the usual and ordinary effect of failure to pay a premium within a grace period. The policy simply lapsed because of appellee's failure to accept the offer to renew by payment or tender of payment within the time allowed. McClure v. State Farm Mutual Automobile Ins. Co., 113 Ga. App. 467, 148 S. E. 2d 475 (1966). * * * The payment by appellee

after expiration of the policy term and after expiration of the offer to renew could only have the effect of providing coverage from the date of its acceptance by the company. See Blashfield, Automobile Law and Practice, Vol. 7, § 293.2 (pocket part); Bek v. Zimmerman, 285 Mich. 224, 280 N. W. 741 (1938)."

For the reasons given the judgment of the District Court is reversed and the action is dismissed.

REVERSED AND DISMISSED.

FIRST NATIONAL BANK & TRUST COMPANY OF LINCOLN, A NATIONAL BANKING ASSOCIATION, APPELLEE, V. TIMOTHY W. HERMANN AND CAROL HERMANN, APPELLANTS.

286 N. W. 2d 750

Filed January 3, 1980. No. 42454.

1. **Uniform Commercial Code: Sales: Notice.** The code requirement for a private sale of collateral is that reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor.
2. _____: _____: _____. Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.
3. **Uniform Commercial Code: Notice.** Notification under the code does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in ordinary course.
4. _____: _____. A notice sent by ordinary mail will comply with the statute.
5. **Uniform Commercial Code: Sales: Notice.** A notification of the sale of collateral sent by certified mail is sufficient under the statute if forwarded to the correct address of the debtor even though it is "unclaimed" by the debtor and returned to the sender.

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

Gary J. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, for appellants.

Richard H. Osborne, for appellee.

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

BOSLAUGH, J.

This action was commenced in the municipal court of the city of Lincoln, Nebraska, to recover a deficiency judgment following the sale of a mobile home to satisfy the amount due on an installment sale contract. Service was not obtained upon the defendant, Timothy W. Hermann, so the action proceeded against only the defendant, Carol Hermann.

The issue is whether the defendant, Carol Hermann, received reasonable notification of the sale of the collateral as required by section 9-504(3), U. C. C. The municipal court found that the plaintiff had not given adequate notice of the sale of the collateral and dismissed the petition.

Upon appeal the District Court found that sufficient notice had been given and reversed the judgment of the municipal court. The defendant has now appealed to this court.

The record shows that the defendant was in default on the contract after July 15, 1977. On or about September 1, 1977, the plaintiff bank mailed a written notice to the defendant that, unless redeemed, the collateral would be sold at private sale on or after September 11, 1977. The notice was sent by certified mail addressed to the defendant at 11 Westward Ho, Rt. 1, Milford, Nebraska 68405. According to the bank this was the last known address that the defendant had given the bank and was the place where the mobile home itself was located. The defendant was not living at Milford, Nebraska, at that time but was residing at 5002 Knox, Lincoln, Nebraska 68504.

The envelope containing the notice was forwarded, by someone whose identity is not shown in the record, to the defendant at the 5002 Knox address. A postal employee testified that he received the envelope containing the notice on September 3, 1977, and attempted to deliver it to the defendant at 5002 Knox on that same day. He knocked on the front door of the residence but obtained no response. He then left a notice of certified mail for the defendant in the mailbox at 5002 Knox. A second notice of certified mail was sent to the defendant at 5002 Knox on September 8, 1977. The envelope and contents were returned to the sender, the plaintiff bank, on September 9, 1977, stamped "unclaimed." A notation concerning the notices appeared on the envelope.

The bank made no further effort to contact the defendant concerning the sale of the mobile home, although it knew where the defendant worked and that she could be reached by telephone at her place of employment. There is a dispute in the record as to whether the defendant had refused to give the plaintiff's collection manager her current address when asked during a conversation at the bank in the collection manager's office on August 4, 1977.

The defendant testified that she had mailed a payment on an automobile loan to the bank on August 15, 1977, and that the return address on the envelope was the Knox street address. She further testified that she did not receive either of the notices of certified mail which had been placed in the mailbox at 5002 Knox by the postal employee. On September 7, 1977, the bank called the defendant at her place of employment to ascertain where the stove, refrigerator, washer, and dryer were that had been removed from the trailer. These items were recovered by the bank from the Knox street address several days later.

The mobile home was eventually sold by the bank on October 14, 1977. A letter sent by certified mail

to the Knox Street address advising the defendant of the deficiency was received by the defendant on October 19, 1977.

The rule in this state is that compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. Bank of Gering v. Glover, 192 Neb. 575, 223 N. W. 2d 56.

The code requirement for a private sale is that "reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor." § 9-504(3), U. C. C. We have interpreted this to mean that a written notice is required and that it should be sent in such time that the debtors will have a minimum of 3 business days to arrange to protect their interests. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N. W. 2d 745.

The issue in this case is whether the defendant was given "reasonable notification" of the sale of the collateral as required by the Uniform Commercial Code. Subsection (26) of section 1-201 of the code provides that, "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course *whether or not such other actually comes to know of it.*" (Emphasis supplied.) In other words, notification under the code does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in ordinary course.

Subsection (38) of section 1-201 of the code provides that, " 'Send' in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communi-

cation with postage or cost of transmission provided for and properly addressed * * *." Under this provision a notice sent by ordinary mail will comply with the statute.

The rule concerning notification under section 9-504(3) of the code is stated in White and Summers, Uniform Commercial Code, § 26-10, p. 983, at pp. 984 and 985, as follows: "The secured creditor can satisfy the notice requirement merely by sending notification; it is not necessary that the debtor receive it. If the mailman loses the notice or the debtor's wife throws it in the wastebasket, that is the debtor's tough luck; he bears such risks under the Code. For example, in Steelman v. Associates Discount Corp. the notice sent to the debtor by certified mail was received by the debtor's sister-in-law who had a similar name and lived on the same rural mail route as the debtor. The Georgia Court of Appeals held as a matter of law that the notice was sufficient to satisfy the requirement that reasonable notice be sent to the debtor."

In Steelman v. Associates Discount Corp., 121 Ga. App. 649, 175 S. E. 2d 62, the letter was delivered to the debtor's sister-in-law who happened to live on the same rural route. The court said: "In view of the above, even though the provisions for waiver of notice as expressed in the contract may be invalid under the Uniform Commercial Code, the real issue is not whether the defendant received notice, but whether the plaintiff took reasonable steps to give notice to her. While what is reasonable would ordinarily be a matter for jury determination, we think that here, in using certified mail, return receipt requested, the plaintiff took reasonable steps as a matter of law, to give the other party notice, notwithstanding the testimony of the defendant disclaiming receipt or knowledge of the notice, even if accepted as true."

In Randolph v. Franklin Investment Co., Inc., 368

A. 2d 1151 (D.C. Ct. App., 1977), vacated on other grounds, 398 A. 2d 340, the court said: "Contrary to appellants' views, we are satisfied that the creditor did satisfy the first notice requirement respecting the proposed public resale, as it posted such notice by certified mail to the address of the purchasers. While this notice was returned unclaimed by the post office, the applicable regulation does not call for proof of receipt."

See, also, Hudspeth Motors v. Wilkinson, 238 Ark. 410, 382 S. W. 2d 191; Trust Co. v. Murphy, 36 N. C. App. 760, 245 S. E. 2d 101; James Talcott, Inc. v. Reynolds, 165 Mont. 404, 529 P. 2d 352; MFT Leasing v. Fillmore Products, Inc., 579 P. 2d 924 (Utah, 1978).

Although there is authority to the contrary, we believe the notification requirement of the code was satisfied in this case even though the notice was not received by the defendant. The notification sent by the bank would have been delivered to the Knox Street address if it had been sent by ordinary mail. This would have been sufficient. The fact that the notice was returned to the bank "unclaimed" by the defendant because the bank had taken the additional precaution of sending the notice by certified mail should not destroy its efficacy.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

Prior to the sale of secured property, the secured party, knowing that the debtor did not receive notice of the impending sale, and having actual knowledge of the debtor's place of work and of the address of the debtor's new residence, does nothing further and requests of this court that we approve a deficiency judgment against the debtor.

The majority is willing to do so. I am not. This result runs counter to the rationale of our earlier cases. Bank of Gering v. Glover, 192 Neb. 575, 223

N. W. 2d 56; DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N. W. 2d 745.

Proceeding to sale when an officer of a secured bank knew notice had not been received by the debtor, and where the officer knew the debtor's whereabouts, has been held not to be in good faith and to bar a deficiency judgment. In re Carter, 511 F. 2d 1203 (9th Cir., 1975).

I would reverse the judgment of the District Court.

HASTINGS, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH C. SVOBODA, APPELLANT.

287 N. W. 2d 41

Filed January 3, 1980. Nos. 42468, 42469, 42470.

1. **Trial: Plea Bargains:** The trial judge should not participate in plea discussions.
2. _____: _____. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence when the judge becomes a participant in plea bargaining.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded.

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.

PER CURIAM.

The defendant, Joseph C. Svoboda (hereinafter referred to as Svoboda), has appealed to this court from a denial of his motion for post conviction relief

in each of three original criminal proceedings. The motions were considered together below and have also been consolidated for briefing and argument in this appeal. We reverse and remand for a new trial.

This is the third appearance of Svoboda before this court on these charges, and therefore a lengthy reiteration of the facts giving rise to these actions is unnecessary. It is sufficient merely to give a brief summary of the events culminating in this appeal. Svoboda was originally charged with three counts of burglary, two of which were supplemented with habitual criminal charges; and in addition he was charged with one count of failure to appear after release on bond. He originally pled not guilty on each of the burglary counts. At the beginning of the second day of trial, Svoboda made a motion in open court to disqualify his attorney. An "in chambers" hearing was held following which the court denied Svoboda's motion. Immediately following the discussion, the trial court suggested that Svoboda reconsider the plea bargain offered him by the State. After consultation with his attorney, Svoboda accepted the plea bargain, and entered a plea of nolo contendere to two counts of burglary and one count of failure to appear. The jury was then dismissed, and the court sentenced Svoboda on the three counts. Following sentencing, Svoboda appealed the convictions to this court. We dismissed his appeal on procedural grounds. State v. Svoboda, 194 Neb. 663, 234 N. W. 2d 901 (1975). Svoboda then filed motions for post conviction relief, contending that his pleas were involuntary because of alleged participation by the trial court in the plea bargain, and also alleged a conspiracy between the prosecution and Svoboda's counsel. These motions were summarily denied by the trial court on the ground that the issues raised there had been raised in the direct appeal of the convictions. On appeal of the denial of these motions for post conviction relief to this court,

we reversed the order and remanded the cases for an evidentiary hearing on the issues raised by Svoboda, noting that our original decision was based on the procedures used, not on the merits of his case. State v. Svoboda, 199 Neb. 452, 259 N. W. 2d 609 (1977). An evidentiary hearing was thereafter held, and Svoboda was again denied relief. The present appeal followed.

Svoboda first contends that the alleged participation by the trial judge in the plea bargain discussions amounted to such coercion as to make his pleas involuntary. Since the issuance of the opinion in 1971, this court has consistently followed State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), in which we adopted the American Bar Association Standards Relating to Pleas of Guilty as minimum standards with reference to accepting pleas. Section 3.3(a) of those standards provides: "The trial judge should not participate in plea discussions." This provision has been variously interpreted, and we note that the extent of judicial participation which has been permitted in other jurisdictions varies greatly. See, Brown v. Peyton, 435 F. 2d 1352 (4th Cir., 1970), cert. den., 406 U. S. 931; People v. Davis, 387 N. Y. S. 2d 909 (App. Div., 1976); Scott v. United States, 419 F. 2d 264 (D. C. Cir., 1969); Commonwealth v. Sanutti, 454 Pa. 344, 312 A. 2d 42 (1973); Address by Judge Hoffman, Ninth Circuit Judicial Conference, 53 F. R. D. 499 (June 30, 1971); Bond, Plea Bargaining and Guilty Pleas, §§ 6.01 to 6.19, pp. 272 to 303.

However, we believe the participation by the trial court in these actions was such as to make Svoboda's pleas involuntary under any interpretation of the authorities. Svoboda made a motion to dismiss his counsel at the start of the second day of the trial. The discourse between the trial judge and Svoboda at that time was as follows:

"MR. SWOBODA: I don't feel he [my attorney] is

prepared. As a matter of fact, he hasn't prepared my case, my defense. Everything has been, 'Plea, better plead, better plead, otherwise they are going to hang you. Plead.' He never did come up to interview me, never. When he came up it was always to try to persuade me to make a plea.

"BY THE COURT: Well, I'm sure [your attorney] worked very diligently in trying to effect a plea bargain, Mr. Swoboda. I know this probably for a fact, from the conferences that I have had with the County Attorney and [your attorney]. But I will tell you this, you were at one time charged with five felonies. You are still charged with four felonies. [Your attorney] told me earlier that you were willing, and you can deny this now if you want, but he told me that you were willing to plead to two burglaries and the escape charge if the State would dismiss the other charges and drop the habitual criminal charge. Now, you are perfectly entitled, if you want to deny it, fine, it isn't all that important, and even if it's true you are entitled to change your mind and have a trial. I think [your attorney] was working in your best interest and I will tell you another reason why, *Mr. Swoboda, I have heard the evidence so far, and the State's evidence is overwhelming toward your guilt. In my experience in trying criminal cases I have never heard evidence so overwhelming.* Now, I don't know what you plan to present as far as a defense, but I'll tell you this much, in consideration of what [your attorney] has done and what you claim he has done, I am convinced he was working toward your best interest and detrimentally to your best interest.

"You do whatever you want. You have a Constitutional right to a trial and to have the State prove the guilt beyond a reasonable doubt.

"Mr. SWOBODA: I told him I didn't want what he entered in the record yesterday and I didn't want that in.

"BY THE COURT: All he wanted to do was protect himself, because when he has recommended that you accept a plea bargain offer by the County Attorney and you don't do it, he simply wanted a record so that later on if you complained that he didn't do anything for you, and he wants to show now that he did. And you don't have to accept any plea bargain. You are entitled to your Constitutional rights to a trial by jury, and that's what we are having.

"I will never punish a defendant for exercising that Constitutional right, and I do not play any part in a plea bargain, but from what I can see, Mr. Swoboda, [your attorney] was acting in your best interest and not in any conflict of interest in working with the County Attorney and in recommending the offer that the County Attorney has made, as far as a plea bargain is concerned. *Because I will repeat it again, I have never seen a case in which the evidence is so overwhelming. Now, maybe you are going to come in with a defense that would balance that out. I don't know, but as of this point, in the State's case, I have never seen a more overwhelming case of evidence toward the guilt of the defendant.*

* * *

"BY THE COURT: Well, now you [Svoboda] have heard it [the plea bargain]. Are you still willing to plea bargain on that basis, Mr. Pane? *You may be thinking it's difficult to believe that he could not understand that, but on the other hand, it's so incredible, frankly, to the Court, that he would insist on having a trial with the evidence as I have seen it, that maybe he did misunderstand it.* This is an unusual situation that we are discussing right now. Ordinarily the Court plays no part in a plea bargain, but you come up after a day of trial and claim your attorney — you don't want him to represent you, and you have told me nothing except facts which your at-

torney is acting in your best interest. Now, do you understand what the plea bargain was?

* * *

"BY THE COURT: Mr. Swoboda, I'm not going to discharge your attorney at this point, I think he has acted in your best interest, both in his negotiations before trial and in his handling of the trial. I think he has done a remarkable job in his cross-examination of the State's witnesses for what little he had to even discuss on cross-examination, in trying to create reasonable doubt. There may be some question about this business of the car that you bring up, I don't know whether the County Attorney is intending to tie it up later or not. Do you, Mr. Pane?

"MR. PANE: I could.

"BY THE COURT: It might be a matter of irrelevant evidence that they find a car with an Iowa license plate and tow it in at this point.

"MR. PANE: I can tie it up.

"BY THE COURT: It might also be irrelevant about the testimony by Mr. Leehy about items taken from his place prior to seven o'clock, and in fact I intended to strike that from the record and admonish the jury to disregard it. *I can assure you even if those two items stayed in the evidence, unless the evidence gets better, as far as the defendant's guilty* [sic] *or innocence is concerned the Supreme Court would undoubtedly say that if there was any error it was harmless in the face of the overwhelming evidence of guilt.*

"I'm not going to discharge [your attorney], and as long as we are in recess now, I suppose the next matter you might want to consider is, if the State is still willing to offer this as a plea bargain, and if you do understand it now, if you are interested in accepting it. Do you want to talk to [your attorney] or consider it on your own for a bit now, in private?

"MR. SWOBODA: (Nods head affirmatively.)" (Emphasis supplied.) (Although in the pleadings

and brief filed by counsel defendant's name was spelled "Svoboda," we note that frequently in the record it was spelled "Swoboda.")

We believe a fair reading of the foregoing indicates that the trial court imparted to Svoboda the impression that the court viewed Svoboda's guilt as proven at this stage of the trial. Under similar circumstances it was stated in People v. Davis, 387 N. Y. S. 2d 909 (App. Div., 1976): "The court in a criminal case may properly review the factors which a defendant might find relevant in making a determination as to whether he wishes to change his plea to guilty. The bounds of propriety are overstepped, however, when the court ceases to function in an impartial manner and becomes, instead, an advocate in persuading a defendant to plead guilty. In the case at bar, the whole tone and content of the court's remarks to defendant were calculated to impress him with the hopelessness of his situation and with the severe penalties which would be attendant upon his conviction after a trial."

We likewise think it is clear that the trial court's remarks to Svoboda, whether so intended or not, must have and did impress upon Svoboda the hopelessness of his situation, and brought about the nolo contendere pleas to the three counts. At the evidentiary hearing, Svoboda stated: "The Judge — the Judge came in and become involved in the plea bargaining discussions. He initiated — I raised my hand for the intentions of disqualifying my attorney, and he told me that he would not disqualify him, and he initiated plea bargain discussions and directed them all the way through. I felt the pressure along with the County Attorney and my own lawyer, manipulating me around until I felt that if I did go to trial I wouldn't stand any kind of a chance. I would be facing longer sentences, and that's why I became disgusted and just pled guilty."

In so doing, we believe the trial court, perhaps un-

wittingly, became an advocate instead of an impartial referee. There is little question that the power and prestige of the trial court undoubtedly had an effect on Svoboda. We fully agree with the statement of the court contained in United States v. Gilligan, 256 F. Supp. 244 (S. D. N. Y., 1966), which case was decided even before the adoption of the American Bar Association standards forbidding participation by the trial judge in plea bargaining in criminal cases. In that case the court said: "The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration, is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence. * * *

"A judge's prime responsibility is to maintain the integrity of the judicial system; to see that due process of law, equal protection of the laws and the basic safeguards of a fair trial are upheld. * * *

"It may well be, as has been suggested, that voluntary, as distinguished from coercive, bargaining between the prosecutor and the defendant has been sanctioned by propriety and practice — in some measure they deal at arm's length. But this is quite different from approbation of plea bargaining between the judge and the accused, where the dispar-

ity of positions is extremely marked. As has been urged: 'Our concept of due process must draw a distinct line between, on the one hand, advice from and "bargaining" between defense and prosecuting attorneys and, on the other hand, discussions by judges who are ultimately to determine the length of sentence to be imposed.' "

We do not say that every time a trial judge enters a plea bargain discussion, he is overstepping the bounds of his office and coercing a defendant. However, where, as here, the actions of the court evoked an immediate response from a previously intransigent defendant, we are forced to conclude that the plea was involuntary.

We therefore find that under the facts of this case, Svoboda's pleas were not voluntary, and in view of our decision on this issue, we need not examine Svoboda's other assignments of error. The orders of the lower court are reversed, and the actions appealed from are remanded for a new trial.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

I dissent from the majority opinion for the following reasons: (1) The issue in this post conviction proceeding to vacate a judgment entered upon a plea of nolo contendere is one of fact, i.e., was the defendant's plea voluntary. This court ignores the finding of fact by the District Judge which is clearly supported by the evidence and decides the issue here as one of law. We have often said: "In post conviction proceedings under section 29-3001 et seq., R. R. S. 1943, the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility." State v. Davis, 203 Neb. 284, 278 N. W. 2d 351. (2) The "participation" by the District Judge, who presided at the aborted trial of the defendant and who accepted the plea and pronounced sentence, was clearly invited by the defendant's own actions and

comments. We have said that a defendant cannot complain of error which he invited the court to commit. State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87; Stuckey v. Rohnert, 179 Neb. 727, 140 N. W. 2d 9; Davis v. State, 116 Neb. 90, 215 N. W. 785; Corcoran v. United States, 19 F. 2d 901 (8th Cir., 1927).

I have no quarrel with the abstract proposition that the trial judge is not to be a participant in plea bargaining discussions. Neither, of course, can anyone challenge the right of a defendant to have the jury speak the final word on his guilt or innocence no matter how overwhelming the evidence against him. The point is that in this case the evidence supports the conclusion of the District Judge that the defendant waived that right knowingly and intelligently.

In order to establish the propositions which I advance for this dissent, it is necessary to examine the record. The majority opinion accurately quotes the conversations between Svoboda and the trial judge. That, however, is not the whole picture. No mention is made of the testimony of the defendant's attorney at the post conviction hearing. No mention is made of the "overwhelming" (an understatement) evidence of guilt. The fact that the trial judge used the quoted adjective did not tell the defendant something he was not already well aware of. No mention is made of the defendant's actual admission of guilt before he tendered his nolo plea. Before the trial judge accepted the plea, he very carefully explained to Svoboda all his constitutional and statutory rights and gave assurances, which we will later quote, that a defendant is never penalized by him for insisting upon a trial. No mention is made of the defendant's obviously sophisticated knowledge of criminal procedure. Surely the judge who presided at the post conviction hearing (not the same judge as the one who presided at trial and whose conduct is criticized) was entitled to consider all those things in making the factual determination of what induced the de-

fendant to plead rather than letting the jury decide.

Let us now examine the record. In the midst of the trial and in the presence of the jury, Svoboda announced: "Your Honor, I would like to disqualify Mr. Matejka as my attorney." The court promptly called a recess and had the jury retire from the courtroom.

At the time Svoboda made his announcement, the State had presented the testimony of four witnesses. The evidence, up to that time, if believed by the jury, would have entitled them to find that the owner of the burglarized building observed the defendant in the act of leaving the building, carrying with him stolen property; and that the defendant was pursued and cornered by the owner and another civilian, and then arrested by the police whom someone had called during the chase.

Briefly summarized, the testimony was as follows. Samuel Moskovits, the owner of the six-plex apartment where the burglary took place, was working on an air conditioner outside the building when he noticed a stranger (Svoboda) leaving the back door of the building, carrying a large box-shaped object which was covered with a blanket. Svoboda also carried a radio. Moskovits, suspecting something was wrong, accosted Svoboda and raised the blanket. The object was a TV set which Moskovits immediately recognized as belonging to one of his tenants. Moskovits was an electronics technician and had performed services on that particular set. The witness then directed Svoboda to take the set back into the building. Svoboda put down the TV set, threatened Moskovits with a pipe wrench which he had in his pocket, and started to flee. Moskovits yelled for assistance and one of his tenants, Leehy, one of the four witnesses at trial, joined the chase, taking a different route than Moskovits, and intercepted Svoboda's line of flight. He confronted Svoboda and was threatened with the wrench and he backed off.

The chase continued until Svoboda fled into a bar. Moskovits covered one exit and Leehy the other. Inside the bar Svoboda entered the toilet room, took off the blue shirt which he had been wearing, and placed that and the wrench he had been carrying in a wastebasket. He then entered the bar in a T-shirt. About that time the police arrived, Svoboda was arrested in the bar, and the shirt and wrench were seized. The identification of Svoboda by Moskovits and Leehy was positive. The breaking and entering of the apartment and the theft were established by other evidence.

Out of the presence of the jury and during the exchange of conversation between the trial judge and Svoboda, Svoboda claimed, among other things: ". . . there is a conspiracy between the prosecution and Mr. Matejka [his attorney]." The judge asked Svoboda to be more specific. Svoboda said: "He tried to persuade me numerous times to plead guilty to a charge I don't want to plead guilty to." Also: "I feel he hasn't defended me to the best of his ability. BY THE COURT: In what way? MR. SVOBODA: In every way, shape and form." Svoboda then complained about a failure of counsel to object to certain testimony. He then charged that Matejka had a "conflict of interest" because Matejka had a prior acquaintanceship with Moskovits and had done legal work for him. He complained that Matejka had not "prepared my" defense.

Then occurred the interchange between the judge and Svoboda which is quoted in the court's opinion. During the course of that exchange, the court said: "You do whatever you want. You have a Constitutional right to a trial and to have the State prove the guilt beyond reasonable doubt. . . . And you don't have to accept any plea bargain. You are entitled to your Constitutional rights to a trial by jury, and that's what we are having. . . . I will never punish a defendant for exercising that Constitutional right,

and I do not play any part in a plea bargain, ..."

It would have been well nigh impossible as well as unrealistic for the District Judge to respond to the defendant's frivolous motion to permit dismissal of his own retained attorney without taking into consideration the strength of the State's case against the defendant.

At the post conviction hearing, Svoboda made the same and numerous other complaints about the effectiveness of his counsel. We will not detail the testimony. Suffice it to say that it did not, on its face, appear credible and the trial judge was not required to believe it. The complaints about failure to object to testimony were of no merit whatever as the testimony was competent and relevant and the foundation therefor had been laid.

Mr. Matejka was called as a witness by the State and, on the advice of his then attorney, Svoboda waived the lawyer-client privilege. Matejka told of being called by Svoboda and talking to him at the county jail for about an hour. He advised Svoboda that he would have to go to the county attorney's office and get a copy of the complete file, including the investigation. That he did. He testified that he read it thoroughly and went through it several times. He then went back to talk to Svoboda. Svoboda then admitted the crime as indicated by the investigative report. Svoboda's only defense was that he would not have done it if he had not been drinking.

Svoboda had pending against him five criminal charges as well as two habitual criminal charges. Matejka advised Svoboda that the best thing to do was to plea bargain with the county attorney.

The record indicates that shortly before the trial commenced, Matejka had arranged that in exchange for a plea of guilty to two of the burglary charges and a charge of failure to appear, the other charges, including the two "bitches" (Svoboda's

phraseology for the recidivist charges) would be dismissed. Svoboda wanted a guarantee from Matejka that the sentences imposed by the judge would be concurrent. Matejka told him there was no way he could guarantee that. Svoboda then declined the bargain and the case went to trial.

After the interruption of the trial and after the exchange between Svoboda and the judge and before the plea was entered, Matejka and Svoboda had a private conversation, the bargain was still open, and Svoboda agreed that was the best route to go.

As to the alleged "conflict of interest," Matejka acknowledged that he had known Moskovits and that about 18 years earlier he had represented him in a municipal court matter, but he actually did not recall that until Moskovits reminded him of it. Matejka denied accusations by Svoboda that he had agreed to try to bribe Moskovits in this case and thus get the charges dismissed.

While the charges involved in this case were pending, Svoboda apparently jumped bond. He was then arrested and charged with being a felon in possession of a firearm. Matejka represented Svoboda on that charge and secured a dismissal after preliminary hearing, apparently because of failure of the State to prove that Svoboda was a felon.

The trial judge testified during the post conviction hearing as to what had occurred.

The record of the trial shows that after Svoboda indicated he wanted to plead, his constitutional rights were explained to him in a most thorough manner by the trial judge. Svoboda waived all those rights. He acknowledged his plea was free and voluntary and he knew the effect thereof. The court, among other things, asked: "Do you feel you are guilty of this charge, the one we are trying now?" He answered: "Yes."

How can it be said in the light of the evidence that the finding of the judge who conducted the post con-

viction hearing that the plea was intelligent and voluntary is not supported by the evidence? The outcome does not depend upon an "interpretation of the authorities," as the majority says, but upon a factual determination.

This is not a good case to use as a vehicle to apply a "sanction" against society because one of its agents, the trial judge, was whipsawed by a knowledgeable defendant. Svoboda is about 41 years of age. He has been involved in burglary since 1949 and has numerous convictions for that offense and many others. He is obviously completely familiar with criminal court procedures.

This case, as the majority opinion shows, is now before this court for the third time. The decision of the court on this occasion ultimately means that it will appear before us a fourth time on direct appeal and probably then for a fifth time on post conviction review.

At this point I make the following personal observations, which I have previously made in the Law Day issue of the Omaha Daily Record 2 years ago.

In the area of criminal law, a criticism frequently voiced is that litigation never seems to end. Much of that criticism is completely justified. Review by direct appeal is followed by post conviction proceeding in the trial court and then another review of that proceeding in the court of last resort of the state, followed by collateral habeas corpus attack on the judgment in the federal district court, and then review by the federal court of appeals. Why such multiplicity is required to secure "justice" is difficult for the layman to understand. The truth is that it is not necessary for that end. Multiple, piecemeal, and parallel litigation is largely a phenomena of the last 25 years primarily as a consequence of decisions of the United States Supreme Court expanding the habeas corpus jurisdiction of the federal district courts. The practice should come to an end.

I would suggest that a partial solution to the problem would result from a repeal by the Nebraska Legislature of the Post Conviction Act. That act, enacted in 1965, was designed largely to provide relief in those cases where state convictions were believed to be constitutionally infirm because of a violation of constitutional rights "discovered" by the Supreme Court of the United States and given retroactive effect by that court after state convictions had become final. The Post Conviction Act, however, was not limited by its terms just to those cases. The newly discovered rights era seems to have come to an end and the original purpose of the Post Conviction Act is no longer served as the retroactive rights cases have all been reviewed. The act has now come to be used by some lawyers, as well as by prisoners who act pro se, as a routine tool for the prolongation of litigation. Some defense counsel now, deliberately and as a matter of tactical choice, fail to raise constitutional issues on direct appeal, saving them for a subsequent post conviction proceeding if the direct appeal fails to produce a reversal of the judgment. It was not the original purpose of the Post Conviction Act to foster piecemeal litigation. It was thought that it would relieve the federal courts of some of the load of habeas corpus cases arising from state court convictions. The fact is it resulted merely in putting two more steps into the multiple litigation process without in any way relieving the load on the federal courts.

There is nothing inherently unfair in requiring a defendant to raise on his direct appeal all of the errors he claims, including those involving alleged violations of constitutional rights, and in foreclosing him from thereafter raising them in the state courts if he does not. State habeas corpus proceedings should be available only where there is a jurisdictional defect resulting in a void judgment. The common law writ of error coram nobis is still available

where there may have been an actual miscarriage of justice and where some fact or facts unknown at the time of trial are later discovered and these new fact or facts would probably result in a different verdict.

The Nebraska Legislature should repeal the Post Conviction Act, section 29-3001 et seq., R. R. S. 1943.

WILLIAM C. COFFEY, APPELLEE, V. JUDITH C. COFFEY, APPELLANT.
286 N. W. 2d 753

Filed January 3, 1980. No. 42475.

Divorce: Parent and Child: Minors. Both parties to a marriage are obligated to support minor children.

Appeal from the District Court for Douglas County: PAUL HICKMAN, Judge. Affirmed.

John P. Inserra and Raymond Pogge, for appellant.

James P. Costello of Costello & Dugan and Terry M. Anderson of Lathrop, Albracht & Swensen, for appellee.

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

WHITE, J.

In this action for dissolution, the trial court dissolved the marriage, awarded custody of three minor children, now 14, 10, and 8 years of age, to petitioner-husband, divided the marital property, and ordered respondent-wife to pay $150 per month child support. Respondent appeals, assigning error in each of the principal findings of the trial court, except the dissolution. We affirm.

William C. and Judith C. Coffey were married

January 23, 1965. Each had little property at the time of the marriage, and each worked during the marriage, except for the comparatively short periods in the case of Judith after delivery of each of her children.

At the time of the dissolution, petitioner had custody of the three minor children. The parties stipulated as to the value of their joint assets, which included equity in a home of approximately $17,500, a 1976 Chevrolet half-ton truck valued at $4,250, a 1973 Volkswagen worth $1,875, household furnishings which were not valued by the parties, a savings account in Judith's name at Commercial Federal, and a Bell Federal Credit Union account of $2,427.42.

The trial court awarded the possession of the home to William and required him to continue the principal, interest, and tax payments. Petitioner was awarded the use of the home until the children reach their majority or are no longer entitled to support. Petitioner was also awarded the 1976 pickup, the household furnishings, and his personal effects. Judith was awarded one-half the equity in the home in the amount of $8,750 to be paid after sale, which was ordered to take place not more than 120 days from the termination of the support obligation. Judith received the Volkswagen, the accounts in the credit union, savings account, and her personal effects.

We review the record de novo, but are conscious that the trial court saw and heard the witnesses and was the best judge of their credibility. Young v. Young, 195 Neb. 163, 237 N. W. 2d 135 (1976).

Judith filed an answer in which she alleged that each party was fit and proper to have custody of the children. At trial she sought to amend to allege William was unfit. At the conclusion of the evidence, the trial court overruled the motion. We agree with the trial judge that each party is fit to have custody. The children would no doubt receive

adequate care and supervision from either parent. It is well established that the trial court's determination on granting custody will not ordinarily be disturbed unless there is a clear abuse of discretion. Mason v. Mason, 200 Neb. 476, 263 N. W. 2d 865 (1978). Nor is it error for a trial court to refuse a motion to amend when the relief requested could not properly have been granted in view of the evidence. Omaha Nat. Bank v. Koliopoulos, 204 Neb. 752, 285 N. W. 2d 496 (1979).

The evidence amply supports the trial court's view that each party was a fit person to have custody. The evidence is undisputed that during the marriage both parties shouldered the burden of cooking, household cleaning, and care of the children and that the children love both parents. In their effort to prove their respective fitness and the unfitness of the other, the parties submitted evidence which was both in conflict and inconclusive. Reiteration of the evidence presented with regard to their improprieties would serve no useful purpose. This court is satisfied that the events complained of, although ultimately disruptive to the marriage, had little, if any, effect on the children.

We are left with the question, where two fit persons desire custody, and the trial court chooses one, ought we too easily reverse that decision, absent strong evidence of an abuse of discretion? We must and do place great reliance on the trial court and will not change such an order absent a clear abuse of discretion or unless it is clearly against the weight of the evidence. Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853 (1977). We are satisfied the trial judge based his decision on the relevant factors established by section 42-364, R. R. S. 1943.

The division of property appears to be within the parameters of our previous decisions. In any event, we are not advised of the value of the household goods and furnishings which appear to be the princi-

pal bone of contention. Although the respondent complains the property division was unfair, she does not specify what part of it she desires to change. The division is proper and will not be disturbed.

Judith is employed and is earning in excess of $700 per month. An award of $150 per month support for the three children does not appear to be excessive. Both parties to the marriage are obligated to support minor children. Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89 (1974).

The judgment of the trial court is affirmed.

AFFIRMED.

TEDCO DEVELOPMENT CORP., APPELLANT AND CROSS-APPELLEE, V. OVERLAND HILLS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

287 N. W. 2d 49

Filed January 3, 1980. No. 42498.

1. **Vendor and Purchaser: Contracts: Property: Taxation.** A vendor in a contract for sale of real estate must pay all taxes or assessments for which he is liable by the terms of the contract or the covenants in the deed, and in the absence of an express agreement, generally the vendor must pay all taxes which are a lien at the time of delivery of the conveyance.
2. _____: _____: _____: _____. A purchaser in a contract for sale of real estate must pay the taxes and assessments for which he is liable under the provisions of the contract or deed, and the purchaser will ordinarily be liable for all taxes which become a lien after the conveyance.
3. _____: _____: _____: _____. Taxes and assessments should, under some circumstances, be apportioned between the vendor and purchaser. Such circumstances would include cases where proration is specifically provided for in the contract or deed or where there is a local custom to that effect; where the contract is silent, statutory provisions may govern; where there is a specific contractual provision, it will govern.
4. **Vendor and Purchaser: Specific Performance: Taxation.** A ven-

dor, sued for specific performance, who has retained possession and received rents and profits of the land, is liable for taxes accruing between the time of contract and the trial.

5. **Res Judicata.** Res judicata is an affirmative defense which must ordinarily be pleaded in order to be available.
6. **Appeal and Error: Evidence: Pleadings.** In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. A corollary of the principle is that where there is no bill of exceptions presented to us, it will be presumed that the evidence supports the judgment.

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

Walsh, Walentine & Miles, for appellant.

Timothy J. McReynolds and Thomas A. Grennan of Gross, Welch, Vinardi, Kauffman, Day & Langdon, for appellees.

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

CLINTON, J.

In a previous opinion in this same case, we affirmed a judgment of the District Court granting to the plaintiff Tedco, as purchaser, specific performance of a contract to purchase real estate from the defendant Overland Hills. Tedco Development Corp. v. Overland Hills, Inc., 200 Neb. 748, 266 N. W. 2d 56. The present appeal is from a judgment of the District Court made upon the application of Overland Hills, filed on June 29, 1978, after issuance of the mandate in the prior appeal, "to determine the manner in which real estate taxes are to be prorated pursuant to Contract between Overland Hills Inc. and Tedco Development Corp." Tedco, on the same date, filed a waiver of notice of hearing and joined in the application. On June 30, 1978, the court entered an order which contained the following recital: "That the parties are to close on the property subject to the Purchase Agreement on June 30, 1978, and cause to be paid into this Court the funds in dis-

pute to await ruling by this Court and/or any appeal therefrom for payment to the party properly entitled thereto." The court then ordered the closing of the sale "in accordance with [the] terms" of the agreement and directed the buyer, Tedco Development Corp., to pay into court $7,500 from the purchase price "to be disbursed to the party rightfully entitled thereto."

On September 25, 1978, the court entered an order construing the contract, saying (referring to the tax provision of the contract which will be set forth later in this opinion): "I interpret this to mean that the buyer is only liable for taxes assessed in 1976, and that the seller is liable for all other real estate taxes due or delinquent up until the time specific performance was decreed. . . . The 1977 taxes, payable in 1978 became due and delinquent during the pendency of court litigation and are the responsibility of the seller." The court then ordered ". . . that the sum of $7500.00 now held by the Court in escrow be paid to Plaintiff Tedco Development Corp. upon the expiration of the appeal time and by motion of plaintiff."

Overland Hills then filed a timely motion for new trial. While that motion was pending the court, after submission of briefs and argument by the parties, did, on November 30, 1978, modify its order as to the 1977 taxes. It found that the parties had closed the transaction on June 30, 1978. It ordered that the 1977 taxes be prorated as of the date of closing, June 30, 1978, and that the funds in escrow in the court in the amount of $7,500 be paid $3,704.04 to the seller Overland Hills, and the remaining $3,795.96 to the purchaser Tedco, "provided that the taxes in issue have been paid to the Sarpy County Treasurer."

Tedco, the purchaser, has appealed and urges that the District Court erred in finding that it was responsible for paying the real estate taxes due December 31, 1976, and payable during 1977. The seller Over-

land Hills has cross-appealed and assigns as error the determination of the District Court that the 1977 taxes, payable in 1978, should be prorated as of the closing date, June 30, 1978.

There is no bill of exceptions before us in connection with the application to construe the contract. We can, of course, and do take judicial notice of the record in the prior proceeding insofar as it is relevant.

It will be necessary to recite some of the history of the prior proceedings and to make reference to the provisions of the contract. On October 19, 1976, Overland Hills entered into a contract to sell the property to one Lopp for the sum of $450,000. On February 1, 1977, Lopp assigned the contract to one Young. That contract by its terms was to be closed on February 25, 1977. As is apparent from the prior record, it was doubtful that Young would have been able to perform.

On February 14, 1977, Overland Hills entered into a contract to sell the property to Tedco for the sum of $485,000. That is the contract which is involved in this litigation concerning payment of taxes and as to which specific performance was decreed.

The Young contract did not close on February 25, 1977. He did not have the ability to perform on that date. On March 2, 1977, Overland Hills declared the Young contract void. Tedco then demanded that its contract be performed. On April 6, 1977, Overland Hills sought to rescind its contract to sell to Tedco because the Young contract had been recorded and there was a resulting title impediment. The action for specific performance was then commenced by Tedco, with both Overland Hills and Young as defendants.

The contract between Overland Hills and Tedco made reference to the prior contract which had been assigned to Young and provided that if the parties to the latter contract did not close on or before Febru-

ary 25, 1977, Tedco would have the sole and only right to purchase. It also provided: "All real estate taxes due or delinquent shall be paid by owner and all taxes due December 31, 1976 and payable during 1977 shall be paid by buyer." It should be noted that when the contract was entered into on February 14, 1977, the 1976 taxes were already a lien, due and payable, although not delinquent. The Tedco contract, in contrast to the Young contract, did not call for closing on a specific date. It provided that the contract would be closed ". . . within 30 days' [sic] after delivery of said abstract of title or title commitment, or in the event title defects are found in said title, within 10 days' [sic] after such defects are cured," and, "If said defects are not cured within a reasonable time, then either purchaser or seller may rescind this agreement and seller shall refund to purchaser the deposit made hereunder." The contract provided that conveyance was to be made by general warranty deed, free and clear of all liens and encumbrances, except certain special assessments.

The basic rules covering liability of vendor and vendee for taxes upon real estate sold under contract are as follows: "The vendor must pay all taxes or assessments for which he is liable by the terms of the contract or the covenants in the deed, and in the absence of an express agreement, generally the vendor must pay all taxes which are a lien at the time of delivery of the conveyance." 92 C. J. S., Vendor & Purchaser, § 290, p. 167.

"The purchaser must pay the taxes and assessments for which he is liable under the provisions of the contract or deed, and the purchaser will ordinarily be liable for all taxes which become a lien after the conveyance." 92 C. J. S., Vendor & Purchaser, § 290, p. 168.

"Taxes and assessments should, under some circumstances, be apportioned between the vendor and

purchaser." 92 C. J. S., Vendor & Purchaser, § 290, p. 169. Such circumstances would, of course, include cases where proration is specifically provided for in the contract or deed or where there is a local custom to that effect. Where the contract is silent, statutory provisions may govern. Where there is a specific contractual provision, it, of course, will govern. 92 C. J. S., Vendor & Purchaser, § 290, pp. 169, 170.

A vendor, sued for specific performance, who has retained possession and received rents and profits of the land, is liable for taxes accruing between the time of contract and the trial. Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728; Mitchell v. Mutch, 189 Iowa 1150, 179 N. W. 440; Lininger v. B. H. G'hound Racing Ass'n., 82 S. D. 507, 149 N. W. 2d 413; Kimball v. Swanson, 47 Wis. 2d 72, 177 N. W. 2d 375.

As already noted, there is no bill of exceptions before us containing evidence which may have been presented at the hearing on the application. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. Hanson v. Hanson, 198 Neb. 675, 254 N. W. 2d 699. A corollary of the above principle is that where there is no bill of exceptions presented to us, it will be presumed that the evidence supports the judgment.

As we see it, two basic questions are involved. First, was the obligation of the purchaser to pay the 1976 taxes in accordance with the specific contractual provisions in any way changed by the delay in performance? Second, how did delay in performance affect the obligation of the parties with reference to the 1977 taxes? The contract was silent on this matter. The 1977 taxes became a lien while litigation was pending and were due and payable at the time the court entered its judgment.

When the contract was executed on February 14,

1977, the 1976 taxes were already a lien. Tedco contracted to pay them, probably because this is what the contract between Overland Hills and Lopp provided. Overland Hills was apparently unwilling to enter the contingent agreement with Tedco on terms less favorable to it than those contained in the Lopp contract. We think we may take note of the common practice that when taxes are already a lien when the contract is made, the usual practice is that the seller contracts to pay them, or if they are for the current year, the contract may provide that they are prorated to the date of possession.

In this case the parties contracted contrary to that practice. No specific closing date was provided in the contract. The closing was to take place within 10 days after defects were cured. Thus, the purchaser Tedco contracted to pay the 1976 taxes even though they were already payable and it was uncertain as to when possession of the real estate would be delivered. Under these circumstances, the general rule that a seller or purchaser must pay those taxes which he is obligated to pay under the terms of the contract is applicable. It is clear that the purchaser's assumption of the 1976 taxes was not in any way intended to be dependent upon obtaining possession at a particular time.

The parties made no provision in the contract as to who would be obligated to pay subsequent taxes which might become a lien and due before the contract was closed. The only reasonable conclusion is that they contemplated that the conveyance of title would take place before that occurred. As we have previously noted in our recital of the facts in the record, Overland Hills attempted to repudiate its contract to sell to Tedco. The action for specific performance was made necessary not merely to remove the claim of Young, which was a title impediment, i.e., the curing of a title defect which arguably was contemplated by the contract, but was

also necessary to compel performance by Overland Hills. Overland Hills was, therefore, responsible for the delay in performance. Under these circumstances, the rule is that a vendor, sued for specific performance, who has retained possession and received the rents and profits of the land, is liable for taxes accruing between the time of the contract and the trial. Russell v. Western Nebraska Rest Home, Inc., *supra*; Mitchell v. Mutch, *supra*; Lininger v. B. H. G'hound Racing Ass'n., *supra*; Kimball v. Swanson, *supra*. See, also, Smith v. Hornkohl, 166 Neb. 702, 90 N. W. 2d 347, as to the effect of notice of title defects upon the rights to specific performance.

In this case, the court directed proration of the 1977 taxes as of the date of closing, rather than directing that Overland Hills pay the full amount. The judgment journal entry contains a recital relative to local custom. In the absence of a bill of exceptions, it must be presumed that there was evidence which supports the verdict or judgment. Hanson v. Hanson, *supra*. The order requiring proration must, therefore, be deemed to have been supported by the evidence.

We must take note of three contentions which Overland Hills raises in its cross-appeal. It contends that the only issue raised in the application was liability for the 1976 taxes, thus the court had no jurisdiction to decide an issue not raised by the pleadings and submitted to the court by the parties. Hallgren v. Williams, 146 Neb. 525, 20 N. W. 2d 499; Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843; National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489; Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N. W. 2d 335.

The principle cited is correct. However, the pleading was in broad and general terms, to wit, "to determine the manner in which real estate taxes are to be *prorated* pursuant to Contract." (Emphasis supplied.) This language is sufficiently broad to

cover the 1977 taxes which were a lien and payable when the pleading was filed and when the court was asked to decide. If the parties had intended to limit the issue, they should have been more precise in their pleadings.

Overland Hills also contends that Tedco should not be permitted to raise any issue as to taxes at all because the matter is res judicata, because the issue could have been raised on the first appeal. Overland Hills relies upon the principle that: "Material facts or questions which were in issue in a former action and were there admitted or judicially determined, and all points which properly belonged to the subject of litigation which might have been brought at the time with reasonable diligence, are conclusively settled by a judgment rendered therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action." Sechovec v. Harms, 187 Neb. 70, 187 N. W. 2d 296. See, also, Waldo v. Lockard, 101 Neb. 797, 165 N. W. 154. Again, the principle is sound. However, res judicata is an affirmative defense which must ordinarily be pleaded in order to be available. Gutzmer v. Nelsen, 121 Neb. 214, 236 N. W. 614. It may be raised by demurrer only where the defense affirmatively appears on the face of the petition. Marsh-Burke Co. v. Yost, 102 Neb. 814, 170 N. W. 172. The issue was not raised in either way in this case. In fact, Overland Hills joined in the application, using language in the waiver of notice which was substantially identical to that of the application.

Tedco also argues that the issue was moot because the parties had closed and no issue was ever raised as to the 1977 taxes. This contention is partially answered by what has already been said. The order of the District Court recites that the transaction was closed, which we presume to mean that the deed had been delivered and the money paid, except for the amount in escrow. However, the terms upon which

the parties closed are not in the record as there is no bill of exceptions. If the determination of the issue was or could have been affected by some provision of the deed, then the deed should have been included in a bill of exceptions so that its provisions could be considered by this court. That has not been done. Again, we must presume that the evidence, whatever it was, supports the judgment of the District Court.

AFFIRMED.

CHERYL D. TAYLOR, ALSO KNOWN AS CHER D. TAYLOR, APPELLANT, V. JAMES E. BENTON AND DONNA F. BENTON, DOING BUSINESS AS HODGE'S BAR, ALSO KNOWN AS HODGE'S PLACE, APPELLEES.

286 N. W. 2d 755

Filed January 3, 1980. No. 42515.

1. **Workmen's Compensation: Evidence: Judgments.** 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.
2. **Workmen's Compensation: Evidence: Appeal and Error.** 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.
3. **Workmen's Compensation: Evidence: Proof.** In a workmen's compensation case the plaintiff has the burden of establishing, by a preponderance of the evidence, that the injury sustained by the employee was caused by or related to the accident and was not the result of the normal progression of the employee's preexisting condition which would have been sustained by the employee even in the absence of the accident.
4. **Workmen's Compensation: Damages.** Where the employee suffers an accident which causes only trivial injury and no loss to the employee either by way of medical expenses or loss of wages related to the trivial injury, the employer is not obligated to compensate the employee.

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

Robert R. Miller, for appellant.

Michael A. Fortune of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P. C., for appellees.

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

KRIVOSHA, C. J.

Appellant, Cheryl D. Taylor (Taylor), appeals from an order entered by a three-judge panel of the Nebraska Workmen's Compensation Court which dismissed Taylor's petition. The three-judge court order found in essence that while the plaintiff sustained an accident in the course of her employment, the accident caused only slight or trivial injury to the plaintiff. Moreover, the court found that the plaintiff was suffering from a preexisting back condition or disease at the time of the accident and that the accident did not materially aggravate her disability or necessitate any of the hospital or medical treatment received by her. Rather, the court found that the disability of which the plaintiff complained, including her surgery and hospitalization, resulted as a natural progression of a preexisting condition. The record in this case discloses a clear conflict in the evidence. Our examination of the record convinces us that the three-judge court could reasonably have made the findings which it did, and therefore we are required to affirm its decision.

The evidence reflects that Taylor began working at Hodge's Bar on December 1, 1976. Her duties generally included waiting on tables, bartending, and stocking the cooler. Taylor testified that on the evening of April 3, 1977, while working at Hodge's Bar, she was engaged in stocking the cooler. She went to the stockroom of the bar to get some 12-

packs of beer stacked along one wall to be taken to the cooler. Since these 12-packs were stacked to a height above her head, she stood on her tiptoes and pushed one of 12-packs off with her fingers, planning to catch it when it fell. She testified that as it was falling, she stepped backwards and into the lower of of two empty beer kegs stacked behind her, causing the top keg to tumble over toward her and strike her on the lower left-hand side of her back. She testified that at this point she felt a sharp pain in that part of her back.

According to Taylor, she picked up and replaced the fallen keg, picked up the 12-pack and took it out of the stockroom. She testified that she spoke to her husband about the pain that night and that she could not sleep all night. She returned to work on the following two days, April 4th and 5th, although she testified that she experienced the same pain and had trouble sleeping at night. By this time, she testified, she was experiencing pain in her hip, leg, and back, the pain shooting down through her leg and into her toes.

On the following morning, April 6th, Taylor's mother-in-law drove her to the emergency entrance of Bishop Clarkson Memorial Hospital where she was examined, X-rayed, and admitted. In addition to the immediate symptom of pain, Taylor testified that by the time she admitted herself to Clarkson Hospital she had a purplish-red bruise that was turning yellowish around the edges. This bruise was in the same location of her body as where she was struck by the keg when it fell on her.

Taylor remained in the hospital for a total of 7 days, receiving physical therapy and medication. Thereafter, she was discharged from Clarkson Hospital on April 13, 1977, and called immediately from the hospital to set up an appointment with Dr. Tribulato, an orthopedic surgeon. His report, which was admitted into evidence, showed that on April 20,

1977, he examined Taylor, took X-rays, and initially diagnosed the problem as a lumbosacral strain. His reports also revealed that Taylor told Dr. Tribulato that she "was having no pain in her back recently prior to this accident of 4/3/77." Dr. Tribulato gave her medicine and set up another appointment for April 27th. At this second appointment she complained of increased pain, although an examination showed no change in her condition.

Taylor was admitted to the Midlands Hospital on April 29th and was treated conservatively but, because of the poor response to treatment, Dr. Tribulato did a myelogram on May 11th which revealed a herniated disc. Taylor eventually underwent surgery for the removal of the disc on May 17th and was released from the hospital on May 28th. Taylor's witnesses, Wanda Markem and Robert Markem, both corroborated plaintiff's account of the accident.

However, on cross-examination Taylor testified that she was involved in a car accident in 1967 in which she hurt her back. After apparently healing, she had recurrent back problems beginning in 1973 when she started working in bars doing shelf stacking, table waiting, and other work. These back problems apparently subsided in time but in December of 1976 they reappeared. The precipitating cause, once again, was stacking beer in coolers, which she was doing in another bar. She admitted she had gone to see a Dr. Anderson about her back in February of 1977 and he gave her medication for the pain. She refilled the pain medication prescription weekly after that time and returned to see Dr. Anderson about 10 days before April 3rd, at which time Dr. Anderson suggested that she see an orthopedic surgeon.

Taylor's witness, Rose Markem, also testified that she had worked with Taylor at Hodge's Bar and that before April 3, 1977, she had two conversations with

Taylor about her back. Taylor told Markem that she needed a back operation and complained about back pain. Although Taylor denied the fact, the evidence revealed that prior to the alleged accident, Taylor had checked with the workmen's compensation board in Lincoln and found out that if she had an accident, her employer's insurance would cover it. Another coworker testified that she had a further conversation with Taylor approximately 1 week before the alleged accident, at which time Taylor told her she had a car accident years ago and wasn't expected to walk. Taylor said she needed an operation but couldn't afford it. She told how she had checked with the Workmen's Compensation Court in Lincoln and was told the employer would have to pay for it if she got hurt on the job.

On Tuesday following the alleged accident, the same two ladies were talking and Taylor asked her coemployee if she would say she witnessed Taylor hurting herself while stacking beer. The witness testified that Rose Markem told her prior to April 3, 1977, that Taylor was talking of faking an accident.

Dr. Tribulato rendered an opinion, by deposition, which was admitted into evidence, to the effect that Taylor's back problems were moderately extensive and her pain and subsequent surgery were both results of the accident on April 3, 1977. He had not, however, been advised by Taylor of her earlier difficulty or the fact that she had seen Dr. Anderson.

After a hearing before a single judge of the Workmen's Compensation Court, Taylor's petition was dismissed, the court finding that her disability and surgery were due to a natural progression of a preexisting condition. She then appealed for rehearing before a three-judge panel, which was granted. The three-judge panel likewise dismissed her petition for the reasons set out earlier in the opinion.

Taylor assigns as error the fact that the three-judge panel found that the accident caused only

slight or trivial injury, and that the accident did not materially aggravate her preexisting condition and did not cause or contribute to her subsequent disability or necessitate any of the hospital or medical treatment received by her. She further claims the court erred in finding that the disability of which she complains, including her surgery and hospitalization, resulted as a natural progression of a preexisting condition.

In reviewing the action of the three-judge panel, we must keep in mind that 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. Newbanks v. Foursome Package & Bar, Inc., 201 Neb. 818, 272 N. W. 2d 372. Furthermore, 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. Likewise, where, as here, the credibility of the evidence is a significant factor, we must keep in mind that the trier of fact gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses. Sherman v. Great Western Sugar Co., 127 Neb. 505, 255 N. W. 772.

The fact that the plaintiff herein had an accident resulting in an injury is not sufficient to entitle her to compensation. She must show that the accident caused some injury as a result of which the employee incurred medical expenses, and that she suffered disability or was otherwise prevented from engaging in her employment. In a workmen's compensation case such as this, the plaintiff has the burden of establishing, by a preponderance of the evidence, that the injury sustained by the employee was caused by or related to the accident and was not the result of the normal progression of the employee's

preexisting condition which would have been sustained by the employee even in the absence of the accident. Where the employee suffers an accident which causes only trivial injury and no loss to the employee either by way of medical expenses or loss of wages related to the trivial injury, the employer is not obligated to compensate the employee. Newbanks v. Foursome Package & Bar, Inc., *supra*. See, also, Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461.

The evidence in this case is such that the Workmen's Compensation Court could reasonably find that the difficulty experienced by Taylor which resulted in her need for medical care and surgery was present prior to the accident on April 3. The record further discloses that Taylor incurred no expenses directly related to the accident on April 3 and that all of the expenses were as a result of a condition which the Workmen's Compensation Court could reasonably find predated the accident on April 3. We are unable to say, as a matter of law, that the findings of fact made by the Nebraska Workmen's Compensation Court were clearly wrong. Being unable to say so, we are required to affirm the decision. The judgment is affirmed.

AFFIRMED.

MICHAEL G. KENYON, APPELLEE, V. STEPHEN K. LARSEN, THIRD-PARTY PLAINTIFF, APPELLEE, V. WALT DEYLE, DOING BUSINESS AS WALT DEYLE AGENCY, THIRD-PARTY DEFENDANT, APPELLANT.

286 N. W. 2d 759

Filed January 3, 1980. No. 42529.

1. **Election of Remedies.** Ordinarily, an election between theories of recovery will not be required unless the theories are so incon-

sistent that a party cannot logically choose one without renouncing the other.

2. **Trial.** The trial court has broad discretion over the general conduct of a trial.
3. **Mistrial: Appeal and Error.** A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion.
4. **Insurance: Contracts.** It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
5. **Insurance: Brokers: Agency: Negligence.** There must be causation between the negligence of the insurance broker or agent and the damage to his principal.
6. **Insurance: Brokers: Damages: Negligence.** The measure of damages for the loss caused by the negligence of the broker in failing to obtain insurance is the amount that would have been due under the policy if it had been obtained by the broker.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions.

Wagoner & Wagoner, for appellant.

Donald J. Loftus, P. C., for appellee Kenyon.

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

BOSLAUGH, J.

This action was commenced in 1975 by the plaintiff, Michael G. Kenyon, to recover the damages he sustained on June 16, 1971, in a collision between a motorcycle on which he was a passenger and a 1966 Chevrolet automobile owned and operated by the defendant, Stephen K. Larsen. In 1976 the defendant filed a third-party petition against Walt Deyle, alleging that the third-party defendant Deyle had breached an oral agreement to obtain automobile liability insurance from the Great Central Insurance Company for Larsen.

On December 7, 1976, the defendant Larsen filed a petition in bankruptcy with Kenyon listed as an unsecured creditor. Larsen was subsequently adjudicated a bankrupt and a discharge was entered on

March 15, 1977. The trustee in bankruptcy disclaimed any interest in the claim of Larsen against Deyle. On May 20, 1977, the bankruptcy court authorized Kenyon to proceed with the litigation against Larsen and Deyle, but enjoined Kenyon from levying upon any asset of Larsen except as involved in the claim of Larsen against Deyle. A stay which the trial court had ordered pending the bankruptcy was dissolved, and the trial court ordered the claim of Kenyon against Larsen be tried separately from the claim of Larsen against Deyle. The claim of Kenyon against Larsen then proceeded to trial.

The trial of the claim of Kenyon against Larsen resulted in a judgment in favor of Kenyon in the amount of $20,000 and costs on November 1, 1977. The judgment was affirmed by this court on June 27, 1978.

On December 2, 1977, Larsen assigned his claim against Deyle to Kenyon, reserving, however, any amounts expended by him as attorney's fees in the Kenyon v. Larsen case and the Larsen v. Deyle case which might be recovered as damages in the case against Deyle. Upon the motion of Kenyon, the trial court substituted Kenyon as the third-party plaintiff in the action against Deyle.

The amended petition filed by Kenyon alleged two theories of recovery. The petition alleged that Deyle had agreed to obtain automobile liability insurance for Larsen but negligently failed to obtain insurance for him, and that Deyle had breached an agreement to obtain automobile liability insurance for Larsen. The case was submitted to the jury upon both theories. The jury returned a verdict for the plaintiff Kenyon in the amount of $23,576.85 on the theory of negligence. The defendant Deyle has appealed. There is no cross appeal.

The defendant Deyle contends the trial court erred in substituting Kenyon as the third-party plaintiff; in failing to require Kenyon to elect upon which theory

he was proceeding; in submitting the breach of contract theory of recovery to the jury; in overruling the defendant's motion for a mistrial; and in failing to limit the plaintiff's recovery to the limits of the policy which the defendant could have obtained for Larsen.

The defendant Deyle contends that Kenyon should not have been substituted as the third-party plaintiff in the claim against Deyle because the assignment from Larsen to Kenyon was conditional. In the assignment Larsen reserved an amount equal to the amount he had expended for attorney's fees. The defendant argues that because the assignment was conditional, Larsen retained an interest in the claim, was the real party in interest, and the action should have proceeded in his name. There are several reasons why this contention cannot prevail.

Kenyon was a judgment creditor of Larsen. Although Larsen had been adjudged to be a bankrupt and a discharge had been entered, the trustee disclaimed any interest in the claim against Deyle and the bankruptcy court authorized Kenyon to proceed on the claim of Larsen against Deyle. Although the claim of Larsen against Deyle was personal to Larsen and could not be enforced in a direct action by Kenyon against Deyle, it could be reached by Kenyon in a proceeding in aid of execution. See, Peak v. Bosse, 202 Neb. 1, 272 N. W. 2d 750; Royal Ind. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N. W. 2d 183; § 25-1564, R. R. S. 1943; Emerson-Brantingham Implement Co. v. Hallgren, 146 Neb. 530, 20 N. W. 2d 501; Steffens v. American Standard Insurance Co. of Wis., 181 N. W. 2d 174 (Iowa, 1970); 12 Couch on Insurance (2d Ed., 1964), § 45:769, p. 668.

In effect this is what the bankruptcy court did in authorizing Kenyon to proceed against Deyle on Larsen's claim against Deyle. The proceeding was similar to a proceeding in aid of execution with Kenyon, as a judgment creditor, acquiring the right to pro-

ceed on the Larsen claim.

The question as to who was the proper party plaintiff was settled by agreement of the parties before the trial commenced. The record recites that the parties agreed, before the trial started, that the court would advise the jury the case was being brought by Kenyon and Larsen as plaintiffs, but that any recovery could be based only on whatever rights Larsen had against Deyle. This settled any controversy there may have been as to who was the proper party plaintiff. The trial court followed this theory in stating the issues in instruction No. 2, and the defendant Deyle made no objection to that part of the instruction. The trial court did not err in substituting Kenyon as the third-party plaintiff, and the defendant can not now claim that the trial court erred in advising the jury that the action was brought by Kenyon and Larsen as plaintiffs.

The verdict of the jury cured any error in submitting the contract theory of recovery to the jury.

The trial court denied the defendant Deyle's motion to require the plaintiff to elect one of the two theories of recovery pleaded in the petition. Pleading alternative theories of recovery is permitted in this state and, ordinarily, an election between theories of recovery will not be required unless the theories are so inconsistent that a party cannot logically choose one without renouncing the other. Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252.

In this case both theories of recovery depended upon proof of a promise by Deyle to obtain automobile liability insurance for Larsen. The record does not disclose that any substantial prejudice to the defendant resulted from submitting both theories to the jury. We conclude there was no error in doing so.

The following occurred during the reading of a deposition to the jury by plaintiff's counsel: "THE

COURT: Mr. Loftus, you may continue the reading of the deposition now. MR. LOFTUS: For the record, I would like the record to show this will only be about two or three pages I would like to read into the record. On the insistence of Mr. Wagoner and Mr. Deyle, I'm going to be required to read this whole deposition in the record. MR. WAGONER: I would like the record to reflect the reasons of my position, I want it read, in order to not disrupt the continuity of the testimony of Mr. Graves and the jury will have the entire testimony in front of them."

After reading several pages of deposition testimony, plaintiff's counsel stated: "MR. LOFTUS: Do you feel that is all essential, Mr. Wagoner?"

Defendant's counsel then approached the bench, the jury was excused, and the defendant moved for a mistrial. Argument was had on the motion and the trial court reserved ruling on the motion. The jury was recalled and the trial court made the following statement: "THE COURT: During your absence, the attention of the Court was brought to certain remarks made by Mr. Loftus from the witness chair when he was reading the deposition or prior thereto about the fact that the deposition was being read in full at the request of the other party. Although this may be in part truthful, his statement was improper. The ruling of the court was — preceding that, was that in the offering of depositions, the offering party may read such portion as he desires, but if the opposite party wants more portions read, then the offering party shall read the entire deposition if necessary and its the condition, if Mr. Loftus chooses to use the deposition, then to read the entire deposition, it's not his choice. Therefore, the statement contributing the time involved or the loss of time to the other side is improper. I instruct the jury to disregard or place any blame based upon those statements, and I would like you to disregard as if those statements had not been made at all so

that we can continue with this trial because the alternative is to stop the trial at this point. You may continue."

At the close of the plaintiff's evidence the motion for a mistrial was overruled.

The procedure to be followed had been settled by a ruling of the court made just before the reading of the deposition commenced. If the plaintiff wanted to object to that ruling the objection should have been made out of the hearing of the jury. Plaintiff's counsel knew what the ruling was, and his remarks could have had no purpose other than to discredit the defendant and his counsel before the jury. The remarks were improper and demonstrated a lack of professional demeanor.

The trial court has broad discretion over the general conduct of a trial. Cardenas v. Peterson Bean Co., 180 Neb. 605, 144 N. W. 2d 154. A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion. Regier v. Nebraska P. P. Dist., 189 Neb. 56, 199 N. W. 2d 742.

The trial court gave thorough consideration to the motion for a mistrial and concluded that it should be overruled. We are reluctant to disturb the ruling of the trial court and, upon consideration of the entire record, we determine that the ruling was not erroneous.

The defendant contends that the plaintiff's recovery should have been restricted to the limits of a policy which the defendant could have obtained for Larsen.

Larsen testified that he went to the Deyle Agency around the noon hour during the latter part of April 1971, to obtain insurance for the 1966 automobile. At the agency he talked with Jean Hesser, an employee of the agency, and advised her that he owned the 1966 automobile and requested "the same liability

coverage that my father's policy carried." On cross-examination Larsen admitted that he did not discuss any precise amount of coverage and "didn't know the coverage as to numbers to me for correct coverage that way." In a previous deposition Larsen testified with regard to limits requested, "Oh, I don't know what they call, 15, 25, or something, coverage. * * * This, I really — this I don't really know. The limits which were previously carried on the previous policies. * * * The policies through my father." Larsen testified that before he left the agency Mrs. Hesser assured him that he had insurance coverage which was effective immediately.

Matt Weides, a friend of Larsen who had accompanied him to the Deyle agency, testified that Larsen asked for the same coverage that Larsen's father had on his car. Weides had previously testified by deposition that Larsen had asked that the insurance be "changed over" so that he would have the same coverage he had previously had on a motorcycle.

Mrs. Hesser testified that she had no recollection of a conversation with Larsen at the Deyle agency in 1971. However, on April 30, 1971, she filled out a request for endorsement form indicating that the 1966 automobile should be substituted for a 1963 automobile on a garage liability policy issued to Elmer Larsen, Stephen Larsen's father.

Elmer Larsen operated a service station and garage and had purchased a garage liability policy from Deyle. This policy covered automobiles owned by Elmer Larsen but could not cover the 1966 automobile because it was owned by his son. The garage policy did not require a schedule or listing of covered automobiles, so the change of endorsement form was merely for information purposes.

The evidence would permit a finding that Deyle, through his agent Mrs. Hesser, had assured Larsen that he had insurance on the 1966 automobile, but in

fact no insurance existed. The jury could find Deyle was negligent in attempting to afford coverage for the 1966 automobile under the garage policy, in failing to attempt to obtain proper coverage for the 1966 automobile, and in not advising Larsen that insurance coverage had not been obtained.

It was the duty of Larsen to advise Deyle as to the insurance he wanted, including the limits of the policy to be issued. Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N. W. 2d 854 (Iowa, 1972).

The evidence shows that the policy which had covered the motorcycle provided limits of $10,000 per person for personal liability. A policy purchased from Deyle on September 30, 1971, insuring a 1955 automobile owned by Stephen Larsen provided the same limits. The record shows that Deyle could not have procured a policy from Great Central insuring an automobile owned by Stephen Larsen with personal liability limits in excess of $10,000 per person because of Larsen's age and status.

It is fundamental that there be causation between the negligence of the insurance broker or agent and the damage to his principal. Pacific Dredging Co. v. Hurley, 65 Wash. 2d 394, 397 P. 2d 819. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. 43 Am. Jur. 2d., Insurance, § 174, p. 230.

The recovery in this case should have been limited to the amount which would have been due under an automobile liability insurance policy with limits of $10,000 per person, plus the reasonable cost of defense in the action of Kenyon v. Larsen. The judgment is reversed and the cause remanded with directions to enter a judgment for the plaintiff Kenyon against the defendant Deyle in the amount of $10,000 and grant a new trial upon the issue of the reasonable cost of defense in the action of Kenyon v. Larsen.

REVERSED AND REMANDED WITH DIRECTIONS.

LEILANI LEE LINN, APPELLEE AND CROSS-APPELLANT, V. ROLAND ROBERTS LINN, APPELLANT AND CROSS-APPELLEE.

286 N. W. 2d 765

Filed January 3, 1980. No. 42539.

1. **Constitutional Law: Statutes: Waiver: Appeal and Error.** Although normally the constitutionality of a legislative act must be raised at the trial or it will be considered to be waived, this court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice.
2. **Appeal and Error.** Depending upon the nature of the action, we are inclined to note plain error which, if regarded, would necessitate a reversal and, if disregarded, would impose unjust results or consequences.
3. **Divorce: Parent and Child.** The right of a parent to maintain custody of his or her own child free of interference from the state is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
4. **Constitutional Law: Statutes: Due Process.** The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined.
5. **Divorce: Parent and Child: Statutes: Constitutional Law.** Termination of parental rights because it is in the "best interests and welfare of the children," as provided for in section 42-364, R. R. S. 1943, is not sufficiently specific to apprise parents of why the state may find it necessary to terminate parental rights and is an insufficient warning of prohibited conduct by which the parents can regulate their parental activities. As such, it is impermissibly vague and is unconstitutional.
6. **Constitutional Law: Statutes.** Where an offending portion of a legislative act can be separated from the remainder so that the latter may be enforced independent of the former, and the invalid portion did not constitute such an inducement to the passage of the valid parts so that the latter would not have been passed without the former, the act is severable and the valid portions may remain enforceable.

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

Regina C. Williams-Rotar of Ellick, Spire & Jones, for appellant.

William L. Monahan, for appellee. Ronald L. Schiltz and Thomas C. Prohaska of Reedy, Schiltz & Prohaska, guardians ad litem.

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

HASTINGS, J.

This was a divorce action in which, after application by the guardian ad litem of the parties' minor child born November 8, 1971, the trial court terminated the parental rights of both parties under the provisions of section 42-364, R. R. S. 1943, enacted as a result of the passage of L.B. 169, Laws 1978. Respondent has appealed and petitioner has cross-appealed. Errors assigned are: (1) The unconstitutional vagueness of section 42-364; (2) that both were denied substantive due process, contrary to the Fourteenth Amendment to the Constitution of the United States, in that section 42-364 does not set forth specific and reasonable standards for termination; (3) that both were denied procedural due process due to inadequate notice and employment by the trial court of an improper standard of proof; (4) that both were denied equal protection of the laws, in contravention of the Fourteenth Amendment, in that section 43-202 (sic), R. R. S. 1943 (section 43-201 et seq.), requires notice of reasons for termination and the parents are judged by different standards than those under section 42-364; and (5) the evidence, in any event, was insufficient to justify termination.

Roland and Leilani Linn are 27 and 38 years of age, respectively, and were married on June 25, 1971. Their minor child Juanita was born on November 8, 1971, has cerebral palsy, but is ambulatory; however, she is supposed to use braces. She

has visual problems which with glasses make her correctable vision 20/50. Roland completed the seventh grade and has an I.Q. of 82. According to Dr. Jack Kenney, the court-appointed medical expert who examined him, Roland manifests "a willingness to be of help to his daughter and until the daughter outgrows Mr. Linn's intellectual capabilities, I feel that he could be an adequate parent." Leilani completed the eighth grade, and at the time of trial was trying to obtain her GED through enrollment in a survival skills program in Lincoln.

Although Roland has been unemployed on several occasions during the marriage and has held a variety of jobs, some temporary in nature, at the time of trial he was employed as a dishwasher and busboy for a restaurant, with a take-home pay of approximately $91 per week. Leilani apparently has not been employed during the marriage.

Various social agencies, including Child Protective Services, have worked with the parents since 1975 in an effort to provide a safe and adequate home for Juanita. In June of 1977, custody of Juanita was placed in the court with temporary possession in Roland. Later, upon a report that the child was found at home unattended, the court, in August of 1977, placed her in the temporary possession of the Douglas County Welfare department. In November joint custody was placed with the court and Douglas County Social Services. Juanita has been in a foster home since that time and has shown considerable improvement in her personal hygiene, eating habits, social skills, and school work.

There is considerable evidence that Leilani does not feel capable of coping with the child's raising and has expressed her desire on one or more occasions to "give up the child." On the other hand, Roland has always wanted to keep Juanita and, during the times when he was not working, did a creditable job. However, he has no real practicable program

for her long-term care. Everyone pretty well concedes that in the recent past both Roland and Leilani have been quite faithful in their allowed visitations with Juanita and a great deal of love and concern is expressed by and among all three of the parties. However, on the theory that adoption was a preferred alternative to long-term foster care, the parental rights were terminated, which gave rise to this appeal.

It is first necessary for us to address the constitutional question. It is conceded by all parties that no constitutional issues were raised in the pleadings or in the motions for a new trial. "The challenge to constitutionality of the statutes was not raised at the trial. Presentation of an issue for the first time in a motion for a new trial is not a ground for granting the motion. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived." State v. Norwood, 194 Neb. 595, 234 N. W. 2d 601 (1975). "However, this court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice." Wittwer v. Dorland, 198 Neb. 361, 253 N. W. 2d 26 (1977). More specifically as to the problem at hand: "Considering the nature of this action and the fact that the custody of a minor child is involved, we have examined this record to determine whether or not there was plain error which, if regarded, would necessitate a reversal and, if disregarded, would impose unjust results or consequences." Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217 (1957).

Although under the circumstances of this case we would be entitled to refuse to consider the constitutional issues, because of their importance and the uniqueness of the facts of this particular case, we do not choose to do so. We therefore review the trial court's decision against the backdrop of the parents' claims of unconstitutional vagueness and denial of

substantive and procedural due process and equal protection. They all find their genesis in the Fourteenth Amendment to the Constitution of the United States, which prohibits a state from depriving any person of "life, liberty, or property, without due process of law" or from denying any person the "equal protection of the laws," and may be considered together.

It was well said by Mr. Justice McReynolds in Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), when, referring to the fact that there had been no exact definition of the liberty thus guaranteed, "Without doubt, it denotes * * * the right of the individual * * * to marry, establish a home and bring up children * * * and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit to happiness by free men." Within permissible limitations, of course, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder." Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). This court itself has recognized that the right of a parent to maintain the custody of his or her children is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child. State v. Metteer, 203 Neb. 515, 279 N. W. 2d 374 (1979). In State v. A. H., 198 Neb. 444, 253 N. W. 2d 283 (1977), we recognized that the due process command imposed by the Fourteenth Amendment translated into two basic requirements: "The statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must contain ascertainable standards by which it may be applied. This does not demand total absence of vagueness in a statute, but merely requires that a statute provide adequate notice of what conduct it requires or pre-

scribes [sic] as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined."

However, there we were dealing with section 43-202, R. S. Supp., 1974, now R. R. S. 1943, which gave the juvenile court jurisdiction over " '(2) Any child under the age of eighteen years * * * (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian or custodian neglects, is unable, 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 * * * dangerous to life or limb or injurious to the health or morals of such child; * * *.' Section 43-209, R. S. Supp., 1974, so far as material herein, 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: * * * (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs * * * which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child; (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indefinite period; * * *.' " State v. A. H., *supra*.

What a far cry those standards are from the ones involved in this case. Section 42-364, R. R. S. 1943, provides in part as follows: "(4) Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall forthwith appoint an attorney as guardian ad litem to protect the interests of any minor children. Such guardian ad litem

shall forthwith personally investigate the facts and circumstances on all matters pertinent to the best interests and welfare of the children. *If it appears to the guardian ad litem that the best interests and welfare of the children may require the termination of the parental rights of one or both parents,* he shall apply to the court in writing or orally on the record for such termination. *The court may then terminate the parental rights of one or both parents after notice and hearing and shall serve notice thereof upon the parents.*" (Emphasis supplied.)

The statute goes on to provide that the court shall notify the parents of their right to counsel at the expense of the county if they are indigent. However, it sets forth no guidelines for the court to follow, although presumably the permission to terminate parental rights after notice and hearing shall be as the "best interests and welfare of the children may require." This is the same general standard required of the juvenile courts as set forth in section 43-209, R. R. S. 1943, without the additional requirement that at least one of six conditions going to the unfitness of the parents has been found to exist. In addition to the two cited in State v. A. H., 198 Neb. 444, 253 N. W. 2d 283 (1977), the statute also sets forth abandonment of the child, repeated neglect and withholding of parental care, failure to provide necessary subsistence, education, or other care necessary for the child's health, or that the child has been determined to be a child described in section 43-202 (1) or (2), R. R. S. 1943.

Again, referring to State v. A. H., *supra*: "The statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must contain ascertainable standards by which it may be applied. This does not demand total absence of vagueness in a statute, but merely requires that a statute provide adequate notice of what conduct it requires or pre-

scribes [sic] as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined."

Further discussing the charge of vagueness in the language of section 43-209, R. R. S. 1943, we went on to say in State v. A. H., *supra*: "These provisions appear to us to be sufficiently specific to apprise the appellant of why the state felt it necessary to terminate her parental right. This language does convey sufficiently definite warning as to prescribed [sic] conduct when measured by common understanding and practice. * * *

"We hold the statutes under attack provide standards which the average intelligent person should be able to understand and by which he or she can regulate his or her conduct." The only standard contained in section 42-364, R. R. S. 1943, is what appears to the guardian ad litem and is determined by the court to be in the "best interests and welfare of the children." There are no provisions "sufficiently specific to apprise" the parents of why the state found it necessary to terminate parental rights; there is no language conveying a warning as to prohibited conduct and no standards by which the parents could "regulate his or her conduct."

Section 42-364, R. R. S. 1943, being vague and lacking in adequate and understandable standards of conduct to which parents should conform so as not to risk the termination of parental rights, violates the due process requirements of the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void.

L. B. 169, Laws 1978, insofar as it provides for a method of termination of parental rights in a divorce action, is impermissibly vague and lacks adequate and understandable standards of conduct to which parents should conform so as not to risk the termination of parental rights. To that extent it violates the due process requirements of the Fourteenth Amend-

ment to the Constitution of the United States, and is therefore unconstitutional and void. However, even though there is no severability clause, it is obvious that, with the exception of several minor details not pertinent here, sections 42-364 and 43-201, R. S. Supp., 1976, and section 43-204, R. R. S. 1943, were in existence in their present form absent the offending subsection (4) of section 42-364, R. R. S. 1943. Therefore, it is equally obvious that the offending portion of L. B. 169, Laws 1978, can be separated from the remainder of the act and the latter enforced independent of the former, and the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without the invalid part. State v. Padley, 195 Neb. 358, 237 N. W. 2d 883 (1976). The act is severable.

In view of this disposition of the case, it is unnecessary for us to address the parents' remaining complaints.

The decree of the trial court is modified by striking that portion of the decree terminating the parental rights of Roland and Leilani as parents of Juanita Linn and awarding care, custody, and control to the Department of Public Welfare for permanent placement of Juanita; and custody of said minor child is placed in the District Court for Douglas County, Nebraska, jointly with the Douglas County Social Services, for appropriate foster care. The decree in all other respects is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN J. ROBBINS, APPELLANT.

287 N. W. 2d 55

Filed January 3, 1980. No. 42624.

1. **Criminal Law: Statutes: Trial: Juries.** Under section 29-2022,

R. R. S. 1943, the determination of whether or not a jury should be permitted to separate during the trial of a criminal case is left to the discretion of the court.

2. **Criminal Law: Statutes: Juries.** Under section 29-2022, R. R. S. 1943, after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until they agree upon a verdict or are discharged by the court.

3. **Criminal Law: Statutes: Juries: Waiver.** Under section 29-2022, R. R. S. 1943, the trial court may properly permit the separation of the jury after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation.

4. **Criminal Law: Statutes: Juries.** A failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case without the express agreement or consent of the parties is erroneous but does not, in and of itself, constitute reversible error.

5. _____: _____: _____. In the absence of express agreement or consent by the defendant, a failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Conviction and sentence affirmed. Cause remanded with directions.

Casey & Elworth, 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.

MCCOWN, J.

The defendant was found guilty by a jury on a charge of first degree murder and sentenced to life imprisonment.

On arraignment the defendant stood mute and a plea of not guilty was entered for him. The evi-

dence at trial established that the 21-year-old defendant had been drinking during the day and evening of July 16, 1978. Shortly after midnight the defendant, carrying a gun in his pocket, went to the residence of the victim. There had been previous disagreements between them concerning defendant's alleged involvement with the victim's wife. The defendant was admitted to the house by the victim. The two argued and a fight ensued. Decedent was shot six times and killed. The defendant testified that he shot the decedent once in the chest and he also admitted responsibility for five shots in the back, although he did not recall firing those shots. His asserted justification was self-defense. During the week of trial preceding submission of the cause to the jury, the jury had been permitted to separate for the night after each day of trial. At the conclusion of the trial, the jury was instructed and the case was submitted to the jury at 4:25 p.m., January 22, 1979. The court ordered: "If you do not agree upon a verdict by 5:30 o'clock p.m., you may separate and return for deliberation at 9 o'clock a.m., tomorrow; but in such event you are warned not to discuss the case with any person or with each other until you reconvene."

There is no indication in the record that the court had any discussion with counsel before taking action allowing the jury to separate after the cause was submitted. There was no objection to the action of the court by counsel for the State or counsel for the defendant. After the jury had retired, counsel for the defendant waived his right to be present and poll the jury when it returned its verdict, and the defendant likewise waived those rights.

The jury returned to deliberations on the morning of January 23, 1979, and returned a verdict of guilty of first degree murder at 2:15 p.m., on that date. The defendant raised no issue as to the separation of the

jury after submission until his motion for new trial was filed.

The sole assignment of error on appeal is that the court erred in allowing the jury to separate after the case had been submitted to the jury without the consent of the defendant or his counsel.

Section 29-2022, R. R. S. 1943, is a part of the code of criminal procedure. That section provides: "When a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court. The officer having them in charge shall not suffer any communication to be made to them, or make any himself, except to ask them whether they have agreed upon a verdict, unless by order of the court; nor shall he communicate to anyone, before the verdict is delivered, any matter in relation to the state of their deliberations. If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, nor to listen to any conversation on the subject; and it is their duty not to form or express an opinion thereon until the cause is finally submitted to them."

This court has consistently held that under the statute the determination of whether or not a jury should be permitted to separate during the trial of a criminal case is left to the discretion of the court. State v. Bautista, 193 Neb. 476, 227 N. W. 2d 835.

This court has also held that under section 29-2022, R. R. S. 1943, after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until they agree upon a verdict or are discharged by the court. Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533.

In Sedlacek this court also held that the right to have the jury kept together after final submission of

the case may be waived by specific agreement or consent of counsel for the parties. The court found in that case that the defendant, by the consent of his counsel, which he knew was given, by his silence and acquiescence, and by his failure to raise the question when the court reconvened after separation, waived the right to have the jury kept together.

The difference between the Sedlacek case and the case now before us is that in the present case there was no specific agreement or consent to separation by anyone, unless it can be inferred by a silent record. There was only a failure to object. In effect, the District Court, in ruling on the motion for new trial, found that a failure to object constituted a waiver of the statutory right to have the jury kept together.

Cases dealing with the separation or sequestration of jurors in criminal cases have been numerous. They are collected and annotated at 34 A. L. R. 1115; 79 A. L. R. 821, 21 A. L. R. 2d 1088, and 72 A. L. R. 3d 248. Analysis of the cases is difficult because of the varying statutory provisions and court rules which are applicable. Many cases treat the defendant's right to have the jury sequestered during deliberations as procedural only and take the position that the failure of a defendant to make timely objection to jury separation during deliberations results in a loss of the right.

It seems clear to us that the basic purpose of section 29-2022, R. R. S. 1943, is to preserve the right to a fair trial by shielding the jury from improper contact by others and restricting the opportunities for improper conduct by jurors during the course of their deliberations. While the statute does not create any constitutional right in either the defendant or the State, it is nevertheless directed at the preservation and protection of the fundamental right to a fair trial. That reason alone is sufficient to place the statute in a category beyond that of a mere

procedural right which may be lost by a failure to object. The language of section 29-2022, R. R. S. 1943, is mandatory and places the duty of sequestration directly upon the trial court. As this court pointed out in Sedlacek v. State, *supra*: "The statute requires the nonseparation of the jury after the case is submitted to it as a protection to both the State and the defendant." In the case now before us neither counsel for the State nor counsel for the defendant made any objection at the time the trial court directed the separation of the jury. Neither did counsel for the State nor counsel for the defendant expressly consent or agree to the court's action, which clearly failed to comply with the mandatory language of section 29-2022, R. R. S. 1943. The critical question here is whether the failure to comply with the statute was prejudicial or nonprejudicial, and who has the burden of proving prejudice or lack of prejudice because of the court's failure to comply with the statute.

In those states having a mandatory statutory requirement of sequestration, some take the position that the court may permit the jury to separate or disperse overnight with the consent or agreement of the defendant or of all parties. Other courts hold that the trial court does not have authority to permit the separation of jurors during deliberations even with the consent of the parties. See Annotation, 72 A. L. R. 3d 248, § 7, p. 265.

Sedlacek v. State, *supra,* has previously approved the principle that a defendant may waive the statutorily required sequestration by express agreement or consent. We believe that principle is sound but requires clarification. The trial court may properly permit the separation of the jury in a criminal case after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of

the jury after final submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation.

Most courts which have considered the issue have held that a failure to comply with the terms of a mandatory sequestration statute, unconsented to by the parties, does not in and of itself constitute reversible error. The critical issue in such cases is whether harm or prejudice has been caused to the defendant by the failure to comply with the statute. Cases which hold that, under mandatory sequestration statutes, the trial court has no authority to permit the separation of jurors during deliberations, even with the consent of the parties, have, in effect, established an irrebuttable presumption of prejudice which constitutes reversible error. At the opposite end of the spectrum are the cases holding that in the absence of objection there is, in effect, an irrebuttable presumption that no prejudice resulted. If prejudice is rebuttably presumed, the burden of proving the absence of prejudice rests on the State. If a lack of prejudice is rebuttably presumed, the burden of proving prejudice rests on the defendant. The general rule is that where a separation of a jury during deliberations in a criminal case is in violation of a statute, or occurs under circumstances which might expose the jurors to improper influence, a presumption of prejudice is created and the burden is placed upon the prosecution to show that no injury resulted. See Annotation, 72 A. L. R. 3d 248, § 2, p. 254, and cases there cited.

In the absence of express agreement or consent by the defendant, a failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted.

Section 29-2022, R. R. S. 1943, is intended to prevent improper contacts or communications with or by the jurors after submission of a criminal case. Separation of the jury overnight without express consent or approval of the parties was the only failure to comply with the statute involved here. Consequently, the issue is whether there was improper contact or communication with or by the jurors during separation which resulted in prejudice to the defendant. Ordinarily, that issue could be established by affidavits or other evidence from the jurors or other persons. In this case the trial court erroneously determined that the defendant had waived compliance with section 29-2022, R. R. S. 1943, by failure to object to separation of the jury, and therefore no evidence was taken at the hearing on the motion for new trial. Neither the defendant nor the State introduced any affidavits or other evidence from jurors or other parties, either to establish or to rebut a presumption of prejudice to the defendant resulting from the failure to comply with section 29-2022, R. R. S. 1943. The sole fact relied upon by the defendant was the failure of the court to comply with the statute. That alone is not enough.

The issues here are a matter of first impression and no hearing was held or evidence presented in this case in accordance with the rules now adopted. We therefore affirm the original conviction and sentence, set aside the order of the District Court overruling the motion for new trial, and remand the cause to the District Court for a hearing on whether there was improper contact or communication with or by the jurors during separation which resulted in prejudice to the defendant.

At such a hearing a juror may testify as to whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror. No evidence may be received

as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith. See, § 27-606(2), R. R. S. 1943; Simants v. State, 202 Neb. 828, 277 N. W. 2d 217.

If the District Court determines, after hearing, that there was no improper contact or communication with or by the jurors during separation, and consequently no prejudice to the defendant, the motion for new trial should be overruled. In the event the District Court determines, after hearing, that there was improper contact or communication with or by the jurors during separation, and consequently prejudice to the defendant, the motion for new trial should be granted.

CONVICTION AND SENTENCE AFFIRMED.
CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. LENA J. DOYLE, APPELLANT.

287 N. W. 2d 59

Filed January 3, 1980. No. 42677.

1. **Criminal Law: Evidence: Proof.** A defendant may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged.
2. **Criminal Law: Evidence: Verdicts: Juries.** Evidence is sufficient to sustain a guilty verdict only when the jury could properly find guilt beyond a reasonable doubt.
3. **Criminal Law: Homicide: Infants.** In a prosecution for killing a newly born baby it is incumbent upon the State to prove that the child was born alive and had an independent and separate existence apart from its mother and that the accused was the criminal agent causing the infant's death.
4. **Criminal Law: Evidence.** Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.

5. **Criminal Law: Evidence: Proof.** To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any other reasonable hypothesis of innocence.
6. **Criminal Law: Evidence.** A conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.

Appeal from the District Court for Frontier County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stanley C. Goodwin and Colfer, Lyons, Wood, Malcom & Goodwin, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellee.

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

KRIVOSHA, C. J.

The defendant, Lena J. Doyle, was charged in a two-count information with second degree murder in violation of section 28-402, R. R. S. 1943 (count I), and feloniously throwing away a dead human body in violation of section 28-1033, R. R. S. 1943 (count II). At the close of all the evidence, the State having rested, and the defendant having elected to put on no evidence, the court found that the State had failed as a matter of law to prove second degree murder and withdrew count I from consideration by the jury. Instead, the trial court instructed the jury on the crime of manslaughter. The jury returned a verdict of guilty on both the charges of manslaughter and feloniously throwing away a dead body. The defendant assigns as one of the errors the trial court's failure to sustain the defendant's motion to dismiss

as to count I. We agree with the defendant that the motion should have been sustained and accordingly reverse the action of the trial court in that regard.

The State offered evidence to show that in late July and early August of 1978, the defendant was observed by neighbors and relatives in Maywood, Nebraska, and from their observations concluded that the defendant was pregnant. One witness testified on behalf of the State that she had asked the defendant when her baby was due and the defendant gave a date of August 8th. The witnesses further testified that following August 5th defendant was again seen by various witnesses and in their opinion was no longer pregnant.

On August 9, 1978, pursuant to a search warrant, a dead human infant was found on the premises occupied by the defendant and her family. The body of the infant was examined by a pathologist on August 9, 1978, and he testified that the infant was at or near term. The pathologist further testified that in his opinion the infant had been born alive. The autopsy, however, disclosed that there was no evidence of either internal or external trauma. Furthermore, the pathologist could not state what was the cause of death.

At the conclusion of the State's case, the defendant moved for dismissal. The trial court overruled the motion and the defendant elected to put on no evidence and rested. The defendant again moved for a dismissal on the basis that there was insufficient evidence to establish guilt beyond a reasonable doubt. Following the motion and argument, several questions posed by the trial court indicate the difficulty the court was having with the evidence. The court asked, "Do you see any evidence of killing here?" to which the State's attorney replied: "Principally as I indicate due to the decomposed, direct evidence no, as to the decomposed condition of that body it's impossible. As to expert testimony, as to

probabilities, there is, strangulation or suffocation.

"THE COURT: What circumstantial evidence do you find of the killing?

"MR. SCHRODER: Dr. Deters' testimony, as this being a probable cause of death.

"THE COURT: Would you amend that to say possible?

"MR. SCHRODER: Yes. * * *."

The trial court again overruled the motions to dismiss but, just prior to meeting with counsel to go over the instructions, advised counsel, "* * * I'm going to withdraw second degree murder and submit manslaughter, and, of course, the disposal of a dead body. * * * I just feel that there's been no showing of a killing in this case. There's a showing of a death, but no killing; no intentional killing."

The trial court then instructed the jury in part as follows: "On Count I of the information in this case, depending on the evidence, you could have found the defendant: a. Guilty of murder in the second degree, or b. Guilty of manslaughter, or c. Not guilty. However, the court has determined as a matter of law and you must accept as true that the state has failed to prove beyond a reasonable doubt that the defendant is guilty of murder in the second degree. Therefore, you shall then proceed to consider the lesser included offense of manslaughter." The court then instructed the jury on elements which the State must prove beyond a reasonable doubt in order to convict the defendant of the crime of manslaughter, including: "1. That the defendant, Lena J. Doyle, killed a newborn human being. 2. That she did so without malice, unintentionally, while Lena J. Doyle was in the commission of some unlawful act."

The court further instructed the jury with regard to the matter of the commission of an unlawful act as follows: "In this regard, you are instructed that the only unlawful act which you are to consider is that of endangering the health of a child as provided

by a statute of the state of Nebraska. * * * The material elements which the state must prove beyond a reasonable doubt in order for you to find the defendant guilty of this unlawful act are: 1. That the defendant had the care, custody or control of the child. 2. That the defendant: (a) Willfully or negligently caused or permitted the life of such child to be endangered. OR (b) Willfully or negligently caused or permitted the health of such child to be injured. OR (c) Willfully caused or permitted such child to be placed in such a situation that its life or health may have been endangered."

An examination of the record discloses that the trial court was absolutely correct when it determined that there was not sufficient evidence to establish a killing. At best the evidence, almost exclusively circumstantial in nature, disclosed that a child was born to the defendant and that the child died. The pathologist was unable to testify as to any cause of death and could not testify that the cause of death was not from natural causes. Obviously, the trial court had concluded that the State had failed to prove a killing beyond a reasonable doubt as the State was required to do. There is no doubt that a defendant may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. In Re Winship, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368. Evidence is sufficient to sustain a guilty verdict only when the jury could properly find guilt beyond a reasonable doubt. State v. Alcorn, 187 Neb. 854, 194 N. W. 2d 798.

The mere fact that a child is born alive and then dies is not sufficient evidence to convict a defendant beyond a reasonable doubt of having killed the child.

In addition, however, for all the reasons for which the trial court concluded it could not submit to the jury the issue of second degree murder, the court was compelled to reach the same conclusion with re-

gard to the charge of manslaughter in this case. The court correctly instructed the jury that in order for the defendant to be guilty of manslaughter, an unlawful act had to have been committed by the defendant in the course of which the infant was killed. The trial court was not able to discover any evidence introduced by the State upon which the jury could find beyond a reasonable doubt that the defendant had been engaged in some unlawful act in the course of which the infant was killed. The court attempted to fill that gap by instructing the jury on the provisions of section 38-116, R. R. S. 1943 (endangering the health of a child). However, the elements necessary to constitute a violation of that statute were likewise lacking in the evidence. There was no evidence offered by the State that had the defendant done something, which she did not do, the infant would have lived; nor that had she not done anything, which she did do, the infant would have lived. There was, in short, no evidence that the defendant had willfully or negligently caused or permitted the life of such child to be endangered or the health of such child to be injured, or permitted the child to be placed in such a situation that its life or health may have been endangered. One may speculate on that point, but speculation alone does not constitute evidence. Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539. There was simply no testimony upon which the jury could have found the defendant guilty under section 38-116, R. R. S. 1943, beyond a reasonable doubt.

The most that could be said, as was said by the State, is that one who has a baby should not have the baby at home. There was, however, no evidence offered that had the child been born in a hospital rather than at home it would not have died. Likewise, there was no evidence that there was an opportunity for the defendant to get to a hospital before the child was born. The only evidence offered by the State was to the effect that a child was born, it

lived momentarily, and was thereafter found dead. That was not sufficient to submit a charge of manslaughter to the jury.

The traditional and prevailing view expressed by courts from other jurisdictions is that in a prosecution for killing a newly born baby it is incumbent upon the State to prove that the child was born alive and had an independent and separate existence apart from its mother and that the accused was the criminal agent causing the infant's death. Lane v. Com., 248 S. E. 2d 781 (Va., 1978). See, also, White v. State, 238 Ga. 224, 232 S. E. 2d 57; Jackson v. Commonwealth, 265 Ky. 295, 96 S. W. 2d 1014; People v. Hayner, 300 N. Y. 171, 90 N. E. 2d 23; State v. Collington, 259 So. Car. 446, 192 S. E. 2d 856.

In the recent case of State v. Klutts, 204 Neb. 616, 284 N. W. 2d 415, we reviewed our rules with regard to a criminal conviction based upon circumstantial evidence, saying, "Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion." To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any other reasonable hypothesis of innocence. State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. State v. Klutts, *supra*.

In Reyes v. State, *supra*, we said, "[A] conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere

fact that some unfavorable circumstances are not satisfactorily explained."

We believe an examination of this record fails to disclose how the jury could possibly find beyond a reasonable doubt that the defendant had violated section 38-116, R. R. S. 1943, or that she was the criminal agent causing the infant's death. In the absence of such evidence, the conviction cannot stand. The trial court should have sustained the defendant's motion to dismiss both the second degree murder and manslaughter charges, and it was error for the court not to do so. Accordingly, we reverse that portion of the court's ruling and remand said matter with instructions to dismiss Count I.

The evidence with regard to count II is somewhat different. Nevertheless, an examination of the record satisfies us that the circumstantial evidence adduced by the State with regard to count II was sufficient to permit the jury to find beyond a reasonable doubt that the defendant had feloniously disposed of a dead human body. After a jury has considered the evidence in light of our rules concerning circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustained some rational theory of guilt. See, State v. Keeton, 199 Neb. 405, 259 N. W. 2d 277; State v. Sommers, 201 Neb. 809, 272 N. W. 2d 367. We have examined defendant's assignments of error insofar as they apply to count II and find each of them to be without merit.

Accordingly, the judgment of conviction on count I is reversed and the cause remanded with directions to dismiss, and the judgment on count II is affirmed.

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

CLINTON, J., dissenting.

I dissent from the portion of the majority opinion

which reverses and dismisses the conviction for manslaughter. I believe the evidence is sufficient to have permitted the jury to find that the child died as a consequence of a willful act or negligent act of the defendant which endangered the life or health of the child, which acts or omissions are wrongful acts under the provisions of section 38-116, R. R. S. 1943.

The majority opinion does not, in my view, contain a fair statement of the evidence and the inferences which a jury could draw therefrom, but rather contains a statement of the court's own factual conclusions. As an appellate court it is not our function to draw conclusions in law cases.

In this case it was incumbent upon the State to prove beyond a reasonable doubt that (1) the child was born alive, and (2) the child died as a consequence of a willful act or negligent act of the defendant endangering the life or health of the baby.

The fact that the defendant gave birth to a male child, who was born alive during the night of August 5, is a permissible conclusion from the following evidence. The defendant was observed by several persons to have been pregnant as late as July 28 and 29 and August 1. One of those persons was a registered nurse with obstetrical experience and she gave her opinion that the defendant appeared to be about to deliver. On August 6, the defendant was observed to be no longer pregnant. On that day the nurse went to the Doyle home for the purpose of lending assistance to the mother and child. A comment by her about "the new arrival" was met with no response but she was admitted to the home. She at that time observed that the defendant was no longer pregnant but appeared to be pale and tired.

A later court-ordered examination of the defendant by a physician resulted in a positive expert opinion that the defendant had recently delivered.

During the night of August 5 (early morning of August 6), Ron Snider, a neighbor boy who lived

next door to the Doyle residence and who had done a good deal of babysitting with infants, became ill about 4 a.m., and had to go to the bathroom. The windows were open. He heard a baby cry and he looked out the window to the Doyle house. The light was on in what other testimony showed was the bedroom of Lena Doyle, the defendant. There also appeared to be a light on in the bathroom of the Doyle home. The crying went on for about 3 minutes. It was not the cry of Lena's 2-year-old child, but that of a small infant. He knew the difference because of his babysitting experience and having been around the small infants of relatives.

The pathologist who performed the autopsy on the body of the baby gave as his expert opinion that the child had been born alive. The basis of his opinion were flotation tests of the lungs as well as microscopic examination of those organs.

The conclusion that the infant's death was caused by willful acts or negligent acts endangering the baby's health or life must be arrived at circumstantially. This court and many others have held that the cause of death need not be established by direct evidence. It may be established circumstantially and by inference. The pertinent cases of this and other jurisdictions we will discuss after we have summarized the evidence on the issue.

In addition to the fact the baby was born alive, the pathological examination showed that it was a full-term healthy infant. External examination disclosed no abnormalities. The heart was normal. The internal organs were those of a completely normal infant. The brain was normal. There was no evidence of infection or inflammation in any part of the body which could have caused the child's death. The pathologist rendered his expert opinion that the autopsy disclosed "*no natural cause of death.*"

The autopsy further disclosed that there was an al-

most complete absence of blood in the body of the infant. So little, in fact, that the pathologist had a hard time getting enough for a blood sample and that he had to obtain from the aorta.

The umbilical cord was untied. It did not appear to have been cut by an instrument for the end was ragged. It could have been torn apart by hand. If the cord is not tied, two things may happen. There may be bleeding from the body of the infant, or before severance the blood may pass from the placenta into the infant's body, causing sludging in the infant's cardiovascular system. It is a reasonable inference from the doctor's testimony that there was no sludging, but, because of the absence of blood in the cardiovascular system of the infant, there had been bleeding. The absence of blood in the body, he testified, ". . . is a pattern that I have seen in bleeding death from other causes. That's what one sees. You see decreased amounts of blood within the vascular system." He gave as his assumption that the absence of blood can only be explained by loss through the umbilical cord.

He stated that the umbilical cord would not be broken accidentally during birth. The portion of the cord remaining attached to the body was about 4 inches long. A normal cord is, on the average, about 15 inches long. Had the cord not been of normal length, the baby would not have developed normally. The placenta and the remaining portion of the cord were not found in the search of the premises which followed the discovery of the body.

The child's body was in a shallow, 6-inch grave with earth mounded over the body. The body itself was covered with a towel. Two sizable patches of human blood were found on the ground adjacent to the grave. Whether this was infant or adult blood could not be determined by scientific analysis. It is reasonably inferable that this blood came from the body of the child while the body lay on the ground

during the digging of the grave.

A considerable quantity of blood on the mattress of the defendant's bed was adult human blood, type O. Blood in the bathroom and on sanitary napkins found in the bathroom of the Doyle home was adult blood, type O.

The grave was located in a portion of the Doyle yard which was concealed from direct view by a garage and a junked vehicle.

The defendant was a mother of one other child who was in her custody. It may be concluded, therefore, that she was generally familiar with childbirth.

When questioned after the discovery of the child's body, the defendant denied that she had been pregnant and that she had given birth.

Guilty knowledge may be inferred from the defendant's denials as well as from the concealment and burying of the child. There was no good reason to hide the birth or deny the pregnancy if the defendant were not guilty of wrongdoing or if the baby had died of natural causes.

A jury could reasonably find from the above evidence that the infant bled to death as a result of the act or neglect of the defendant.

In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant. State v. Casper, 192 Neb. 120, 219 N. W. 2d 226; United States v. Stabler, 490 F. 2d 345 (8th Cir., 1974); Hall v. State, 243 Ga. 207, 253 S. E. 2d 160; The People v. Ryan, 9 Ill. 2d 467, 138 N. E. 2d 516; State v. Collington, 259 So. Car. 446, 192 S. E. 2d 856.

In State v. Casper, *supra*, the deceased was subdued by two men and they took his billfold. He got away from them and escaped into the river and that was where he was last seen. Several days later his body was found in the river. I quote from the opinion: "An autopsy was performed on the body of

Armstrong by Dr. Jerry Wilson Jones but the cause of death could not be determined from the post mortem examination. Dr. Jones testified there were no tests or findings which would establish conclusively whether a person found in the water under these circumstances had actually died from drowning. He was allowed to testify over objection that his findings were consistent with drowning."

In United States v. Stabler, *supra*, a human body was found in a burned automobile. It could not be identified. The alleged victim was missing. He had been last seen in the car in a comatose condition. There was no scientific or other evidence as to the cause of death of the body found in the car. The whole matter is summarized in the seventh syllabus as follows: "Evidence that human body was found in burned car, that particular individual was last seen in the car and had not been seen in the community since the fire, that car was parked long enough for it to become cool and negate possibility that an operating defect caused the fire, and that the missing person did not smoke and was comatose when last seen was sufficient to warrant finding that the missing person was dead and that his death was caused by a criminal act."

Hall v. State, *supra*, involved infanticide in circumstances similar to those here involved. The court held: "Evidence that defendant gave birth to deceased child in toilet, that she placed child in trash can without determining whether child was alive or dead and subsequently buried child in her back yard and that defendant's children heard baby crying after defendant placed it in trash can was sufficient to convict defendant of murder of newly born baby." There was, in that case, no scientific or expert testimony on the cause of death.

In The People v. Ryan, supra, the defendant, a nurse, gave conflicting statements as to whether the baby was born alive. However, she wrapped it in a

towel and placed it in an overnight case. The next day she buried the body. One of the girls with whom she shared an apartment testified that on the night of the birth she heard the defendant crying and then get up and go to the bathroom. About 30 or 40 minutes later she thought she heard a baby cry.

The court discussed the testimony of the pathologist as follows: "Dr. Van Pernis, a pathologist, was called and testified that he performed an autopsy on the baby in question, which had been dead at least 24 hours and perhaps longer. The external appearance indicated it had been buried a longer time. The child was a full-term female, approximately eight pounds in weight and normal length. He also determined the presence of gas, actually air, in both lungs which were fully expanded. The presence of gas, he stated, could come from two main sources: It indicates that the body had recently been alive or that there is decay present by bacteria and other organisms which may produce gas. In his opinion the infant had been alive because the lungs were fully expanded, filling the chest cavity on both sides. He explained that ordinarily in a new-born baby which has not been alive, the lungs are collapsed and are in the middle of the chest leaving a considerable space between the lung tissues and the chest wall itself; that in the body under consideration there was no evidence any place in the lungs that there was any collapse of tissue. He determined that the umbilical cord was still present and that it had probably been tied with a black string-like material. He further testified that in his opinion death had occurred relatively soon after birth as the bones of the skull were overriding. It was his opinion that the child did live and breathe. On cross-examination he testified he could not determine with any degree of medical certainty how long the child had lived. Dr. Van Pernis did not give and was not asked if he was able to determine medically as to what was the cause of

death." The court held the evidence sufficient to permit the jury to find that the baby was born alive and that the child died by suffocation or neglect.

In State v. Collington, *supra*, a newborn infant was found dead in a trash bin. The defendant admitted she had given birth to the baby in her dormitory room, but she said it was born dead. I now quote from the opinion: "The evidence adduced by the State tending to prove the child was born alive was as follows. The first doctor to see the body shortly after it was discovered testified that the baby's mouth was stuffed full of paper, 'either toilet tissue or Kleenex'. He did not remove or closely examine such paper. The coroner viewed the child's body at the mortuary, observed the paper in the mouth of the infant, used his finger to feel it, and testified that the 'paper was tightly stuffed in the mouth'. On or about November 30th, the body of the infant, then badly degenerated, was exhumed and an autopsy performed by a pathologist. He testified that from his examination he believed that the child was born alive and breathed naturally, and had to be alive for at least a short time, his opinion being based on his examination of the lungs. He testified that both lungs were full of air, soft and spongy as a normal lung would be when full of air: that they floated on water as if full of air, and that microscopically the air was 'uniformly throughout' the lungs. . . . The record contains no expressed medical opinion as to the actual cause of death."

In each of the cases we have cited, there was an absence of *competent* direct evidence that the death of the victim was caused by the act of the defendant. In United States v. Stabler, *supra*, e.g., perhaps the victim died of a heart attack before the fire. In State v. Casper, *supra*, it was possible the cause was something other than drowning and the fact that the victim was chased into the water was not the cause of death. The circumstances, however, were suffi-

cient to permit the jury the inference of criminal causation. They are also in this case.

I find the majority opinion inconsistent in affirming the conviction for abandoning a dead human body in a place other than a regular place for burial under a death certificate, section 28-1033, R. R. S. 1943, while holding that the evidence is insufficient on the manslaughter charge. It is "possible" that some other member of the household "threw away or abandoned" the body. If the evidence is insufficient on the manslaughter charge, it is also on the abandonment charge as well, and the court ought to take note of the insufficiency of the evidence on its own motion as plain error in order to prevent injustice.

Of course, the evidence on both counts points to the defendant as the perpetrator.

There is nothing in this case to indicate that the child died from any cause other than bleeding to death as a result of defendant's act or neglect. The jury verdict should not be set aside.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ARNOLD EAGLE DEER, APPELLANT.

286 N. W. 2d 770

Filed January 3, 1980. No. 42681.

1. **Criminal Law: Indictments and Informations.** Where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count.
2. **Criminal Law: Evidence: Verdicts.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury, and

the verdict must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

David J. Clegg and Gary C. Newnham, Of Counsel, Western Nebraska Legal Services, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

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

MCCOWN, J.

The defendant was charged on one count of feloniously entering a building and one count of stealing an automobile. He was found guilty by a jury on count I, and found guilty of the lesser-included offense of taking an automobile for wrongful use under count II. He was sentenced to 5 years in the penal complex on count I, and 6 months in the county jail for the offense of wrongful use of an automobile, the sentences to run concurrently, with credit given for time already served in jail.

Sometime before 5 a.m., December 7, 1978, the defendant entered the Merchen Chevrolet garage building in Gordon, Nebraska, through a window. The defendant testified that he had been drinking prior to his entry into the building and his memory was not good. He spent some time in the building and then took an automobile and drove it out of the garage. At approximately 5 a.m., on December 7, 1978, the automobile was found stuck in a ditch on a country road some 8 miles east of Gordon, Nebraska. The defendant was in the automobile when it was first observed by a witness, who reported to the police. Police officers responding to the report found the defendant walking along the road a short distance from the automobile. Inside the automobile was a 5-gallon gas can approximately half full, and

some of the automobile owner's clothing which had been left in the car. The defendant was wearing some pieces of the clothing when he was found. Testimony established that the gas can came from the Merchen Chevrolet garage and that the can was not in the automobile when the building was closed the evening before.

The defendant contends that the jury verdict is legally inconsistent. His position is that because the jury did not find him guilty of stealing the automobile on count II, they could not have found that he attempted or intended to steal something of value within the building, which is an essential element of the offense charged in count I of feloniously entering a building. Defendant's argument rests on the assumption that the automobile is the only property which could establish an attempt to steal under count I, and that, in essence, the two counts are all a part of one transaction, and consequently the verdict is inconsistent. Essentially, the defendant asserts that because the jury did not find him guilty of stealing an automobile, then he cannot be found guilty of feloniously entering a building. We disagree.

The general rule which is followed by this court is that where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count. State v. French, 195 Neb. 88, 236 N. W. 2d 832.

The charge in count I of feloniously entering a building and attempting to steal and the charge in count II of stealing an automobile were separate and distinct charges. The evidence was sufficient for the jury to find that the offenses occurred at different times and involved different property. The evidence was sufficient for the jury to find that the de-

fendant, at the time he entered the building, intended and later attempted to steal property of value, other than the automobile, while he was in the building. The gas can, gasoline, and articles of clothing were all property of value. The evidence was also legally sufficient for the jury to have found the defendant guilty of stealing the automobile, but the fact that he was found guilty of only the lesser-included offense of wrongful use of the automobile on count II does not make the guilty verdict on count I inconsistent or invalid.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations or weigh the evidence. Such matters are for the jury, and the verdict must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Tiff, 199 Neb. 519, 260 N. W. 2d 296.

The jury verdict in the present case is not inconsistent, and the evidence is sufficient to sustain the verdict on each count. The judgment of the District Court was correct and the conviction and sentence on each count is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT N. LONG, APPELLANT.
286 N. W. 2d 772

Filed January 3, 1980. No. 42735.

1. **Criminal Law: Convictions: Appeal and Error.** A finding of guilty is a conviction, but it is not a judgment or final order from which an appeal may be taken.
2. **Criminal Law: Judgments: Sentences.** The judgment in a criminal case is the sentence.
3. **Criminal Law: Appeal and Error.** An appeal in a criminal case before a sentence has been imposed is premature.

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

Johnson & Skorupa and Frank J. Skorupa, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellee.

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

BOSLAUGH, J.

The defendant was convicted in the county court of driving while under the influence of alcoholic liquor and refusal to submit to a breath test. Upon appeal to the District Court the conviction on the first count was reversed, the conviction on the second count was affirmed, and the cause was remanded to the county court for sentencing. The defendant then appealed to this court.

The State has moved to dismiss the appeal for lack of jurisdiction.

The record shows that after the defendant was found guilty in the county court, he filed a notice of appeal to the District Court even though no sentence had been imposed on either count by the county court. It is elementary that there can be no appeal except from a judgment or final order and that the judgment in a criminal case is the sentence. § 25-1912, R. R. S. 1943; State v. Shaw, 202 Neb. 766, 277 N. W. 2d 106. A finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed.

The appeal to the District Court was premature because there was no judgment from which an appeal could be taken. Since the District Court acquired no jurisdiction, its proceedings were void. This court has acquired no jurisdiction and the appeal must be dismissed.

APPEAL DISMISSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1980

RENNE EDMUNDS, GUARDIAN OF THE ESTATE OF HAROLD EDWARDS, INCOMPETENT, APPELLANT, V. INEZ EDWARDS, APPELLEE.

287 N. W. 2d 420

Filed January 8, 1980. No. 42535.

1. **Marriage: Statutes.** Although by statute marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential, it is not a contract resembling in any but the slightest degree any other contract with which the courts have to deal, except as to the element of consent. What persons establish by entering into matrimony is not only a contractual relation, but also a social status. The interest of the state must always be taken into account.
2. **Marriage: Mental Health.** Marriages are void when either party, at the time of the marriage, is insane or mentally incompetent to enter into the marriage relation.
3. _____: _____. A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto.
4. _____: _____. Mere weakness of mind is not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his free, intelligent consent to it.
5. _____: _____. Absolute inability to contract, insanity, or idiocy will void a marriage, but mere weakness of mind will not unless it produces a derangement sufficient to void all contracts by destroying the power to consent.
6. _____: _____. A marriage is valid if a party has sufficient capac-

ity to understand the nature of the contract and the obligations and responsibilities it creates.

7. **Marriage: Proof.** A marriage is presumed valid, and the burden of proof is upon the party seeking annulment.
8. **Marriage: Evidence.** It is the general rule that the existence of a valid marriage is a question of fact.
9. **Marriage: Divorce: Evidence: Appeal and Error.** The rule is well established that where evidence on material questions of fact is in irreconcilable conflict, the Supreme Court, in determining the weight of the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying, and therefore must have accepted one version of the facts rather than the opposite. This rule has been applied both in annulment actions and in divorce actions.

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

Renne Edmunds of Knowles & Edmunds, for appellant.

Vard R. Johnson and William L. Monahan, for appellee.

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

BRODKEY, J.

This case involves an action brought in the District Court for Douglas County on May 23, 1977, by Renne Edmunds, guardian of the estate of Harold Edwards (hereinafter referred to as Harold), against Inez Edwards (nee Ryan, hereinafter referred to as Inez), to annul the marriage of his ward Harold to Inez, which occurred on May 10, 1975. In his petition, the guardian alleged that the marriage was void for the reason that Harold did not have the mental capacity to enter into a marriage contract on that date, which allegation was specifically denied by Inez. In its order entered on November 27, 1978, following trial of the matter, the District Court found that Harold was mentally retarded, as that phrase is commonly used in medical science, but not to a degree which, under the law of the State of

Nebraska, is of such a nature as to render him mentally incompetent to enter into the marriage relation, and that at the time of the marriage between Harold and Inez, Harold had sufficient capacity to understand the nature of the marriage contract and the duties and responsibilities incident to it, so as to be able to enter into a valid and binding marriage contract. The court therefore found that the marriage of Harold and Inez, which occurred on May 10, 1975, was, in fact and in law, a valid marriage and continues to exist as a valid marriage under the laws of the State of Nebraska, and is in full force and effect. The guardian has appealed to this court from that order. We affirm.

Harold was born on August 7, 1918, and was institutionalized at the Beatrice State Home as mentally retarded on September 25, 1939. He was a resident at the Beatrice State Home for a period of approximately 30 years. It was during this period that he first met Inez, who was also a patient of the home, and Bill Lancaster, who lived with Harold in Omaha after their release from the Beatrice State Home, and who has continued to reside with Harold and Inez since their marriage. Harold was placed in Omaha on November 14, 1969, and started a new life under the auspices of the Eastern Nebraska Community Office of Retardation (ENCOR), which was established in 1968 to provide alternatives for institutionalization of retarded persons at the Beatrice State Home and to assist in the normalization of the retarded in local communities. After coming to Omaha, Harold obtained employment as a food service worker in the Douglas County Hospital on February 16, 1970, and lived in a staffed ENCOR apartment from that time until shortly before his marriage in 1975. As will later be made apparent, he has functioned satisfactorily in that employment, and has received promotions and salary increases since commencing on that job. While under the

auspices of ENCOR, Harold and Inez developed a romantic interest in each other and eventually decided to get married. The date of the marriage was postponed in order to afford the couple the opportunity to have premarital sex counseling and marriage counseling from the pastor of their church in Omaha. They were married by Reverend Verle Holsteen, pastor of the First Baptist Church in Omaha, Nebraska, and their friends, staff members of ENCOR, and out-of-state relatives attended the wedding in that church. The guardian did not bring this action to annul the marriage for a period of approximately 2 years after the date of the marriage ceremony.

Before discussing the nature of the marriage contract in Nebraska, and the legal aspects of annuling marriages on the ground of lack of mental capacity, it will be helpful to first review some of the pertinent testimony presented by the witnesses who testified at the trial. There is no question but that Harold was mentally retarded at the date of his marriage. The question in this case is the degree of his mental retardation, and whether it was such as to prevent him from entering into a valid marriage contract.

According to testimony in the record, mental retardation refers basically to delayed intellectual function and developmental delays usually associated from the time early in life and persisting throughout life. There are various degrees of mental retardation according to the official diagnostic system or nomenclature of the American Medical Association. Those degrees are mild, moderate, severe, and profound. Formerly, there was older nomenclature that defined the degrees of mental retardation as idiot, imbecile, and moron. The older classification of idiot is now encompassed under the two new groupings of "profound" and "severe;" the older classification of "imbecile" is now encompassed within the range of moderate mental retardation; and the older term "moron" is today classified as

mild mental retardation. The expert medical witnesses for both parties agree that Harold falls within the classification of mild mental retardation.

The guardian first called his medical expert, Dr. Robert Mitchell, a psychologist connected with Creighton University in Omaha. Dr. Mitchell expressed the opinion that he did not believe Harold was competent to enter into a valid marriage, but admitted on cross-examination that being mildly mentally retarded did not automatically preclude a person from marriage. He also testified that he had asked Harold during his examinations and consultations what marriage meant, to which Harold responded "For life," and also "You stay married forever." Harold told Dr. Mitchell during the interview that he wanted to get married. Dr. Mitchell also stated: "[I] found no evidence from him or the way he behaved in my interview that he was attempting to get out of the marriage, he seemed very happy with the marriage * * *." Dr. Mitchell also testified: "It is much better, I think, to refer to Mr. Edwards as a person who is fifty-nine years of age who is not as bright as most people. But he has had fifty-nine years of experience, and he is an adult, and physiologically he is matured, as well."

The medical expert witness called by the defendant was Dr. Frank J. Menolascino, a psychiatrist specializing in the field of mental retardation, and author of numerous books and articles upon the subject. He was well acquainted with Harold, having first met him in 1959 when he was doing work at the Beatrice State Home, and had seen Harold many times since that time. He had examined Harold in December 1977, and again in July 1978, during the week Dr. Menolascino testified. He testified that Harold was not functioning below the mildly retarded range and that the tests reflected that a great deal of Harold's difficulty appeared to be primarily a lack of training. Harold told him he was marrying

a lady he had known at the Beatrice State Home and that he had had premarital counseling from the minister of his church and also sexual counseling. Dr. Menolascino also testified that he had asked Harold why he wanted to get married, and Harold replied, "I don't want to be lonely." Harold had been married approximately 2½ years before Dr. Menolascino saw him in December of 1977, and his mental status was "remarkably similar to the one I had seen in the past in the '60s." Dr. Menolascino was asked: "Doctor, do you believe that you have an opinion as to whether Mr. Edwards was capable of understanding the nature of a marriage within the paradigm you have discussed in May of 1975?" and he answered: "Yes, he was able to." He further testified that in his examination of Harold in December 1977, he questioned whether Harold was even mildly retarded, but at the subsequent examination, he concluded that Harold was mildly retarded, upper level. On cross-examination Dr. Menolascino was asked: "In your opinion, do you think that Harold Edwards understands the fact that he is liable for Mrs. Edwards' bills if she goes to a store and runs up some bills?" to which he replied: "Yes." He was then asked: "Do you think he understands the fact that if he gets a divorce he might have to pay alimony?" His reply to that question was: "I am not sure. I am not sure. * * *."

In addition to the medical witnesses who testified, there was also evidence adduced from various lay witnesses. Renne Edmunds, the guardian, testified that he first met Harold about April 8, 1975, although the date of the inception of the guardianship was October 18, 1972. At that time Harold was already under the care and guidance of ENCOR. Edmunds testified: "It was my conclusion that he [Harold] could not only manage a fund of thirty thousand, he couldn't manage the small purchases, as well." He testified that he refused to pay certain expenses

of the wedding because they were not compensable from guardianship funds. He admits that he was told about the marriage taking place, and that he had filed no action to prevent the marriage, which took place May 10, 1975. His annulment action was filed approximately 2 years later. Harry John Naasz, an adviser for ENCOR, who was Harold's supervisor, testified that he had assisted Harold in making preparations for the marriage including obtaining of blood tests and the marriage certificate. He had discussed the forthcoming wedding with Harold: "Can you tell us what you discussed concerning the marriage? A. We discussed what it would mean, what it would mean living together, sharing their lives. Q. And what did Harold express to you? A. He wanted to get married. Q. What did he say that led you to believe that he might understand marriage? A. He mentioned to me that he understood, too that it was a commitment to each other, that Inez would be living there." Mr. Naasz did admit in his testimony that at the beginning he did have some question in his mind about whether Harold understood marriage. He later referred the couple for marriage counseling.

David Bones, an employee of planned parenthood in Omaha and Council Bluffs, and also an ordained minister in the United Methodist Church, testified with reference to premarital sex counseling he had given to Harold and Inez on April 16, 1975. He testified: "As I recall, we talked some about the responsibility of economics, we talked about what kind of things they liked to do together, which is the common things we talked to most folks about. Q. Was there a response from Harold as to what kind of things they liked to do together? A. Well, the thing that I recall — and I cannot swear that it is a specific — specifically a statement made — that, you know, Harold and Inez together talked about their enjoying just being together and being together in

the sense of arms around each other, holding each other, holding hands, kidding one another, those things were a nice part of their experience as they were, and it appeared to us —." Bones testified that he basically completed his premarital sex course with Harold and Inez and that Harold appeared to understand it and nodded his head.

Reverend Verle Holsteen, who was the pastor of the First Baptist Church on Park Avenue in Omaha, and who was the officiating officer at the marriage between Harold and Inez, testified that he had known Inez since 1971 and Harold since 1974, and they attended his church regularly. He gave them premarital counseling and recalls having had three sessions with them. He asked Harold if he understood what they were talking about and Harold said yes. Reverend Holsteen performed the wedding ceremony and attended the reception which was held at the First Baptist Church parlor. He recalls church members being present, as well as friends of Harold and Inez from ENCOR and relatives from California. He stated: "My perception of their relationship to each other is that they get along well, that they enjoy being together. I have never had either one of them come to me and say, you know, I have a problem with the other. Q. Do you have an opinion on whether or not Harold understood the nature of marriage at the time you counseled him? * * * A. My feeling at the moment was that Harold understood as best he could, as anyone does." Reverend Holsteen testified on cross-examination: "I felt that Harold understood that if things followed through that he would be married to Inez." He was asked whether he had some doubt in his mind as to whether Harold understood what a marriage contract was all about and he replied: "By observing him I would say that he would not understand as much as other people what a marriage contract would be about. But I recognized, and I stand by

this, that they would get along well together." On redirect-examination he was asked: "Reverend, your testimony is, you did have some concern initially about his capacity? A. Yes, I did. Q. And is it also, then, your testimony that after talking to Harold and Inez your reservations were resolved? * * * A. I would say yes, they were resolved."

Also testifying at the trial was Elizabeth Cartwright, an employee of ENCOR, who monitors Harold and Inez' finances. She testified that when Harold gets paid at the Douglas County Hospital he signs his check, takes it to the bank, deposits all the money except $40, and gives Inez $20 and he keeps $20. She does not have to go to the bank with him. Elizabeth Cartwright also testified that Inez is quite a bit sharper than Harold and she helps him around. She also testified about an incident involving the loss of Harold's wedding ring. She stated: "Just recently Harold lost his wedding band and he called me up at work and was very much upset and stated that he lost his wedding band, and he said to me that it was exchanged to him on his wedding day, Inez gave it to him, he wanted another wedding band. So in talking with Inez and Harold they came to the conclusion that they would purchase another one at Crossroads, and they withdrew money from their savings account for the first time and purchased a wedding band. Harold selected it." She also testified, however, that Harold cannot figure his finances and needs assistance.

The final witness offering testimony at the trial was John Taylor, personnel director for the Civil Service Commission for Douglas County. He testified that Harold was first employed by the Douglas County Hospital on February 16, 1970, in the food service department, and that Harold has been promoted since and has received pay increases since February 1970, reflecting good job performance. Neither party to the marriage testified at the trial.

We now examine some established rules of law which we believe are applicable to this case. We first consider the nature of the marriage contract. Section 42-101, R. R. S. 1943, provides: "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." Although by statute, marriage is referred to as a "civil contract," we have held: "That it is not a contract resembling in any but the slightest degree, except as to the element of consent, any other contract with which the courts have to deal, is apparent upon a moment's reflection. * * * What persons establish by entering into matrimony, is not a contractual relation, but a social *status*; and the only essential features of the transaction are that the participants are of legal capacity to assume that *status*, and freely consent so to do." University of Michigan v. McGuckin, 64 Neb. 300, 89 N. W. 778 (1902). Also, in Willits v. Willits, 76 Neb. 228, 107 N. W. 379 (1906), we stated that while our law defines marriage as a civil contract, it differs from all other contracts in its consequences to the body politic, and for that reason in dealing with it or with the status resulting therefrom the state never stands indifferent, but is always a party whose interest must be taken into account. See, also, Collins v. Hoag & Rollins, 122 Neb. 805, 241 N. W. 766 (1932).

Another statutory provision of which we must take cognizance in this appeal is section 42-103, R. R. S. 1943, which provides: "Marriages are void * * * (2) when either party, at the time of marriage, is insane or mentally incompetent to enter into the marriage relation; * * *." This statute was reiterated, and other applicable rules with reference to competency to enter into a marriage relationship were reviewed in Homan v. Homan, 181 Neb. 259, 147 N. W. 2d 630 (1967), wherein we stated: "The petition alleged that the ward was mentally incompetent at the time of marriage. By statute a marriage is void 'when

either party is insane or an idiot at the time of marriage, and the term idiot shall include all persons who from whatever cause are mentally incompetent to enter into the marriage relation.' § 42-103, R. S. Supp., 1965.

"A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto. Fischer v. Adams, 151 Neb. 512, 38 N. W. 2d 337. Mere weakness or imbecility of mind is not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his fee [sic] and intelligent consent to it.

"Absolute inability to contract, insanity, or idiocy will void a marriage, but mere weakness of mind will not unless it produces a derangement sufficient to avoid all contracts by destroying the power to consent. Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445; Adams v. Scott, 93 Neb. 537, 141 N. W. 148. A marriage is valid if the party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates. Fischer v. Adams, *supra*; Kutch v. Kutch, 88 Neb. 114, 129 N. W. 169.

* * *

"A marriage is presumed valid, and the burden of proof is upon the party seeking annulment. Adams v. Scott, *supra*." See, also, Annotation, Mental capacity to marry, 82 A. L. R. 2d 1040; 4 Am. Jur. 2d, Annulment of Marriage, § 28, p. 460.

It is the general rule that the existence of a valid marriage is a question of fact. 52 Am. Jur. 2d, Marriage, § 166, p. 1011; 4 Am. Jur. 2d, Annulment of Marriage, § 87, p. 502; 55 C. J. S., Marriage, § 46, p. 919. In this case the trier of fact was the court and the court had all the foregoing evidence, summarized above, before it. Concededly, much of the evidence

with reference to the capacity of Harold to enter into the marriage contract was conflicting and disputed. An action to annul a marriage, being an action in equity, is governed by the provisions of section 25-1925, R. R. S. 1943, which provides: "In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." However, it is also the well-established rule that where the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and therefore must have accepted one version of the facts rather than the opposite. This rule has been applied both in annulment actions and in divorce actions. Fischer v. Adams, 151 Neb. 512, 38 N. W. 2d 337 (1949); Seybold v. Seybold, 191 Neb. 480, 216 N. W. 2d 179 (1974); Patton v. Patton, 203 Neb. 638, 279 N. W. 2d 627 (1979).

Applying this rule to the present case, we conclude, therefore, that the trial court was correct in dismissing the guardian's petition to annul the marriage of his ward, and that its action in this regard should be and hereby is affirmed.

AFFIRMED.

BOSLAUGH, CLINTON, and HASTINGS, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. CHARLES A. ABY, APPELLANT.

287 N. W. 2d 68

Filed January 8, 1980. No. 42651.

1. **Criminal Law: Witnesses: Evidence: Sexual Assault.** The testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault.
2. **Criminal Law: Evidence: Sexual Assault.** Corroboration as to material facts and circumstances is sufficient and evidence that a complaint was made after the offense is admissible.
3. **Criminal Law: Lesser-Included Offenses: Words and Phrases.** A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.
4. **Criminal Law: Lesser-Included Offenses: Informations and Indictments.** A crime and a lesser-included offense may be charged in separate counts of the same information.
5. **Criminal Law: Lesser-Included Offenses: Convictions.** A defendant cannot be convicted of two degrees of the same offense or a crime and a lesser-included offense based upon the same act or transaction. A conviction or acquittal of the principal offense bars any prosecution or punishment for a lesser-included offense.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Judgment on count I affirmed. Judgment on count II reversed and dismissed.

George E. Brugh, 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.

BOSLAUGH, J.

After trial to the court the defendant was convicted of first degree sexual assault and felony debauching of a minor. He was sentenced to 15 years imprisonment on the first count and 2 years imprisonment on the second count, the sentences to run concurrently. He has appealed and contends the evidence is insufficient to support the conviction; the State should have been required to elect between

the counts because count II was a lesser-included offense of the crime charged in count I; and the sentences are excessive.

The record shows that the defendant is 33 years of age. On October 22, 1976, he married Peggy Gibbs who had two children by a previous marriage, a son and a daughter. Mrs. Gibbs was employed by the Farmers Co-Op in York, Nebraska. On August 16, 1977, Mrs. Gibbs attended a seminar in Hutchinson, Kansas, as a part of the duties of her employment. While she was away from York, Nebraska, she left the children at home in the care of the defendant.

On the night of August 17, 1977, while Mrs. Gibbs was away, the defendant entered the bedroom of Mrs. Gibbs' daughter, who was then 10 years of age, and committed the offenses charged in the information. It is unnecessary to recite the details of the offenses here which were testified to in detail by the victim.

Mrs. Gibbs and the defendant separated on October 8, 1977 several weeks before she petitioned for the dissolution of their marriage.

During the last week in November 1977, Mrs. Gibbs received a telephone call from a friend. She immediately questioned her daughter, who related what the defendant had done to her.

On December 3, 1977, Mrs. Gibbs contacted the sheriff's office. The complaint was then investigated by a state patrolman and the victim was interviewed by a clinical psychologist. As a result of the investigation a complaint against the defendant was filed on December 14, 1977.

The defendant had left York, Nebraska, on or about November 30, 1977, shortly after he learned that charges would be filed against him. He went to California and used an assumed name. He was apprehended and returned to Nebraska in May 1978.

The defendant's principal contention is that there was insufficient corroboration for the testimony of

the victim. The rule is that the testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. State v. Fisher, 190 Neb. 742, 212 N. W. 2d 568. Corroboration as to material facts and circumstances is sufficient and evidence that a complaint was made after the offense is admissible. Texter v. State, 170 Neb. 426, 102 N. W. 2d 655.

The evidence shows that the victim did not immediately complain to her mother when Mrs. Gibbs returned from Kansas because she was afraid and ashamed of what had happened to her. However, when she was asked about the incident she told her mother what had happened. During subsequent interviews with the state patrolman and the psychologist she related the details of the incident. The testimony of the psychologist tends to corroborate her testimony. We think the record as a whole shows there was sufficient corroboration and the evidence of the State was sufficient, if believed, to support a finding of guilt beyond a reasonable doubt.

First degree sexual assault in this case consisted of sexual penetration of a person less than 16 years of age by a person more than 18 years of age. § 28-408.03 (1) (c), R. R. S. 1943. Felony debauching of a minor as charged in count II consisted of fondling or massaging in an indecent manner the sexual organs of a person under 16 years of age. § 28-929 (2), R. R. S. 1943.

A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Comer, 199 Neb. 762, 261 N. W. 2d 374. The evidence of the State which proved the first degree sexual assault in this case also proved felony debauching of a minor although the element of penetration was not an element of the debauching offense. Thus, under the evidence in this case, debauching of a minor was a lesser-included offense of

the sexual assault charge.

The State was not required to elect between the counts because a crime and a lesser-included offense may be charged in separate counts of the same information. See, Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907; Longsine v. State, 105 Neb. 428, 181 N. W. 175.

However, a defendant cannot be convicted of two degrees of the same offense or a crime and a lesser-included offense based upon the same act or transaction. In re Resler, 115 Neb. 335, 212 N. W. 765. A conviction or acquittal of the principal offense bars any prosecution or punishment for a lesser-included offense.

For that reason the judgment on count II must be reversed and that count dismissed.

Prior to sentencing the trial court determined that the defendant was not a sexual sociopath.

At the sentencing hearing the trial court found there was a substantial risk the defendant would engage in additional criminal conduct if placed on probation, that probation would depreciate the seriousness of the offense and promote disrespect for the law, the defendant was in need of correctional treatment, and a sentence of imprisonment was necessary for the protection of the public. The record supports these findings.

Although the presentence report shows the defendant has a prior record of only minor offenses, the incident which was the basis for the prosecution in this case was not an isolated incident. There is evidence that the defendant committed the same offense with the victim over a period of several years and had molested a 4-year-old girl on a number of occasions. There is further evidence that the defendant was able to conceal these crimes by threatening to hurt the children if they told anyone.

Under the circumstances of this case the sentence imposed was not excessive. The judgment of the

District Court on count I is affirmed; the judgment on Count II is reversed and dismissed.

JUDGMENT ON COUNT I AFFIRMED.
JUDGMENT ON COUNT II REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. WESLEY H. PEERY, APPELLANT.
287 N. W. 2d 71

Filed January 8, 1980. No. 42659.

1. **Criminal Law: Evidence: Reports.** All evidence that is not turned over to the defendant does not constitute suppressed evidence. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigating work on a case.
2. **Trial: Evidence.** Newly discovered evidence must be of such a nature that if offered and admitted at a former trial, it probably would have produced a substantial difference in result.

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

Stanley D. Cohen, for appellant.

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

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

WHITE, J.

After a verdict of guilty on two counts, murder in the first degree and robbery, the defendant, Wesley H. Peery, was sentenced to death for count I and to a term of not less than 16 nor more than 50 years on count II. On appeal, we affirmed in State v. Peery, 199 Neb. 656, 261 N. W. 2d 95 (1977). Peery filed a motion for new trial, supported by an affidavit, pursuant to section 29-2102, R. R. S. 1943, which motion

was overruled by the District Court for Lancaster County. Subsequently, defendant filed a motion for rehearing on the motion for new trial based on newly discovered evidence. The court overruled this motion. Defendant appealed to this court alleging certain evidence had been suppressed by the prosecution and that the trial court erred in failing to grant a motion for new trial on the basis of newly discovered evidence. We affirm.

In support of his motions, Peery submitted an affidavit of one Jacky Dean Howard. In this affidavit, made in August 1978, Howard stated that he observed an individual departing from the coin shop at approximately 10:30 a.m., on the morning of the murder.

Two police officers had interviewed Howard on June 6 and another officer on June 7, 1975. Howard reported seeing a motorcyclist attempting to start a motorcycle at a curbside location near the shop, but did not report seeing the individual leave the rare coin shop. After interviewing Howard concerning his observations, the officers discontinued that line of investigation.

The thrust of appellant's argument rests on two grounds: That by failing to disclose the existence of the evidence concerning the motorcyclist, the prosecution suppressed exculpatory evidence, and that Howard's July 1978 statement constitutes newly discovered evidence which warrants the granting of a new trial. We treat each contention separately.

Appellant argues that the police officers' report of the interview with Howard taken prior to trial was exculpatory evidence; consequently, the defendant was denied a fair and impartial trial because the evidence was suppressed by the prosecution. If appellant chooses to couch his argument in the context of "suppressed evidence," the evidence must meet the criteria set out by the United States Supreme Court. These criteria are set forth in United States

v. Agurs, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), as well as by this court in State v. Atkinson, 191 Neb. 9, 213 N. W. 2d 351 (1973). At the heart of both of these holdings is the requirement that the evidence must be favorable to the accused and is material either to guilt or punishment. The evidence must qualify as "exculpatory evidence" or something the prosecutor was required to produce in order to assure the defendant a fair trial.

In denying Peery's motion for new trial, the court stated: "* * * the Court found nothing in any of the police reports * * * which was of an exculpatory nature as far as the defendant is concerned or which would mitigate the degree of the offense or severity of punishment * * *." The order further stated: "* * * there is nothing in the police reports that were reviewed by the Court that indicated that the motorcyclist who was attempting to start his motorcycle in the street near the Rare Coin Shop had any connection with the robbery and murder of Marianne Mitzner." After reviewing the police report, we do not ascertain even the most tenuous connection between the motorcyclist and the robbery and murder of Marianne Mitzner.

Clearly, all evidence that is not turned over to the defendant does not constitute "suppressed evidence." In Moore v. Illinois, 408 U. S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972), the court said: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." The argument that the prosecution suppressed evidence is totally without merit.

We next consider the police report as well as Howard's statement given in July 1978, under the standards applicable to newly discovered evidence. "The rule is well established that newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it *probably* would

have produced a substantial difference in result. Such evidence must be relevant and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial." State v. Munson, 204 Neb. 814, 285 N. W. 2d 703 (1979); State v. French, 200 Neb. 137, 262 N. W. 2d 711 (1978). Howard's testimony, if accepted, at most would only tend to discredit or impeach the testimony of people who had been or were in the coin shop during the period prior to 10:30 a.m., on June 6, 1975.

In denying the motion for new trial, the court concluded that the purported newly discovered evidence supplied by Howard would not have affected the outcome of the trial, and that the evidence does not support the contention that defendant was denied due process. A motion for new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Munson, *supra*.

We affirm the order of the trial court denying defendant's motion for new trial.

AFFIRMED.

KRIVOSHA, C. J., concurring in part, and in part dissenting.

I recognize that we have previously set down rules concerning the finality of a judgment in a criminal case which, when applied in this case, precludes further consideration concerning the imposition of the death penalty in this case. I would, however, hold that L.B. 711, Laws 1978, applies in all cases in which the sentence has not been executed and, because of my views as expressed in State v. Williams, *ante* p. 56, 287 N. W. 2d 18, would sentence this defendant to life imprisonment for the balance of his natural life rather than to be executed. In all other respects I concur with the majority.

STATE OF NEBRASKA, APPELLANT, V. ROSS J. DIMAURO, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V. THOMAS D. KESSLER, APPELLEE.

287 N. W. 2d 74

Filed January 8, 1980. Nos. 42745, 42747.

1. **Criminal Law: Wiretaps: Statutes.** Title 18 U.S.C.A., section 2518, and section 86-705, R. R. S. 1943, are, in all substantive ways and in wording, virtually identical. They describe the information the application must contain, what the judge entering the order must be able to find, and what the order must contain, as well as certain other matters.
2. **Criminal Law: Wiretaps.** The language of Title 18 U.S.C.A., sections 2518(1) (c) and 2518 (3) (c), is designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.
3. **Criminal Law: Wiretaps: Words and Phrases.** In enacting Title III, Congress did not require the exhaustion of "specific" or "all possible" investigative techniques before wiretap orders could issue.
4. **Criminal Law: Wiretaps.** There is no requirement that every investigative methodology be exhausted prior to application for a section 2518 authorization under Title 18 U.S.C.A. Investigators are not obliged to try all theoretically possible approaches. It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion.
5. **Criminal Law: Wiretaps: Statutes.** The history of both the federal act and the state statute concerning wiretapping makes clear that the statute must be used with great caution and may not be indiscriminately used by authorities.
6. _____: _____: _____. Statutory authority for wiretapping is to be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures are not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.
7. **Criminal Law: Wiretaps.** Neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued nor is the government required to use a wiretap only as a last resort.

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

Herbert M. Fitle, City Attorney, Gary P. Bucchino and Richard M. Jones, for appellant.

John J. Higgins of Eisenstatt, Higgins, Kinnamon & Okun, P.C., for appellees.

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

KRIVOSHA, C. J.

The two separate cases involved in this appeal were filed with this court in a single brief and consolidated for argument and will, therefore, be considered by us as one. The State in each case appeals from the action of the District Court for Douglas County, Nebraska, sustaining motions filed in each of the cases to suppress evidence obtained by reason of wiretaps which the defendants maintained were illegally obtained. The District Court for Douglas County, Nebraska, found that the wiretap in each case was in fact, illegally obtained and suppressed the evidence gathered from the use of the wiretaps. We have reviewed the record and find that the action of the trial court is sustained by the record. We therefore affirm.

On October 10, 1978, the Omaha police department made an application to the District Court for Douglas County, Nebraska, for an electronic surveillance order allowing them to intercept the telephone communications of one Rose Trader on telephone number 391-5191, located at 7712½ Blondo Drive in Omaha, Nebraska. On the same day the order was granted.

Pursuant to the order of October 10, 1978, the Omaha police division monitored telephone conversations between Rose Trader and one Joseph J. Digilio. During the course of the electronic surveillance, the police intercepted a telephone conversa-

tion between Digilio and the defendant DiMauro. On November 4, 1978, Officer Richard Griffith personally viewed the residence of Ross J. DiMauro located at 9806 Charles Street. Officer Griffith found that the residence was located in a very quiet residential area, with very little vehicle or foot traffic, and that few, if any, vehicles were parked in the street. Officer Griffith therefore concluded from this and other factors that surveillance techniques would not be feasible. Based upon an affidavit of November 7, 1978, supporting the application for the wiretap, the District Court for Douglas County, Nebraska, issued a wiretap order authorizing the interception of telephone communications of the defendant, Ross J. DiMauro, on four different telephone numbers. During the course of this interception, a telephone conversation of DiMauro with the defendant Kessler was intercepted.

The affidavit filed by the State in this case upon which the DiMauro wiretap was authorized recited in part that "while normal police investigative procedures might provide enough evidence to arrest Ross J. Diamauro [sic] for illegal gambling, normal investigative procedures have been attempted in the past by members of the Omaha Nebraska Police Division Vice-Narcotics Unit, to obtain enough evidence to apprehand [sic] or at least identify the other parties involved in this illegal gambling operation being conducted by Ross J. DiMauro, and these methods have failed and are most likely to fail in the future." Likewise, at the hearing on the motion to suppress, the State's witness conceded that no other investigative procedure was attempted and all the police sought to do was obtain the wiretap. The witness, Richard T. Griffith, testified as follows: "Q Well, just tell me specifically in DiMauro's case what you did besides get a wiretap? A That's all. Q That's all? A That's all. Q And attempts at other investigation were disregarded in favor of the wiretap, is

what it amounts to? * * * A That's correct. Q All right, and that wiretap led you to Mr. Kessler . . . is that correct? A That's correct."

The wiretap in this case was issued pursuant to the provisions of section 86-701 et seq., R. R. S. 1943. In the case of State v. Kolosseus, 198 Neb. 404, 253 N. W. 2d 157, we traced the history of the state wiretap statute and its relationship with the federal act found at Title 18 U.S.C.A., section 2516. In that decision we said: "Title 18 U.S.C.A., section 2518, and section 86-705, R. R. S. 1943, are, in all substantive ways and in wording, virtually identical. They describe the information the application must contain, what the judge entering the order must be able to find, and what the order must contain, as well as certain other matters. The particular subsections of the statutes at issue here are (1) (c) and (3) (c). These subsections read as follows: 'A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . . . normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . . .' "

The scope of the foregoing sections has been set forth by the Eighth Circuit many times. In United States v. Jackson, 549 F. 2d 517 (8th Cir., 1977), it was stated: "The Supreme Court has stated that the language of sections 2518 (1) (c) and 2518 (3) (c) 'is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.' United States v. Kahn, 415 U. S. 143, 153 n. 12, 94 S. Ct. 977, 983, 39 L. Ed. 2d 225 (1974). In enacting Title III, Congress did not require the exhaustion of 'specific' or 'all possible' investigative techniques before wiretap orders could issue. United States v. Smith, 519 F. 2d 516, 518 (9th Cir. 1975). Congress prohib-

ited wiretapping only when normal investigative techniques were likely to succeed and not too dangerous, United States v. Daly, 535 F. 2d 434, 438 (8th Cir. 1976), and '[m]erely because a normal investigative technique is theoretically possible, it does not follow that it is likely.' S. Rep. No. 90-1097, 90th Cong., 2d Sess., reprinted in [1968] U. S. Code Cong. and Admin. News, p. 2190. Thus sections 2518 (1) (c) and 2518 (3)(c) have been deemed to be designed only to ensure that wiretapping is not 'routinely employed as the initial step in criminal investigation.' United States v. Giordano, 416 U. S. 505, 515, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974)." See, also, United States v. Losing, 560 F. 2d 906 (8th Cir., 1977), cert. den., 434 U. S. 969, 98 S. Ct. 516, 54 L. Ed. 2d 457 (1977); United States v. Abramson, 553 F. 2d 1164 (8th Cir., 1977), cert. den., 433 U. S. 911, 97 S. Ct. 2979, 53 L. Ed. 2d 1095 (1977); United States v. Matya, 541 F. 2d 741 (8th Cir., 1976), cert. den., 429 U. S. 1091, 97 S. Ct. 1101, 51 L. Ed. 2d 536 (1977); United States v. Kirk, 534 F. 2d 1262 (8th Cir., 1976), cert. den., 433 U. S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

We likewise expressed concern over such problems in State v. Kolosseus, *supra*, wherein the court stated: "It is to be noted that the language of subsection (1) (c) does not require the exhaustion of all other possible or reasonable avenues of investigation. It does not, in fact, require that other methods even be tried if the application demonstrates other procedures are unlikely to succeed or are too dangerous. The requirements are alternative, that is, other methods must have been tried and failed 'or' the second alternative must be demonstrated. In United States v. Smith, *supra*, the court said: 'Congress, in its wisdom, did not attempt to require "specific" or "all possible" investigative techniques before orders for wiretaps could be issued. As United States v. Giordano, 416 U. S. 505, 515, 94 S. Ct.

1820, 1827, 40 L. Ed. 2d 341 (1974), states — wiretap "procedures were not to be routinely employed as the initial step in criminal investigation," but it is equally true "that the statute does not require the government to use a wiretap only as a last resort." United States v. Kerrigan, 514 F. 2d 35 (9th Cir. 1975); United States v. Staino, 358 F. Supp. 852, 856-7 (E. D. Pa. 1973).' United States v. Vento, *supra,* makes exactly the same point. In that case the court said: 'In United States v. Armocida, this Court, in accord with the legislative history, adopted a "pragmatic" approach to subsection (c). We held that the government's showing is to be "tested in a practical and commonsense fashion." There is no requirement that every investigative methodology be exhausted prior to application for a section 2518 authorization. Investigators are not obliged to try all theoretically possible approaches. It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion.' United States v. Pacheco, *supra*, also points out that all possible, imaginable methods need not be tried. We conclude that what is required under the first alternative is that the application make a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a tap is authorized."

The history of both the federal act and our own statute makes clear that the wiretapping statute must be used with great caution and may not be indiscriminately used by authorities. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C., section 2510 et seq., severely prohibits the use of electronic surveillance except under the most carefully defined circumstances and then only

after securing appropriate judicial authorization. See United States v. Kalustian, 529 F. 2d 585 (9th Cir., 1975).

The United States Supreme Court in the case of United States v. Giordano, 416 U. S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341, said: "The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. §§ 2518 (1) (c) and (3) (c). The Act plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop."

It is clear that the use of a wiretap, if not scrupulously regulated, could indeed be an intrusion on our constitutional rights. The federal courts have acknowledged that the constitutionality of the surveillance act itself exists only because of the strict restrictions imposed upon its use. In United States v. Kalustian, *supra*, the court noted, "Within our prescribed limits, * * * the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been declared constitutional only because of its precise requirements

and its provisions for close judicial scrutiny. United States v. Bobo, 477 F. 2d 974 (4th Cir. 1973); United States v. Cox, 449 F. 2d 679 (10th Cir. 1971), cert. denied, 406 U. S. 934, 92 S. Ct. 1783, 32 L. Ed. 2d 136 (1972); United States v. Cox, 462 F. 2d 1293 (8th Cir. 1972)."

While we have clearly stated in State v. Kolosseus, 198 Neb. 404, 253 N. W. 2d 157, that neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued nor is the government required to use a wiretap only as a last resort; nevertheless, the wiretap procedures cannot be routinely employed as an initial step in criminal investigation. The record in this case discloses, without question, that the wiretap was indeed the initial step in the investigation. The District Court was therefore correct in sustaining the motion to suppress the wiretap evidence. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROSE M. TRADER, APPELLEE.

287 N. W. 2d 78

Filed January 8, 1980. No. 42746.

Criminal Law: Wiretaps. It is not necessary for the State to use all other investigative techniques before making application for the use of a wiretap. The State must, however, show that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried.

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

Herbert M. Fitle, City Attorney, and Gary P. Buchino and Richard M. Jones, for appellant.

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

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

KRIVOSHA, C. J.

This appeal is a companion case to the cases of State v. DiMauro and State v. Kessler, *ante* p. 275, 287 N. W. 2d 74. For reasons described herein, we reach a contrary conclusion in connection with this matter.

As in the DiMauro and Kessler cases, the State herein appeals from the order of the District Court for Douglas County, Nebraska, sustaining the defendant Rose Trader's motion to suppress wiretap evidence obtained by the State. Unlike the evidence in the DiMauro and Kessler cases, however, we believe the State had properly conducted an initial investigation and that the issuance of the wiretap in this case was appropriate. For that reason we reverse the action of the trial court and remand the case back to the District Court for further proceedings.

It appears from the record that the Omaha police began an investigation of one Rose Trader with reference to reports the police received which indicated that she was conducting a bookmaking operation in violation of Omaha city ordinance 25.77. This investigation resulted from information given to police by three unidentified sources. The first source, whose reliability had not been proven, informed an Omaha police officer on May 10, 1978, that a party named "Rose" was a bookie; that "Rose" had been arrested approximately 1 year prior to May 10, 1978; and that a different party laid off bets to "Rose." This information was partially substantiated by a second source in the latter part of July 1978. The second source, who had proven his reliability to the police, indicated that Rose Trader was then conduct-

ing a bookmaking operation. A third source, whose reliability had not been proven, informed police on August 17, 1978, that a third party had been laying off bets with "Rose." This third party was the same person named by the first source as laying off bets with a party named "Rose."

On September 15, 1978, a police officer drove by the residence of Rose Trader (hereinafter referred to as Trader) to check the activities occurring there. The officer observed a vehicle, which was subsequently determined to be registered to Trader, in the driveway. Two days later, this same officer observed two vehicles, subsequently determined to be registered to Trader, parked at the residence. The next day, September 18, 1978, the police determined, from inspection of prior police records, that Trader had, in October of 1977, engaged in illegal gambling with a third party whose first name corresponded to that given by the three sources. They further determined that the telephone company's records contained a subscription for service to a dwelling located at an address directly behind Trader's residence. However, no such dwelling existed in fact. Further surveillance of Trader was undertaken but proved unsuccessful as no other parties with whom she might be engaged in bookmaking could be identified. Thus, in an attempt to "apprehend or at least identify the other parties" to the gambling operation, the Douglas County Attorney, on October 5, 1978, applied for a court-ordered wiretap pursuant to sections 86-701 to 86-707, R. R. S. 1943.

The application was granted that same day and presented to the telephone company the following day. At that time, the police were advised that Trader had changed her telephone number to a nonpublished listing. This number was determined on October 10, 1978, and an amended court order was entered on that same date authorizing the wiretap of this new listing.

The affidavit recited in detail the facts upon which the State sought the order. The affidavit indicates that before seeking the wiretap, the police conducted an investigation which disclosed characteristics common to and familiar with bookmaking operations.

Moreover, the affidavit recited that because of the location of the home in question, the nature of the operation, and the need to apprehend or identify the other parties to the illegal operation, normal police investigative methods had failed in the past and were most likely to fail in the future.

Unlike the activity in the DiMauro and Kessler cases, the affidavit in this case discloses that the police department did indeed attempt other investigative procedures before seeking the authorization for the wiretap.

The defendant argues that the evidence fails to disclose that the State has used all other means at its disposal and lists for us a number of other techniques which might have been employed. While it may be true that there may be other techniques which could have been employed, we have heretofore held that it is not necessary for the State to use all other investigative techniques before making application for a wiretap. In State v. Kolosseus, 198 Neb. 404, 253 N. W. 2d 157, we said, "The statutory language does not require that every conceivable kind of investigation must first be tried. Neither does it require that all methods be either tried, or shown to be unlikely to succeed or to be too dangerous. * * * As we have previously noted, the cited cases confirm the statute makes no such requirement." See, also, United States v. Jackson, 549 F. 2d 517 (8th Cir., 1977); United States v. Abramson, 553 F. 2d 1164 (8th Cir., 1977), cert. den., 433 U. S. 911, 97 S. Ct. 2979, 53 L. Ed. 2d 1095 (1977); United States v. Losing, 560 F. 2d 906 (8th Cir., 1977), cert. den., 434 U. S. 969, 98 S. Ct. 516, 54 L. Ed. 2d 457

(1977). Our examination of the affidavit and evidence in this case satisfies us that the necessary prerequisite investigation was conducted and that normal police investigative methods had either failed or were most likely to fail in the future. The State was therefore entitled to the issuance of the wiretap in this case. The order of the District Court sustaining the motion to suppress was in error and is therefore reversed and the cause remanded with directions in conformance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RAYMOND M. CRAIG, JR., APPELLANT, V. AMERICAN COMMUNITY STORES CORPORATION, DOING BUSINESS AS HINKY DINKY, APPELLEE.

287 N. W. 2d 426

Filed January 15, 1980. No. 42308.

1. **Workmen's Compensation: Statutes: Words and Phrases.** Disability under section 48-121, R. R. S. 1943, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function.
2. **Workmen's Compensation: Words and Phrases.** In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.
3. _____: _____. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work or work of a similar nature that he is trained for, accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
4. _____: _____. A workman who, solely because of his injury, is unable to perform substantial amounts of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.
5. **Workmen's Compensation: Labor and Labor Relations.** An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect re-

mains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Cline, Williams, Wright, Johnson & Oldfather, for appellant.

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

Heard before BOSLAUGH, CLINTON, and MCCOWN, JJ., and BURKE and WHITEHEAD, District Judges.

WHITEHEAD, District Judge.

This is a claim for compensation instituted in the Nebraska Workmen's Compensation Court. The plaintiff, Raymond M. Craig, Jr., was a journeyman meatcutter employed by the defendant, Hinky Dinky, at the time of the accident on February 21, 1975. On that day the plaintiff was on a ladder, a rung broke loose, plaintiff fell backwards, hit some boxes, fell on his back onto a steel cart, and then flipped over off of the cart and struck both knees on the concrete floor, suffering injuries to his knees and back as a result of the fall. The injuries resulted in several surgical procedures and the eventual removal of the right kneecap.

The plaintiff was unable to return to work as a meatcutter and underwent retraining as a small engine repairman in 1977. He worked as a small engine repairman from April 10, 1977, until August of 1977, during which time his leg swelled and his leg and back hurt so badly that he was unable to work many days. He quit working in August and was terminated. The plaintiff then worked as a truck-driver-deliveryman part time, but lost his job when a new owner took over. Since that time the plaintiff

has supervised work on his garage and has done some small engine work in his home. Dr. James Styner treated the plaintiff for the injuries suffered in the accident as of the date of trial before a one-judge court. As of May 1, 1978, Dr. Styner felt Mr. Craig had a 50 percent permanent disability of his right leg, 10 percent permanent disability of his left leg, and a 5 percent permanent disability rating of his body as a whole. Dr. Harold Horn was called to testify by the defendant and he evaluated the injuries to the plaintiff as of May 8, 1978, as a 35 percent permanent disability of the right leg, a 5 percent permanent disability of the left leg, and no disability anywhere else.

In a trial before the one-judge compensation court, the court found that the plaintiff can recover the sum of $89 a week for 133-1/7 weeks, and in addition a sum of $89 per week as long as the plaintiff remained temporarily totally disabled; that when the plaintiff's total disability ceased, for another hearing to be had; and that the plaintiff was entitled to rehabilitation services.

Both the plaintiff and defendant appealed from the decision of the one-judge compensation court. On rehearing, two members of the three-judge panel agreed that the plaintiff had sustained 50 percent permanent disability to his right leg, 10 percent permanent disability to his left leg, and 5 percent permanent disability to the body as a whole, representing injury to the back. Judge Novicoff dissented as to that portion finding that the plaintiff sustained a 5 percent permanent disability of the body as a whole. Judges Buchholz and Novicoff agreed that the plaintiff's total disability ended on April 10, 1977, while Judge Monen found the plaintiff to be totally disabled within the meaning of the workmen's compensation statutes. The findings and award were concurred in by at least two judges of the court, although not the same judges in every instance, and

consequently the award constituted a judgment of the court, although signed by only one judge. The plaintiff has appealed.

The question before the court is how disability is determined under section 48-121, R. R. S. 1943, when an employee injures two members as defined under section 48-121 (3), and also suffers an injury falling under section 48-121 (1) and (2). In Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275, this court held, " 'Disability under section 48-121, R. S. Supp., 1953, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function. * * * In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.' Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700."

The Nordahl case is very similar to this one in that in both cases the plaintiffs fell from ladders, the plaintiffs were limited by their doctors to lifting only light objects, both had back difficulties, and the symptoms in both cases are subjective. In the Nordahl case, the defendants contended that the plaintiff was employed as a farmer, and in this case there is evidence that Mr. Craig worked, when able, for Mohawk Rents as a small engine repairman, but the plaintiff testified he was unable to continue the work. Since that time the plaintiff has been able to hold only one job as a truckdriver-deliveryman part time, from which job he was terminated when a close friend of his, the owner of the business, sold the business. The plaintiff has been unable to find work since that time. He has a tenth grade education and is qualified to perform only manual labor, except for his training as a meatcutter or small engine repairman, both of which occupations he is physically incapable of performing.

This court has previously said, "For workmen's

compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Elliott v. Gooch Feed Mill Company, 147 Neb. 309, 23 N. W. 2d 262. Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275. And, " 'A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.' " Elliott v. Gooch Feed Mill Company, *supra*. See, also, Camp v. Blount Bros. Corp., 195 Neb. 459, 238 N. W. 2d 634.

The compensation court found the plaintiff's total disability ceased on April 10, 1977, which is the day before the plaintiff started working for Mohawk Rents as a small engine repairman. He left this employment on or about August 13, 1977, because of persistent swelling and numbness of his right knee, pain in the back, and numbness of his left leg. Plaintiff previously had undergone occupational rehabilitation and received training in the field of small engine repair work. During the period of time the plaintiff worked for Mohawk Rents he missed many days because of his injury, and finally left and was terminated because of his inability to perform the work. The compensation court held that the plaintiff is entitled to further occupational rehabilitation. It appears to this court that implicit in that holding is the fact that plaintiff was unable to return to work as a small engine repairman.

The plaintiff, since the time he has left the employ of Mohawk Rents, has worked for Cornhusker Wholesale Meat on a part-time basis as a truckdriver-

deliveryman, and eventually was terminated at Cornhusker Meat when new owners took over, who were not close personal friends of the plaintiff. Since that time the plaintiff has been unable to find permanent work, his only work being occasional as small engine repair in his garage and supervising the building of his garage and work on his car. This court has stated on numerous occasions in the past that " '[A]n employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.' " Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805. See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561; Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152; Nordahl v. Erickson, *supra*.

In the Crable and Nordahl cases the claimants also were able to work at various jobs for a period of time but were found to be totally disabled. If this court applied the rule as set out by the compensation court in this case, it would prove to be counterproductive, for any person who was disabled dare not attempt employment for fear if he found he was physically incapable of performing the duties of the employment, he would find that he had lost all benefits under the Workmen's Compensation Law. We therefore hold that the plaintiff is permanently and totally disabled. The judgment of the Workmen's Compensation Court is reversed as to that portion of the award, affirmed in all other respects, and the cause remanded with directions to amend its judgment in accord with this opinion.

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

CLINTON, J., concurs in result.

BURKE, District Judge, not participating in decision.

ROBERT MOON, APPELLANT, V. WINGER BOSS COMPANY, INC., AND IOWA BEEF PROCESSORS, INC., APPELLEES.
287 N. W. 2d 430

Filed January 15, 1980. No. 42408.

1. **Strict Liability: Negligence: Torts.** A manufacturer is not liable for injuries to a user of a product which it has manufactured in accordance with plans and specifications of one other than the manufacturer, except when the plans are so obviously, patently, or glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them.
2. **Evidence: Judgments: Appeal and Error.** An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside.

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

Yaneff & Cosgrove, O'Brien & Galvin, and Mohummed Sadden, for appellant.

William Kunze and Maurice Redmond, for appellees.

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

HASTINGS, J.

Plaintiff, an employee of defendant, Iowa Beef Processors, Inc. (IBP), filed this action against defendant, Winger Boss Company, Inc. (WB), for injuries sustained when he fell during the course of his employment and became entangled in certain machinery manufactured for IBP by WB. The case was submitted to a jury on issues of strict liability in tort and negligence, and resulted in a verdict in

favor of WB. Plaintiff has appealed, assigning as errors certain of the trial court's instructions defining a manufacturer's duties, the plaintiff's duties, including contributory negligence and assumption of risk, and issue preclusion. We affirm.

On July 12, 1974, plaintiff was working on a clean-up crew in IBP's meatpacking plant, using a high-pressure hot water hose. While descending a stile over a conveyor he tripped and fell and somehow his arm became entangled in the sprocket, chain, and framework located at the takeup end of a moving conveyor-type breaking table.

The production line of IBP consisted of a series of conveyors and conveyor-type tables called breaking tables. It was the latter type of table into which plaintiff fell. The particular table, BT-9, was approximately 70 feet long and 36 inches high. It consisted of supporting framework and a work surface composed of a series of metal slats attached to a pair of endless chains. At the power end, the chains were propelled by a sprocket wheel and chain attached to an electric motor. The takeup end consisted of a pair of large sprocket wheels slightly less than 36 inches in diameter around which the entire slatted table surface revolved. The appearance was not unlike that of the end portion of the drive tread of a huge crawler-type tractor. There was no safety shield or guard protecting the "pinch points" made by the chain moving onto the sprocket wheel, and it was possible for someone to stick an arm or leg into this area. Screen guards were placed here after the accident.

John Travlos, an engineer for WB, was called as a witness by plaintiff. He explained how his company was involved in the design and manufacture of packinghouse equipment. According to him, his company had manufactured and installed similar conveyor tables for other meatpackers before 1969. He readily conceded that the end of a breaker table,

where the conveyor chain meshes with the takeup sprocket, is a danger point where a piece of clothing or an arm or a hand could become caught. He also agreed that WB did not provide or recommend any shield guard at the takeup end of any of the tables. IBP had specified all the components to be used in the manufacture of the breaking tables, and, as a matter of fact, the takeup sprocket wheels in use at the time of the accident were different from those furnished by WB.

Further amplifying his testimony when called as a witness for the defendant, Mr. Travlos related how his company was invited to bid on the manufacture of the component parts for the various breaking tables, based upon a set of specifications furnished by IBP. After the bid was made, and during a conference in January of 1969 with IBP officials, the specifications were changed at the latter's request. Basically, the original specifications called for a Sandvick belt type of operation which is a continuous stainless steel belt riding on a vulcanized belt. The belt is moved along by a sprocket wheel which, instead of having teeth on its outer perimeter, has a groove in which the belt rides. The change to the metal slats attached to a chain, existing at the time of the accident, was requested by IBP. The contract was awarded to WB and the parts manufactured accordingly. WB was not requested to assist IBP in the design of any of the equipment. It manufactured the steel frame for the conveyor, the adjustable shoes for the conveyor, the chain and flights, the sprockets, shafts, cutting boards, motors, and reducers which were shipped loose to be assembled by IBP upon arrival in the plant. During the manufacturing process, WB had requested a detailed plant layout for the section of IBP's packing plant where the various breaking tables were to be assembled and installed, but this request was refused on the ground that the system that was being

employed was to be a very secretive way to process meat. WB was also denied entrance to the IBP plant. The specifications provided for chain guards for the power end, which were furnished. There is no evidence that the specifications required Winger Boss to furnish chain guards on the conveyor takeups.

Ray Durflinger testified that he was the design engineer hired by IBP to design and develop a material-handling system to automate the processing of boxed beef. He prepared the specifications upon which WB made its bid. The breaking tables, including BT-9, were component parts of that system. He stated that his design did not contemplate a chain guard at the takeup end of the conveyor because "it is not normally guarded there." He also said it is difficult to guard something when other equipment is placed next to it and that the takeup end is "normally guarded after the equipment is installed and related equipment installed then you guard where necessary." He said IBP had this responsibility.

Donald Wandling, a mechanical engineer, testified for the defendant. Generally, his testimony was to the effect that it would be impossible to satisfactorily guard equipment of the nature involved here until the complete system was installed. The reason for this opinion was that it would be necessary to know what other equipment would be placed in the immediate vicinity, where other conveyors are to pass by, where work spaces are to be located, and the presence of walkovers, pillars, walls, and auxiliary equipment. He also felt that no one could design a system of guarding unless he had a knowledge of the completed system.

Leo Peters, a professional mechanical engineer, testified on behalf of the plaintiff. He pointed out the reasons why moving chain drives, belts, conveyors, and cog wheels having "nip points" can be

dangerous. He also opined that it would not be practicable to isolate machinery used in a packing plant when it is designed so that people have to be working around or near it, and that the only feasible safety precaution is to employ shields or guards around the hazardous parts. Finally, he gave as his opinion that a takeup end as was involved in this case, in the absence of some kind of a guard, would be "unreasonably dangerous." He also felt that, in his opinion, reasonable engineering standards were not exercised in the production of a breaking table with an unguarded takeup end, nor was a reasonable degree of care, skill, and diligence exercised. He also called attention to the shield or guard over the takeup end of the table that was shown in a photograph taken in 1975. He said it would have been feasible to manufacture and install such shields in 1969 for about $100 per table end.

Plaintiff's claim both as to strict liability and negligence is founded on improper design. There is no evidence to support a finding of improper manufacture. A defect in the design of a product can form the basis of a claim in either strict liability or common law negligence. Hancock v. Paccar, Inc., 204 Neb. 468, 283 N. W. 2d 25 (1979). However, we have never before considered the situation in which a manufacturer follows completely the design of the employer without the opportunity for final inspection. Restatement, Torts 2d, § 404, p. 364, states: "One who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." However, reading on into Comment a. to that section, it states in part as follows: "Indeed, chattels are often made by independent contractors from materials furnished by their employers. In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided

by his employer. The contractor is not subject to liability if the specified design or material turns out to be insufficient to make the chattel safe for use, *unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe.*" (Emphasis supplied.)

Spangler v. Kranco, Inc., 481 F. 2d 373 (4th Cir., 1973), involved an injury to the plaintiff, an employee of a subcontractor of Reynolds Metals Company, occurring during construction of a plant for the latter. Plaintiff was struck by a pendant overhead crane being operated by an employee of Reynolds. The crane had been manufactured by defendant according to plans and specifications furnished by Reynolds. The crane was not equipped with any bells or warning devices nor did the specifications call for the same. In sustaining a judgment which had directed a verdict for the defendant, the court said: "We find additional support for the action of the district judge in the principle that the products liability rule holding a manufacturer liable does not apply where the product has been manufactured in accordance with the plans and specifications of the purchaser except when such plans are so obviously dangerous that they should not reasonably be followed. Littlehale v. E. I. du Pont, etc. & Co., 268 F. Supp. 791, 802 n. 16, (S.D.N.Y. 1966), aff'd 380 F. 2d 274 (2 Cir. 1967); Davis v. Henderlong Lumber Co., 221 F. Supp. 129 (N.D.Ind. 1963). Cf. Greater Richmond, etc., Inc. v. A. H. Ewings Sons, Inc., 200 Va. 593, 106 S. E. 2d 595."

In Littlehale v. E. I. du Pont de Nemours & Co., 268 F. Supp. 791 (1966), aff'd 380 F. 2d 274, the court awarded summary judgment in favor of the defendant manufacturer of blasting caps, suggesting by way of an extensive footnote that a manufacturing contractor complying with strict contract requirements and specifications is relieved of liability un-

less such plans are so glaringly or patently insufficient that an ordinary prudent manufacturer would not follow them.

In granting a summary judgment in favor of the defendant manufacturer, the court, in Davis v. Henderlong Lumber Company, 221 F. Supp. 129 (1963), stated in part: "Thus, it was stated in Russell v. Arthur Whitcomb, Inc., 100 N. H. 171, 121 A. 2d 781 (1956), that one important limitation on the rule placing building contractors on the same footing as sellers of goods, * * * is that *the contractor is not liable if he has merely carried out the plans, specifications, and directions given him, since in that case the responsibility is assumed by the employer, at least when the plans are not so obviously dangerous that no reasonable man would follow them.* (Emphasis supplied by court).

"Insofar as Travis v. Rochester Bridge, 188 Ind. 79, 122 N. E. 1 (1919), is consistent with this rule, it is the law of Indiana, and the generally-accepted rule in other jurisdictions governing that question in the instant case."

Although somewhat distinguishable on the facts, the language in Taylor v. Paul O. Abbe, Inc., 516 F. 2d 145 (3rd Cir., 1975), is helpful here: "Also, while we must accept the jury's conclusion, based on expert testimony, that the mill was unreasonably dangerous, we do not believe that the absence of a gear guard was such a hazard that it was a near certainty that the machine, if operated at all without the guard, would result in serious injury." The judgment of the trial court was reversed with instructions to grant judgment notwithstanding the verdict in favor of the defendant.

Union Supply Co. v. Pust, 196 Colo. 162, 583 P. 2d 276 (1978), at first blush would seem to be on all fours with the instant case, but reaching a result opposite to that which we announce today. However, it was decided on facts suggesting that the manufac-

turer was the designer. "Based on this evidence, a jury could find Union Supply to be a designer of the conveyor * * *. If Union Supply is found by the trier of fact to be a designer and if the other elements of a s. 402A design defect case are established, then Union Supply will be strictly liable for Pust's injuries." The Colorado court rejected the court of appeals' view that a nondesigner manufacturer may be held strictly liable if it is feasible for him to install safety devices, but decided to follow what it calls the majority view holding such manufacturer liable for the injuries to a consumer caused by design defects in the component parts when they are expected to and do reach the consumer without substantial change in condition. We reject that view as it may apply to the specific facts in this case.

Barnthouse v. California Steel Buildings Co., 215 Cal. App. 2d 72, 29 Cal. Rptr. 835 (1963), was a case involving injuries to a small child who fell through the opening between the seat board and backrest of a grandstand, built by defendant in accordance with plans and specifications of the county of Madera. A jury verdict in favor of the plaintiff was reversed. The court said: "When the work has been performed in accordance with plans and specifications furnished by the owner which the contractor is bound to follow and the completed work has been accepted by the owner, the contractor is not liable to a third person for injuries resulting from a structural defect." The concurring opinion merely suggested that an exception should arise "* * * if a contractor builds a structure that constitutes an obvious danger to life or limb, or constitutes a hidden peril * * *" or the " '* * * plans and specifications * * * are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.' "

The better rule, it seems to us, and the one we adopt, is that a manufacturer is not liable for in-

juries to a user of a product which it has manufactured in accordance with plans and specifications of one other than the manufacturer, except when the plans are so obviously, patently, or glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them. Here, WB manufactured every part in accordance with IBP's specifications. It furnished safety guards as prescribed. It was refused details of the proposed layout of the completed system. It was denied admittance to the IBP plant to observe the contemplated placement of the various component parts in relation to each other, personnel, or other structures. It was permitted no opportunity to inspect the assembled system once it was installed and made operational in order to determine the need for safety devices. As stated in Spangler v. Kranco, Inc., 481 F. 2d 373 (4th Cir., 1973): "There was no defect in the crane itself * * *. True, there was no bell or warning device but the reasonable need for such equipment depended upon the environment in which it was used by Reynolds * * *. Assuming that its use in the construction phase required a warning device, such a hazard was open and obvious to Reynolds and its personnel and the responsibility rested upon them not upon Kranco." There was no credible evidence supporting a finding that the plans as submitted were so obviously, patently, and glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them. To hold otherwise would be to engage in speculation and conjecture and to make the manufacturer an insurer as to everyone dealing with the machinery.

"An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside." Lincoln Fire Fighters Assn. v. City of Lincoln, 198 Neb. 174, 252 N. W. 2d 607 (1977). At the conclusion

of every jury case the court must decide, when properly raised, whether there is any evidence upon which a jury can properly proceed to find a verdict for the plaintiff. Empfield v. Ainsworth Irr. Dist., 204 Neb. 827, 286 N. W. 2d 94 (1979).

Winger Boss's motion for a directed verdict should have been sustained. While the trial court submitted the case to the jury, the verdict returned was for Winger Boss. As we determine on the record herein that the plaintiff did not carry his burden of proof, we would have been required to have set aside any other verdict than one for the defendant Winger Boss. In light of this conclusion, there is no need to discuss the errors assigned by the plaintiff. We therefore affirm the judgment for the defendant.

AFFIRMED.

KRIVOSHA, C. J., concurring.

I concur in the result reached by the court in this matter. Likewise, I concur in the rule announced by this court to the effect that a manufacturer is not liable for injuries to a user of a product which it has manufactured in accordance with plans and specifications of one other than the manufacturer, except when the plans are so obviously, patently, or glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them. I disagree, however, with the majority when it concludes that the trial court should have directed a verdict in this case. In my view, there was sufficient evidence introduced to create a question of fact as to whether or not the manufacturer should have recognized the danger. I would have decided the instant case on the basis that whether the plans were so obviously, patently, or glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them was a question of fact, and the jury having found in favor of the manufacturer and against the plaintiff, the judgment should be af-

firmed. See Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403.

PAUL STUTHMAN ET AL., APPELLANTS, V. HARVEY LIPPERT ET AL., APPELLEES.

287 N. W. 2d 80

Filed January 15, 1980. No. 42417.

1. **Injunction: Covenants.** Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants.
2. **Injunction.** An injunction will not issue against discontinued acts unless there are reasonable grounds to believe there will be a resumption of the violations or activities. The purpose of injunctive relief is preventive, protective, and prohibitory.
3. **Injunction: Appeal and Error.** An action for injunctive relief is an equitable action which is triable de novo in this court.
4. **Trial: Evidence: Equity.** In weighing the evidence in an equitable action, we take into consideration the fact that the trial court had the advantage of observing the witnesses and, where the evidence is conflicting, must have accepted the successful party's version of the facts.

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

Philip T. Morgan of Morgan & Morgan and Glenn A. Rodehorst, for appellants.

Raymond E. Baker of Baker, Tessendorf, Milbourn & Fehringer, P. C., for appellees.

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

CLINTON, J.

This action is for relief in the form of an injunction, restraining alleged violations of restrictive cov-

enants contained in a dedication plat of Flamme First Subdivision, Platte County, Nebraska. The plaintiffs are the owners of and reside upon one of the lots in the subdivision. The defendants are the owners of and reside upon another and nearby lot in the same subdivision. After trial, the court dismissed the petition of the plaintiffs. The plaintiffs have appealed and assign and argue the following alleged errors of the trial court: (1) The decision is contrary to law and the evidence. (2) The court did not properly interpret the restrictive covenants. We affirm.

In their petition, the plaintiffs allege two violations of the covenants, viz., the erection of a building thereon not permitted by the covenants and the carrying on of a construction trade upon the property. The two covenants pertinent to the present suit are the following: "1. All of the above lots shall be known and described as Residential Lots, and no structure shall be erected on any residential building plot other than one, two, three or four family dwelling not to exceed two stories in height, and one, two, or three car garage. . . . 4. No noxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood."

The defendants, in their answer, denied violation of the covenants and also pleaded an estoppel, to wit, the plaintiffs were guilty of similar violations of the restrictive covenants and, therefore, were not in the position to demand injunctive relief.

The evidence shows that upon the defendants' property is a one-family dwelling with an attached two-car garage and an "outbuilding" of the approximate dimensions of 28 feet by 50 feet. This latter building has a single garage door at one end. The evidence also shows that upon the plaintiffs' property was located a single family residence with an attached two-car garage, together with what would ap-

pear to be a detached two-car garage of the approximate dimensions of 22 feet by 24 feet. Evidence also shows that other residential properties in the subdivision have dwelling houses with garages, together with other detached outbuildings.

At the time of trial, the plaintiffs did not and in their brief to this court do not urge injunctive relief directing the removal of the 28 by 50 outbuilding; they ask only that the operation of the business thereon be enjoined.

The plaintiffs introduced evidence tending to show the defendants were operating a construction business from the outbuilding. The defendants introduced evidence tending to show that this was not true, that most of the activities to which the plaintiffs objected were those which took place during 1976 and 1977 when their residence was being constructed on the premises, and that these were not activities of Harvey Lippert in his business as a contractor. The defendants' evidence also tended to show that, even if the premises had been used for the construction business, the use had ceased by the time of trial. There was no evidence to indicate the likelihood of continued violations of the covenants in this respect.

The following principles are applicable: "Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants." Pool v. Denbeck, 196 Neb. 27, 241 N. W. 2d 503. However, an injunction will not issue against discontinued acts unless there are reasonable grounds to believe there will be a resumption of the violations or activities. The purpose of injunctive relief is preventive, protective, and prohibitory. Chizek v. City of Omaha, 126 Neb. 333, 253 N. W. 441; Conrad v. Kaup, 137 Neb. 900, 291 N. W. 687; 43 C. J. S., Injunctions, § 25, p. 810.

An action for injunctive relief is an equitable action which is triable de novo in this court. Pool v. Denbeck, *supra*. However, in weighing the evidence, we take into consideration the fact that the trial court had the advantage of observing the witnesses and, where the evidence is conflicting, must have accepted the successful party's version of the facts. Nickman v. Kirschner, 202 Neb. 78, 273 N. W. 2d 675.

In this case, the trial court did not make any specific findings. Thus, we do not know the exact basis of its decision.

In review de novo, however, we find that the alleged activities have ceased and are not likely to be resumed. Should future violations occur, equitable relief would still be available to the plaintiffs. Under these circumstances, it is not necessary that we make any determination as to precisely what the covenants mean and how the covenants would apply to the evidence in this case.

AFFIRMED.

KNOELL CONSTRUCTION COMPANY, INC., APPELLEE AND CROSS-APPELLANT, V. JAMES A. HANSON AND MARJORY HANSON, APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH LEO WOLFE ET AL., APPELLEES.

287 N. W. 2d 435

Filed January 15, 1980. No. 42483.

1. **Pleadings.** The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, but judicial admissions.
2. **Trial: Appeal and Error.** This court will dispose of an appeal on the theory on which it was presented to the trial court by the parties.

Appeal from the District Court of Valley County: JAMES R. KELLY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Carlos E. Schaper and John O. Sennett, for appellants.

Steven O. Stumpff and Stumpff & Washburn, for appellee Knoell.

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

KRIVOSHA, C. J.

This appeal once again proves the old adage that haste makes waste or at least provides fertile ground in which to raise disputes. This case is the first in what appears to be an ongoing series of disputes between appellants and appellee concerning the leveling of land owned by appellants. See Knoell Constr. Co., Inc. v. Hanson, *post* p. 311, 287 N. W. 2d 439.

The record reflects that some time early in October of 1976 Knoell Construction Company (Knoell) filed a petition in the District Court for Valley County, Nebraska, which in essence sought to foreclose an alleged mechanic's lien on property owned by James A. Hanson and Marjory Hanson (Hansons). The petition alleged in very general terms that on March 17, 1975, Hansons entered into an oral contract with Knoell for the leveling of land owned by Hansons. The petition further alleged that Hansons "* * * promised and agreed to pay to the Plaintiff for the labor so furnished by the Plaintiff, the sum of * * * $51,567.50 * * *." The petition alleged further that Hansons had paid to Knoell the sum of $28,000 and that there was still due and owing $23,567.50. The petition prayed for judgment against all the defendants for $23,567.50 and for a foreclosure of Knoell's mechanic's lien.

Thereafter, in January of 1977, Knoell filed an amended petition which set out in greater detail the alleged agreement, including the fact that Hansons first sought to employ Knoell to level 100 acres of

land owned by Hansons for the sum of $28,000 if Knoell did not run into mud in the low areas during the land leveling work. The petition further alleged that at a later time a new map was prepared covering approximately 170 acres and at that time Hansons agreed to pay Knoell $40,000 for the land leveling "if conditions were favorable." The petition does not make clear what conditions were to be considered "favorable." The petition then alleged that virtually all the work had been done, that Hansons had paid to Knoell only the sum of $28,000, and that there was due and owing $23,567.50 plus interest for which Knoell sought judgment and the foreclosure of the mechanic's lien.

Hansons thereafter filed an answer in which they generally denied the specific allegations of Knoell's amended petition but did admit that Knoell had agreed to level 200 acres of Hansons' land for which Hansons agreed to pay $40,000; that all the work had not been done and Knoell, therefore, had not substantially performed its contracts so as to be entitled to a foreclosure of its mechanic's lien. Hansons asked that the petition seeking foreclosure be dismissed.

On the morning of trial and just after opening statements had been made, Knoell's attorney orally moved the court for an order authorizing an amendment to the amended petition by striking the language which alleged the parties had a specific oral contract for the payment of $51,567.50, substituting therefor allegations which created an oral contract to perform labor for an unspecified hourly rate which Hansons agreed to pay to Knoell. Knoell further sought to amend the amended petition by additionally alleging that "Defendant James A. Hanson knew of the labor so furnished by the Plaintiff and agreed to being billed by the hour, which totals by the hour the sum of * * * $51,567.50 and paid to the Plaintiff the sum of * * * $28,000.00 leaving a balance

of * * * $23,567.50 which has not been paid." Over the objection of Hansons, the trial court permitted the amendment and trial then proceeded on the basis of an oral contract to perform labor at an unspecified hourly amount. Hansons did not seek a continuance and asked that their answer to the amended petition previously filed be considered as their answer to the amendments thereto as well. Knoell then proceeded to introduce evidence of the oral contract to perform the labor at an unspecified hourly rate. At the conclusion of Knoell's case, Hansons moved to dismiss on the sole ground that Knoell had failed to prove substantial performance. The motion was overruled, and Hansons without further objection proceeded to introduce their evidence.

At the conclusion of all the evidence neither party made any further motions and both parties rested. The trial court took the matter under advisement and thereafter entered a written judgment. The judgment specifically found, contrary to Knoell's amended petition and claim that there was an oral contract to pay Knoell on an unspecified hourly rate totaling $51,567.50, that in fact there was a specific contract for the payment of $40,000. The judgment does not indicate, however, whether the payment of the $40,000 was for 100 acres as first alleged, 170 acres as later alleged by Knoell, or 200 acres as alleged by Hansons. What is clear, however, is that Knoell did not prove either a specific contract for $51,567.50 or an oral contract on an hourly basis amounting to $51,567.50.

The trial court further concluded that Knoell, having failed to prove the material allegations of its amended petition, was not entitled to foreclose its mechanic's lien but was instead entitled to a judgment for money. The trial court further concluded that Knoell had not completed all the required work and that it would require an additional 1½ days of work in order to complete the land leveling. The

court found that the reasonable value of the work was in the amount of $2,109, that Hansons had paid Knoell $28,000, and therefore entered judgment for Knoell and against Hansons in the amount of $9,891. Neither the judgment nor the record makes it clear how the trial court arrived at its finding concerning either the 1½ days work or the amount of $2,109. The record is simply insufficient in that regard.

Hansons claim the trial court erred in granting judgment for Knoell based upon a specific contract for $40,000 when Knoell had pleaded an hourly contract totaling $51,567.50. In support of that position Hansons rely upon the rule of law that a party may not plead a cause of action on an express agreement and then, over objection, prove and recover on a cause of action founded on quantum meruit. See School Dist. No. 145 v. Robertson, 171 Neb. 176, 105 N. W. 2d 735. Hansons further argue that the rule of law is inflexible and that the allegations and the proof must agree. See, Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118; Foote v. Chittenden, 106 Neb. 704, 184 N. W. 167.

The record makes it clear that the parties tried the case on a single theory of a promise to pay some amount for leveling a certain number of acres. Each side disputed the amount of the contract and without objection offered evidence as to the amount. Likewise, the parties disputed the amount of land to be leveled and again without objection offered evidence to support their view. Both sides conceded that some work remained to be done and without objection offered evidence to support their position.

Hansons, in their answer, admitted a contract had been entered into by the parties. They claimed the contract was for leveling 200 acres at a price of $40,000. That answer limited the issues in the case. "The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, * * * but judicial admissions * * * i.e., they are not a

means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation on the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings." Cook v. Beermann, 201 Neb. 675, 271 N. W. 2d 459. The trial court adopted Hansons' theory as set out in their answer. We fail to see how Hansons can object. We have frequently said that this court will dispose of an appeal on the theory on which it was presented to the trial court by the parties. Reeves v. Associates Financial Services Co., Inc., 197 Neb. 107, 247 N. W. 2d 434; Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548; Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist., 179 Neb. 687, 140 N. W. 2d 10. That portion of the trial court's finding that there was an express contract between the parties for the amount of $40,000 is fully supported by the record and must be affirmed.

The parties further agree that some work was left to be done for which Hansons should receive credit. We are unable to determine from the record what the amount of work is or what the reasonable value of performing the work would be. To that extent the case must be remanded to the District Court for the limited purpose of taking evidence and determining how many acres were to be leveled, how many acres remained undone, and the reasonable value of the work to be done under the contract. Once that has been determined, a judgment for $40,000 less the amounts heretofore paid and credits due Hansons should be entered for the appropriate party.

Further, we are unable to determine why the trial court denied Knoell's prayer to foreclose its lien for

the amount found due. There was no finding made by the trial court of gross neglect or fraud on Knoell's part. We have frequently held in a mechanic's lien foreclosure that in the absence of a showing of carelessness or willfulness in making the claim, the recovery of a just debt will not be denied where nothing but fair dealing was intended. See, Central Construction Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817; Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699. While the record discloses a difference of opinion as to the contract, with the court accepting one version over the other, we find no evidence of gross carelessness or design necessary to defeat a mechanic's lien in its entirety.

Once the balance due and owing is determined and if it runs in favor of Knoell, a foreclosure of the lien in that amount should be ordered.

We have reviewed Knoell's cross-appeal and find the evidence insufficient to establish its claim for $51,567.50. The trial court was correct in its basic finding and the cross-appeal must be denied.

The judgment is therefore reversed and the cause remanded with directions for further proceedings in accordance with this opinion.

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

KNOELL CONSTRUCTION COMPANY, INC., APPELLEE, V. JAMES A. HANSON AND MARJORY HANSON, APPELLANTS.

287 N. W. 2d 439

Filed January 15, 1980. No. 42446.

1. **Pleadings: Proof.** A party cannot plead one cause of action and then introduce proof to establish another.
2. **Contracts: Proof.** A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Reversed and remanded for a new trial.

Carlos E. Schaper and John O. Sennett, for appellants.

Steven O. Stumpff of Stumpff & Washburn, for appellee.

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

BOSLAUGH, J.

This was an action to foreclose a mechanic's lien for land leveling performed on farmland owned by the defendants. The trial court found that there was $11,267.50 due the plaintiff from the defendants and granted foreclosure. The defendants have appealed.

The amended petition alleged an express oral contract between the plaintiff and the defendants in which the defendants promised to pay $34,267.50 to the plaintiff, of which $23,000 had been paid. The answer denied that the defendants had promised to pay the plaintiff $34,267.50 and alleged that the $23,000 paid to the plaintiff was in full payment of the amount due the plaintiff. The answer further alleged that the plaintiff had agreed to do the work for not more than $20,000, and that the extra $3,000 paid to the plaintiff was to settle the plaintiff's claim that the job required more work than the plaintiff had originally contemplated.

The evidence shows the defendants had purchased a half section of land and planned to install two pivot irrigation systems on the land. The land was rolling and some leveling was required in order for the pivot systems to operate properly. Mark Knoell, an officer of the plaintiff, looked at the property at the defendants' request and estimated the cost of performing the work. The evidence is in sharp conflict as to what the parties agreed to and what the work was to cost.

The plaintiff's evidence tended to show that on or about August 13, 1975, Mark Knoell looked at the land with James Hanson and estimated that the work would cost $20,000. The land was not staked at that time and Mark Knoell assumed that no leveling would be required in the hill area to the north and east of the pivot point on the west quarter. According to Mark Knoell, nothing was said about filling a lagoon on the defendants' property or stockpiling the topsoil for replacement after the leveling had been completed.

After Mark Knoell had looked at the land, James Hanson returned to the plaintiff's office in Broken Bow, Nebraska. Emilian Knoell, the father of Mark Knoell and the president of the plaintiff at that time, testified that he recommended to Hanson that the topsoil be stockpiled and replaced after the leveling had been completed. According to Emilian, he explained to Hanson that replacing the topsoil would cost more money and that Hanson said to go ahead and do it that way.

On cross-examination Mark Knoell admitted that James Hanson did not agree to pay $34,267.50 for the job as alleged by the plaintiff. There was no evidence of an express oral contract as the plaintiff had alleged.

After the plaintiff had rested the defendants moved to dismiss the petition because there was no evidence to sustain the plaintiff's allegation of an express contract. The plaintiff then requested leave to amend the petition to allege a cause of action in quantum meruit. Leave was granted, but the transcript filed in this court does not show how the petition was amended. Although the plaintiff was permitted to introduce evidence of the reasonable value of the work it had performed on the defendants' land, this evidence was received over the objection of the defendants.

It is fundamental that a party cannot plead one

cause of action and then introduce proof to establish another. A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit. Lincoln Service & Supply, Inc. v. Lorenzen, 171 Neb. 671, 107 N. W. 2d 333. See, also, Imhoff v. House, 36 Neb. 28, 53 N. W. 1032; United States Rubber Co. v. Grigsby, 113 Neb. 695, 204 N. W. 817.

The evidence of reasonable value offered by the plaintiff was not admissible under the pleadings. The defendants were entitled to try the case on the basis of the issues made by the pleadings, and the leave to amend the petition, granted after the plaintiff had rested, was erroneous and prejudicial.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. RICHARD D. HOLTAN, APPELLANT.

287 N. W. 2d 671

Filed January 15, 1980. No. 42452.

1. **Criminal Law: Death Penalty: Legislature: Time.** No capital case in which a final sentence was imposed prior to the effective date of L. B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act.
2. **Criminal Law: Post Conviction.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
3. **Criminal Law: Statutes: Aggravating and Mitigating Circumstances.** The trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating circumstance as set forth in section 29-2523.

4. **Criminal Law: Attorney and Client.** Where one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant.
5. ____: ____. The adequacy of counsel cannot be determined solely on the basis of the amount of time he spent interviewing his client.
6. **Criminal Law: Right to Counsel.** If competent counsel, after investigation, considers a point worthless, the fact that he is court appointed does not require him to pursue it. The right to counsel does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit.
7. **Criminal Law: Pleas: Hearings.** The mere fact that the defendant maintains he does not recall committing the crime but with full faculty enters a plea does not impose upon the trial court an obligation or duty to require a competency hearing.

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

J. William Gallup, for appellant.

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

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

PER CURIAM.

This is the second appearance of this case before this court. In the first case, State v. Holtan, 197 Neb. 544, 250 N. W. 2d 876, we affirmed the judgment of the District Court which found the defendant guilty of first degree murder in the perpetration of a robbery and with shooting with intent to kill, wound, or maim. The defendant had entered a plea of nolo contendere to both counts and was sentenced to death on the first count, and to serve 15 to 45 years on the second count. Defendant now appeals from a denial of a motion which sought post conviction relief under the provisions of the Post Conviction Act, section 29-3001 et seq., R. R. S. 1943.

By amended motion to vacate, the defendant maintains that his conviction was invalid for a num-

ber of reasons which are more particularly set out in the amended motion to vacate. They may, however, be grouped together and will be so discussed herein. They fall into the following general categories: (1) The inadequacy of trial counsel; (2) the failure of the trial court on its own motion to order a psychiatric examination of the defendant prior to accepting the plea to first degree murder; (3) the imposition of the death penalty violates the constitutional rights of the defendant as more particularly set out in various paragraphs of the motion to vacate; (4) Nebraska's death penalty statute is unconstitutional because it does not permit the trial court to consider all mitigating factors concerning the character of the defendant; and (5) the provisions of L.B. 711, Laws 1978, enacted after the imposition of sentence in this case, should be now applied, thereby entitling defendant to be sentenced to life imprisonment.

Taking defendant's claim concerning L.B. 711 first, we can dispose of that quickly. L.B. 711, Laws 1978, was not enacted until after the sentence in this case had been imposed and became final. Having become a final judgment prior to the effective date of L.B. 711, it is not affected by the adoption of L.B. 711. No capital case in which a final sentence was imposed prior to the effective date of L.B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act. Moreover, in State v. Holtan, *supra,* we specifically reviewed the aggravating and mitigating circumstances in the instant case and concluded that a careful review of the record revealed that the three-judge sentencing panel gave careful consideration to all aggravating and mitigating factors pertaining to the offense and correctly concluded that the aggravating factors considerably outweighed the mitigating factors. We determined that the sentence imposed could not be held to be improper or excessive under the law. We, therefore, reject defendant's contention that the

imposition of the death penalty in this case is either unjustified or improper.

With regard to the defendant's several claims concerning the constitutionality of the Nebraska death penalty, we note that the defendant, in his direct appeal to this court, challenged the constitutionality of Nebraska laws pertaining to the death penalty. As noted in the defendant's direct appeal, questions regarding constitutionality have been dealt with by this court in State v. Rust, 197 Neb. 528, 250 N. W. 2d 867, and again in State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849. Furthermore, we have frequently held that a motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Weiland, 190 Neb. 111, 206 N. W. 2d 336; State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110; State v. Weiland, 188 Neb. 626, 198 N. W. 2d 327. Defendant's contention in that regard is without merit.

Defendant further maintains that the trial court erred in not considering as a mitigating factor that the defendant had sought to save the life of an inmate while in jail. The record does not reflect the fact that the court did not consider that issue. The court did receive additional evidence consisting of an exhibit and testimony of a deputy sheriff concerning the incident. The court concluded that the fact was not a mitigating circumstance within the specific provisions of the statutes. With that conclusion we do not disagree. The defendant's argument concerning the statute, section 29-2523, R. R. S. 1943, however, is apparently based upon the decision of the United States Supreme Court in the cases of Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973, and Bell v. Ohio, 438 U. S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010. Defendant claims that section 29-2523 is in violation of the United States Constitution in that it does not permit the court to consider all

matters relevant to mitigation as required by both the Lockett and Bell decisions. In this respect, we believe the defendant reads the statute incorrectly. The statute, section 29-2523, sets out specific aggravating and mitigating circumstances. The trial court was correct in concluding that the matter concerning the aiding of the prisoner did not specifically fall within one of the mitigating circumstances. Nevertheless, section 29-2521, R. R. S. 1943, specifically provides that in the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence. The statute further provides, "Any such evidence which the court deems to have probative value may be received." All the sections must be read together. In this case the evidence sought to be introduced by the defendant was received. The court did consider the evidence even though it was not a mitigating circumstance within the meaning of the statute. It concluded that the offered fact was not of such weight as to cause the court to refrain from imposing the death sentence.

The United States Supreme Court in Lockett v. Ohio, *supra,* said: "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be *precluded* from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis supplied.) Nothing in our statute precludes the court from considering *all* aspects of the defendant's character. To the extent there may be any question we now hold that the trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to

have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating *circumstance* as set forth in section 29-2523. Our review of the record satisfies us that indeed the trial court did consider all the evidence, including the fact that the defendant had aided in saving the life of an inmate. Defendant's claim of error, as it pertains to the statute in question, is without merit.

Defendant further maintains that the conviction may not stand because of inadequacy of counsel. Defendant's counsel was appointed by the court and was a member of the Douglas County Public Defender's office. A reading of the record discloses that defendant's claim of inadequacy of counsel is totally without support. We have recently said with regard to determining adequacy of counsel: " 'Our present test would be that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.' " State v. Lang, 202 Neb. 9, 272 N. W. 2d 775. Likewise, we have said that where one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant. See State v. Lang, *supra.*

Defendant maintains that inadequacy of counsel is displayed in a series of ways, one of which was that counsel did not sufficiently consult with the defendant. The record in that regard is totally in conflict. The defendant maintains he saw counsel only five or six times. Counsel, on the other hand, maintains he saw the defendant at least once a week. In either event, defendant does not in any manner show us how, had counsel discussed the matter with defendant any more than he did, anything different would have occurred. The adequacy of counsel cannot be determined solely on the basis of the amount of time he spent interviewing his client. See Kress v. Unit-

ed States, 411 F. 2d 16 (8th Cir., 1969). There simply is no evidence to support that claim or to show how or in what manner defendant was prejudiced.

Defendant further maintains that counsel failed to adequately investigate his case and to advise defendant of the facts. It appears there was some evidence to indicate that one of the two surviving victims had difficulty in identifying the defendant. The record, however, conclusively establishes that the other surviving victim fully, accurately, and completely identified the defendant and could identify the defendant at time of trial without difficulty or hesitation. Defendant maintains that had he known there was a discrepancy between the parties as to his identification, he would not have entered a plea of no contest and would have hoped that the jury would have found him not guilty by reason of the conflict in identification. There is simply no basis to that claim.

The record discloses that court-appointed counsel was of the opinion that if the defendant went to trial and the two surviving victims were called to testify, notwithstanding any minor conflict in identification, the evidence of the nature of the crime would be so overwhelming that the imposition of the death penalty would be a certainty. Hindsight, of course, discloses that entering a plea of no contest did not save the defendant from the maximum penalty. Nevertheless, the record simply does not justify a claim that the defendant was not aware of sufficient facts upon which he could make an intelligent decision with regard to entering a plea. "[I]f competent counsel, after investigation, considers a point worthless, the fact that he is court-appointed does not require him to pursue it. * * * the right to counsel * * * does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit. One reason a defendant

is given a lawyer is because he is legally ignorant." White v. Hancock, 355 F. 2d 262, (1st Cir., 1966).

Defendant further maintains that counsel was inadequate in that he did not adequately pursue a defense of insanity. The record, however, discloses that counsel not only had the defendant examined by a prominent local psychiatrist but further consulted with psychiatrists in the state of Washington who were familiar with the defendant's condition. That investigation disclosed that while there was evidence of defendant's mental condition, it was not of the type to satisfy the M'Naghten rule followed in this jurisdiction. Even the testimony produced by defendant at the post conviction hearing did not establish grounds upon which the M'Naghten rule could be pursued as a defense. The failure of trial counsel to pursue that defense was not inadequate.

Finally, the defendant maintains that counsel was inadequate in that he did not subpoena witnesses from the state of Washington who would have testified as to his good character. The record, however, fails to disclose what, if anything, the witnesses would have testified to had they been called. What they might have testified to at best was the defendant's hope and wish. In the absence of evidence to disclose what the witnesses would have testified to, we are unable to establish any prejudice and therefore unable to establish any error.

A full reading of the record discloses that the defendant simply did not have much upon which to base his defense and his counsel, likewise, did not have much with which to work. The record further discloses that before the defendant was permitted to enter a plea, the trial court conducted a textbook-perfect interrogation of the defendant and likewise repeated that interrogation before imposing sentence. Had there been any significant error or inadequacy as suggested by the defendant, the trial court afforded the defendant every opportunity to

call that to its attention. The defendant chose not to do so. The defendant would seem to argue that having chosen a specific trial tactic and having failed with that tactic he was inadequately represented. It was a calculated decision which the defendant intelligently took. It simply did not work as he had hoped it would. That does not create inadequate counsel.

The final point raised by defendant is that he was denied due process because of the trial court's decision not to order a competency hearing on its own motion. While the record discloses that the defendant may very well be suffering from a form of amnesia brought about by his unconscious desire to block out the crime, there is no evidence in the record to suggest that at the time he entered a plea he was not competent and did not understand what was taking place or that he was in fact entering a plea. Having already disposed of the defense of insanity, the mere fact that the defendant maintains he does not recall committing the crime but with full faculty enters a plea does not impose upon the trial court an obligation or duty to require a competency hearing. The defendant has produced no evidence to disclose that at the time he entered his plea he was not competent to do so. The issue is not whether or not he remembers the commission of the crime, but rather whether he is competent to enter a plea. In that regard, the record clearly establishes that he was so competent. We find that this claim made by defendant is likewise without merit.

For all the reasons set out herein, we find that the defendant has failed to establish any basis for post conviction relief and affirm the judgment of the trial court which denied the defendant any such relief.

AFFIRMED.

KRIVOSHA, C. J., dissents.

CLINTON, J., concurs in result.

DEPARTMENT OF BANKING, STATE OF NEBRASKA, APPELLEE, V. ELM CREEK STATE BANK, ELM CREEK, NEBRASKA, APPELLEE, FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER AND LIQUIDATOR, APPELLEE, DARYL CALKINS, STOCKHOLDER-APPELLANT.

287 N. W. 2d 440

Filed January 15, 1980. No. 42567.

Banks and Banking: Interest. In bank insolvency proceedings an award of interest to creditors may be made out of surplus for the period during which the insolvent bank has been in the hands of the receiver.

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

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

Tye, Worlock, Tye & Taylor, for appellee FDIC.

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

WHITE, J.

Appellant, Daryl Calkins, a stockholder in the insolvent and dissolved Elm Creek State Bank (hereafter Bank), appeals from an order of the District Court for Buffalo County, Nebraska. We affirm the order of the trial court.

Some background is necessary. On May 8, 1973, the Department of Banking, State of Nebraska, filed a Declaration of Insolvency of the Bank. The Federal Deposit Insurance Corporation was appointed receiver.

In due course, on the 20th of June, 1974, the Federal Deposit Insurance Corporation filed an order on classification and priority of claims and allowed claims denominated as preferred and general. Paragraph II of the order provided in part: "That the following * * * general claims * * * are, allowed * * * to be paid when and after all prior claims in Para-

graph I hereinabove [preferred claims] have been paid in full *including interest at the legal rate.*" (Emphasis supplied.)

The District Court subsequently, on July 24, 1974, ordered a dividend of 55 percent of the preferred claims; on March 26, 1975, a further 30 percent; on July 13, 1976, 10 percent; on May 3, 1977, 5 percent; and on September 18, 1978, the court ordered the payment in full of all general creditors, and on November 13, 1978, ordered the payment of interest on preferred claims from May 5, 1973.

It is the appellant Calkins' contention that each of the orders of distribution prior to the order of September 18, 1978, were final orders. The orders made no reference to interest on preferred claims and were not appealed from. Therefore, the order of November 13, 1978, allowing interest on preferred claims was unlawful. We reject appellant's claim, and for the reasons set forth we affirm the order of the trial court.

Although we are somewhat troubled by the lack of any evidence or support in the record of the status of appellant as a stockholder who would be entitled to share in proceeds over and above claims of creditors (see The People v. Farmers State Bank, 371 Ill. 222, 20 N. E. 2d 502 (1938); 9 C. J. S., Banks and Banking, § 550, p. 1087), appellant was allowed to appear and file a resistance to the application without complaint to the trial court. We will not normally consider a matter not first called to the attention of the trial court. Harlan County v. Thompson, 125 Neb. 65, 248 N. W. 801 (1933); Underwriters Acceptance Corporation v. Dunkin, 152 Neb. 550, 41 N. W. 2d 855 (1950). Whether interest on preferred claims could have been paid prior to payment of general claims is not here argued or decided. The trial court, in its final order, directed the payment of all claims, preferred and general, before interest was allowed.

Counsel concedes that an award of interest to

creditors is not unlawful, although no specific statute is cited that authorizes such payment. However, in bank insolvency proceedings, it is clearly the majority rule that an award of interest may be made out of surplus for the period during which the insolvent bank has been in the hands of the receiver. See 10 Am. Jur. 2d, Banks, § 777, p. 743; 9 C. J. S., Banks and Banking, § 550, p. 1087; Fed. Dep. Ins. Corp. v. Farmers Bank of Newton, 238 Mo. App. 350, 180 S. W. 2d 532 (1944); Federal Deposit Insurance Company v. Leggett Bank Commissioner, 204 Ark. 780, 164 S. W. 2d 882 (1942).

It is clear, however, that no claim for interest could have arisen until there was a surplus above the total of the claims. This fact could only have been ascertained when the application for final payment was made to the trial court. Any application to the trial court for interest on a partial installment would properly be denied as premature; hence a failure to apply to the court to do something then outside of its power cannot be said to be either a consent to its denial, or res judicata to the entitlement to interest. For an excellent discussion of this point, see Fed. Dep. Ins. Corp. v. Farmers Bank of Newton, *supra*.

The order of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
FRANK ANTHONY LAMPONE, JR., APPELLANT.

287 N. W. 2d 442

Filed January 15, 1980. No. 42723.

1. **Criminal Law: Entrapment.** Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact

that an officer or agent provides a favorable opportunity for the violation does not constitute entrapment.

2. **Criminal Law: Entrapment: Instructions.** Ordinarily where the defense of entrapment is properly raised and an entrapment instruction is given by the trial court, the instruction should be in the form of NJI 14.34, although the names of law enforcement officers or agents may be added or other pertinent alterations made where appropriate.

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

S. J. Albracht of Lathrop Albracht & Swenson, 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.

MCCOWN, J.

Defendant was charged on two counts of delivery of a controlled substance. He was found guilty by a jury on both counts and sentenced to 2 years probation on each count, the sentences to run concurrently.

By stipulation the defendant admitted that he delivered the controlled substances involved in counts I and II at the times and places alleged, but denied the delivery was made knowingly and intentionally, and raised the defense of entrapment.

The evidence for the State established that on June 13, 1978, the defendant offered to sell pills to Richard Fay, gave him one pill to try, and told Fay that he would stop at Fay's house that evening. That evening the defendant came to Fay's house, brought several hundred pills with him, and asked Fay to try some. Defendant told Fay the prices for various pills, told him to see if anyone was interested in buying them, and left the pills with Fay.

The next day Fay returned the pills to defendant

and told him that Fay thought the pills had been stolen from a local drugstore. Defendant admitted they had been and took them back. Sometime later Officer Nichols of the Norfolk city police department, who was investigating a drugstore burglary, was advised by Fay that Fay believed the defendant had some of the stolen drugs that Officer Nichols was searching for.

On June 16, 1978, Officer Nichols asked Fay to make arrangements for an undercover agent to be introduced to the defendant to make a drug buy from him. Fay was to receive $100 if the defendant made a sale to the undercover agent.

On the evening of June 16, 1978, Fay went to defendant's house, told the defendant he had a friend who was interested in the pills, and told the defendant that it was safe. Officer Fosmer, an undercover agent of the Nebraska State Patrol, arrived at the defendant's house driving an unmarked car. Fay introduced the undercover agent to the defendant and the defendant suggested that they drive to a place out of town. The defendant and Fay drove in the defendant's van and the undercover agent followed in his car. They parked off a gravel road. The undercover agent got into the back of defendant's van with the defendant. Fay stayed in the front seat and took no part in the negotiations. The defendant showed Officer Fosmer pills, discussed prices, and sold him packets of capsules and tablets for $150. Fosmer gave defendant three $50 bills. Fosmer left and the defendant gave Fay $40. Later Fay received the $100 agreed upon from the officer.

The State's evidence as to the facts and circumstances surrounding the sale of drugs by the defendant on June 16, 1978, is uncontradicted. The defendant attacked the credibility of the State's witnesses on cross-examination, but the defendant did not testify.

The jury found the defendant guilty on both counts

and he was sentenced to 2 years probation.

Defendant complains that the District Court failed to give the standard jury instruction on entrapment, NJI 14.34, which refers to improper inducement by "a law enforcement officer (acting directly or through an agent)." Instead instruction No. 7 limited the individuals who might have induced the defendant to act to Officer James Fosmer and the state witness, Richard Fay. The contention is that it was improper to exclude Officer Nichols.

Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer or agent provides a favorable opportunity for the violation does not constitute entrapment. State v. Gurule, 194 Neb. 618, 234 N. W. 2d 603.

NJI 14.34 is phrased in terms of "improper" inducement. However, law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.

The instruction given, as well as NJI 14.34, placed the burden on the State to prove beyond a reasonable doubt that defendant was not improperly induced to commit any unlawful conduct. Under the tests previously approved by this court, the evidence established that defendant was not induced but was predisposed and ready to commit the acts charged, and was merely afforded an opportunity to do so. Under the "objective" test now adopted by some courts, the evidence also established that the conduct of Fay and the law enforcement officers in this case was not reprehensible as a matter of public

policy and would not have induced an ordinary law-abiding citizen to do what the defendant did. Under any accepted test, the evidence was insufficient to entitle the defendant to the defense of entrapment in this case.

Instruction No. 7 as given omitted portions of NJI 14.34, and altered other portions. The trial court refused to add the name of Officer Nichols to those of Fay and Fosmer on the ground that Officer Nichols had no direct contact with the defendant. NJI 14.34 applies, by its terms, to a law enforcement officer acting directly by himself or indirectly through an agent. The instruction on entrapment given in this case was erroneous, although that error was not prejudicial under the circumstances here. Ordinarily where the defense of entrapment is properly raised and an entrapment instruction is given by the trial court, the instruction should be in the form of NJI 14.34, although the names of law enforcement officers or agents may be added or other pertinent alterations made where appropriate.

Finding no prejudicial error the judgment is affirmed.

AFFIRMED.

WHITE, J., concurring.

I concur. The evidence did not require the submission of the entrapment instruction.

STATE OF NEBRASKA, APPELLEE, V. WARREN W. RATHBUN, APPELLANT.

287 N. W. 2d 445

Filed January 15, 1980. No. 42758.

1. **Criminal Law: Confinement.** The place of confinement for serving a sentence for felony is the Nebraska Penal and Correctional Complex.
2. **Criminal Law: Sentences.** Where the maximum term of a sen-

tence pronounced is the statutory maximum for the offense, credit for jail time must be given.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed as modified.

Robert P. Chaloupka, Esq., and Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

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

CLINTON, J.

The defendant entered a plea of nolo contendere to a charge of having, on October 25, 1978, committed a sexual assault in the second degree in violation of section 28-408.04, R. R. S. 1943. No evidence was introduced by the State to show that the assault caused serious personal injury to the victim. The defendant was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. That term is the maximum for second degree sexual assault in cases where there is no serious personal injury to the victim.

On appeal to this court, defendant makes the following assignments of error: (1) The court erred in not giving him credit on the sentence for the 146 days the defendant was confined in the county jail awaiting trial. (2) The place of confinement should be the county jail rather than the Nebraska Penal and Correctional Complex. We sustain the first assignment and reject the second.

Section 28-408.04, R. R. S. 1943, provides as follows: "(1) A person shall be guilty of sexual assault in the second degree when such person subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, or (b) knew or

should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct.

"(2) Sexual assault in the second degree shall be punishable by imprisonment for not more than one year unless the actor shall have caused serious personal injury to the victim, in which case it shall be punishable by imprisonment in the Nebraska Penal and Correctional Complex for not more than fifteen years."

Sexual assault in the second degree is, by definition, a felony, even though the actual penalty imposed may be less than 1 year. Section 29-102, R. R. S. 1943 (repealed effective January 1, 1979), defined felony and misdemeanor as follows: "The term felony signifies such an offense as may be punished with death or imprisonment in the Nebraska Penal and Correctional Complex. Any other offense is denominated a misdemeanor." Historically, the maximum permissible penalty has determined whether a crime is a felony or a misdemeanor. If the maximum penalty is 1 year or more in the penitentiary, the crime is a felony. Rains v. State, 142 Neb. 284, 5 N. W. 2d 887; Goedert v. Jones, 150 Neb. 783, 36 N. W. 2d 119; Bright v. State, 125 Neb. 817, 252 N. W. 386.

Section 28-408.04, R. R. S. 1943, defines only one class of crime, a felony. Historically, felony sentences are served in the penitentiary. Section 28-408.04, R. R. S. 1943, although not a model of clarity, refers to only one place of confinement, to wit, the Nebraska Penal and Correctional Complex. Under present law the actual place of confinement within the complex is determined administratively. § 29-2401, R. R. S. 1943. We note in passing that under the provisions of the Nebraska Criminal Code, effective January 1, 1979, places of confinement are defined with more specificity. §§ 28-105, 28-106, R. S. Supp., 1978.

The trial court did not err in sentencing the defendant to the Nebraska Penal and Correctional Complex.

We have held that where the maximum term of a sentence pronounced is the statutory maximum for the offense, credit for jail time must be given. State v. Blazek, 199 Neb. 466, 259 N. W. 2d 914. See, also, Eutzy v. State, 199 Neb. 384, 258 N. W. 2d 829. Since the maximum penalty for the crime under the circumstances here was 1 year and that penalty was imposed, credit should have been given for jail time. The judgment is modified to provide that the defendant shall be given credit on the 1-year sentence for the 146 days confinement in the county jail awaiting trial.

AFFIRMED AS MODIFIED.

VERA W. BROWN, ADMINISTRATRIX OF THE ESTATE OF STEVEN L. BROWN, DECEASED, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

287 N. W. 2d 676

Filed January 22, 1980. No. 42395.

1. **Torts: Negligence: Judgments.** Findings of the trial court in actions brought under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong.
2. **Trial: Proximate Cause: Evidence: Words and Phrases.** Where the evidence is conflicting on the question of "sole proximate cause," the determination of that issue is for the trier of facts.

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

Ryan, Scoville & Uhlir, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

BRODKEY, J.

The appellant herein, Vera M. Brown, appeals to this court from a judgment entered by the District Court for Dixon County in an action brought by her against the State of Nebraska under the State Tort Claims Act, sections 81-8,209 to 81-8,235 R. R. S. 1943. Appellant brought this action both on her own behalf and as administratrix of the estate of Steven L. Brown, her son, for the purpose of recovering damages suffered by her and by the estate of her deceased son resulting from an automobile accident. The accident occurred upon a portion of U. S. Highway 20 during the early morning hours of July 21, 1973, when an automobile owned by the deceased and driven by one Ellen Madsen (now Mrs. Ellen Morey) struck the buttress of a bridge located upon said highway which was at that time undergoing construction. Appellant first filed a claim with the State Claims Board, which claim was denied. She thereafter filed her petition against the State of Nebraska in the District Court for Dixon County, joining in said action seven contractors who were involved in various phases of the construction contract in question, and alleging separate grounds of negligence against each of the defendants.

This appeal, however, involves only the claim of the appellant against the State of Nebraska, which, under the terms of the State Tort Claims Act, must be tried to the court without a jury. See § 81-8,214, R. R. S. 1943.

In her petition the appellant alleged 16 separate grounds of negligence against the State of Nebraska, the principal allegations being that the State was negligent in failing to erect guardrails at the bridge in question and in failing to warn motorists of the lack of guardrails at the location, and also that said negligence was the proximate cause of the wrongful death of her son. In its judgment entered on July 12, 1978, following trial of the cause, the court found:

"It is the finding and judgment of this court that the State of Nebraska was not guilty of any violation of reasonable, ordinary care in relation to the conditions of the roadway and bridge located at Station 254+74 on July 21st, 1973. *That the sole and proximate cause of the accident* and resulting death of the decedent was the negligence of the driver of decedent's vehicle as hereinbefore set forth and judgment is rendered for the Defendant State of Nebraska and against the Plaintiff Vera W. Brown, Administratrix of the Estate of Steven L. Brown, deceased, * * *." (Emphasis supplied.) In her brief on appeal to this court from that judgment, the appellant contends that the trial court erred in making the foregoing findings. We affirm.

Before reviewing the evidence in this case, we first consider the scope of review by this court of appeals from actions brought under the State Tort Claims Act. The law is well established that in such appeals the findings of the trial court will not be disturbed unless clearly wrong. See, Cortes v. State, 191 Neb. 795, 218 N. W. 2d 214 (1974); Buttner v. Omaha P. P. Dist., 193 Neb. 515, 227 N. W. 2d 862 (1975); Craig v. Gage County, 190 Neb. 320, 208 N. W. 2d 82 (1973). In this appeal, therefore, we must affirm the findings of the trial court if there is competent evidence to support them.

Most of the evidence adduced at the trial was presented by use of depositions mutually offered by the parties. It would appear from the evidence so adduced that the deceased, Steven L. Brown, age 21, was a resident of Iowa and employed in a furniture store in Sioux City, Iowa. He had just received a promotion in his employment on July 20, 1973, and decided to celebrate the event. That evening, he and three acquaintances took his automobile and drove in and around the Sioux City area, actually traveling in the states of Iowa, Nebraska, and South Dakota. Before commencing their journey the de-

ceased purchased two or three six-packs of beer, the exact amount being in dispute. It appears clear from the record, however, that during the course of the evening the deceased consumed most of the beer himself. At approximately 11:30 p.m., Steven, who was driving his automobile at that time, drove from Sioux City into northeast Nebraska and proceeded in a westerly direction on U. S. Highway 20 toward Allen, Nebraska. It was raining heavily during this trip. Ellen Madsen was riding in the front seat of the vehicle on the passenger's side. There is a conflict as to whether the deceased asked her to drive the automobile or whether she had requested that she be allowed to drive the automobile. In any event, their route took them through the area where the bridge in question was being widened, and after passing through the area the deceased turned the vehicle around preparatory to driving back to Sioux City in an easterly direction. At that time the deceased turned the driving over to Ellen Madsen, age 16. Prior to her taking control of the automobile, Ellen Madsen, along with the others in the automobile, had been engaged in drinking beer, the amount, however, being a matter of dispute. The testimony in the record indicates that she consumed from one to two cans. According to her testimony, as she was driving in an easterly direction and prior to arriving at the bridge in question, she hit something on the road which caused the automobile to start to skid and leave the traveled portion of the roadway. She stated that she had had no trouble driving prior to this time. It is interesting to note, however, that one of the passengers in the automobile contradicted her testimony and indicated that she had driven off the road five or six times prior to the accident, and that the deceased, who was sitting next to her on the passenger's side, grabbed the wheel about five or six times. In any event, after the skid to which Ellen Madsen testified, the automobile left the traveled

portion of the roadway, and although she apparently regained partial control of the vehicle, it struck the buttress of the bridge in question. As a result of the impact, the deceased was pinned between the buttress and the automobile and suffered injuries from which he subsequently died.

The bridge which the automobile struck was located in Dixon County, Nebraska, on U. S. Highway 20. On December 14, 1972, the state had let bids for a state project on this highway, which project included the widening of three bridges and was for the general roadside improvement of an 18-mile stretch of the aforementioned highway. As previously mentioned, separate contracts were awarded for bridge work, grading, paving, culvert work, guardrail placement, and the seeding of the project area. Starting dates for the various contractors were set and work was begun on the project on April 10, 1973. The project was completed on September 4, 1974. Throughout the construction period, the highway was open to at least one lane of traffic. The record reveals that informational signs, 5-foot by 10-foot lighted barricades, and signs which indicated entry into a construction area and the length of the construction zone were placed at the west and east ends of the project prior to the inception of any work, and remained in place throughout the construction period.

Work on the project was started at the west end and proceeded in a generally easterly direction. On the date of the accident, which occurred on Saturday, July 21, 1973, the work was 29.2 percent completed for the entire project. As previously stated, part of the project included the widening of three bridges. The bridge which was the site of the accident was one of those bridges. The plans called for the widening of the bridge in question an additional 10 feet on each side of the existing bridge. The construction of the bridge itself was completed as of the

date of the accident with the exception of installation of an ornamental handrail. At the time of the accident the grading was completed to a point east of the bridge itself, and no part of the roadway leading to the bridge was disturbed during the entire construction project.

It is clear that at the time of the accident, which was only 1 month after completion of the work on the bridge itself, the guardrails had not as yet been installed on the bridge. That portion of the contract was completed on July 26, 1974. The evidence also reveals that at the time of the accident Ellen Madsen was driving between 40 and 45 miles per hour, which was not in excess of the posted speed limit at that location. The parties stipulated that the weight of the Brown vehicle at the time of the collision was 3,000 pounds and its loaded weight was 3,700 pounds. They also stipulated that, under the design specifications of the guardrail for the bridge, the guardrail would withstand an impact greater than that which the Brown automobile and occupants would exert on the guardrail even at a greater speed than that which the evidence indicates the Brown car was traveling. While evidence was introduced as to the purpose and function of guardrails, the record contains nothing which would indicate conclusively that had the guardrails been in position at the time of the accident the resulting accident and death of the decedent would not have occurred.

With the foregoing in mind, we now examine the errors assigned by the appellant as justifying reversal in this case, and we consider them in the order they are set out in appellant's brief. Appellant first contends that the trial court erred in finding that the sole proximate cause of the accident and resulting death of the decedent was the negligence of the driver of decedent's vehicle. We believe there is clearly sufficient evidence in the record to support this finding of the trial court. A detailed recitation

of the evidence with reference to the conduct of the driver of the automobile is unnecessary. As previously stated, evidence was adduced which clearly indicates that the driver did not have her car under proper control and was not observing the warning signs which were in place at that time. Her lack of control is indicated by evidence in the record, which the trial court was entitled to believe, that the driver, Ellen Madsen, had driven off the traveled portion of the roadway five to six times prior to the accident, although she herself testified that she experienced no trouble driving. It must also be remembered that although there is no testimony in the record that the driver was intoxicated at the time, the evidence does reveal that she had been drinking, and the trial court may have taken this into consideration.

The evidence is undisputed that it was raining hard at the time of the accident and that the visibility was consequently reduced. The existence of adverse weather conditions affecting the visibility or the ability to maneuver the vehicle must likewise be taken into account by the driver, and requires him to be more alert and vigilant for danger. See, Vrba v. Kelly, 198 Neb. 723, 255 N. W. 2d 269 (1977); Rief v. Foy, 198 Neb. 572, 254 N. W. 2d 86 (1977); C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N. W. 2d 272 (1977). Also, there is no question that the driver of the automobile had been in the automobile while it was driven through the construction area in a westerly direction before she took over the driving of the automobile on the return trip and that there were signs posted indicating that the area was under construction, and cautioning the motorists of that fact. Of interest in this regard is Tely v. State, 307 N. Y. S. 2d 307, 33 App. Div. 2d 1061 (1970), which was an action for death and personal injuries caused by an automobile accident. In that case, the driver of a westbound automobile drove the automobile off

the surface of the highway onto the shoulder, and in attempting to return the automobile to the surface, lost control of it, and the automobile went into the eastbound lane where it collided head-on with claimant's vehicle. The state had erected a sign stating: "DANGER USE CAUTION CONSTRUCTION." The court held that the failure of the state to have warning signs or devices along the edge of the pavement at the place of the accident was not negligence, and that the sole cause of the accident was the negligent operation of the westbound automobile. The analogies between that case and the instant case are apparent, and persuasive.

From the totality of the evidence, the trial court might properly have concluded that the driver of the automobile, while not traveling at speeds in excess of the posted limits, was traveling at speeds which were excessive under the weather conditions prevailing; that she had been operating the automobile in an unsafe manner; and that she failed to retain proper control of the vehicle. Under the State Tort Claims Act, the case must be tried to the court sitting without a jury; and that being so, it follows that the judge acts as the trier of facts. Where the evidence is conflicting on the question of proximate cause, the question is ordinarily one for the jury or the trier of facts. Brewer v. Case, 192 Neb. 538, 222 N. W. 2d 823 (1974); 57 Am. Jur. 2d, Negligence, § 136, p. 487. The trier of facts determines questions of sole proximate cause. Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842 (1958). Under the evidence in the record, we conclude that the trial court was not clearly wrong in its finding that the sole proximate cause of the accident and death of the decedent was the negligence of the driver of the automobile. We therefore affirm its finding in this regard.

In view of our decision on the issue of sole proximate cause, it is unnecessary for us to consider the other assignments of error raised by the appellant.

Even if it were determined that the State of Nebraska was in some respects negligent, in the absence of evidence that such negligence was the proximate cause or a concurring cause of the accident or injuries, such negligence would not justify the imposition of liability on the State of Nebraska. The judgment and findings of the trial court must be and hereby are affirmed.

AFFIRMED.

IN RE INTEREST OF JOHNNY JOE MOSIER, A MINOR CHILD UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. DIXIE BURGER, APPELLANT.
288 N. W. 2d 22

Filed January 22, 1980. No. 42477.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile case is by trial de novo upon the record.
2. **Parent and Child: Statutes: Evidence.** An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence.
3. **Parent and Child: Statutes.** Parental rights may be terminated for any one of the six independent circumstances proscribed by section 43-209, R. R. S. 1943.

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

Donald E. Rowlands II of Baskins & Rowlands, for appellant.

Scott P. Helvie, Lincoln County Public Defender, and Charles Balsiger, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ, and RIST and BARTU, District Judges.

BARTU, District Judge.

Dixie Burger, natural mother of Johnny Joe Mosier, appeals from an order of the Lincoln County juvenile court, affirmed by the District Court, termi-

nating parental rights to her son. She assigns as error (1) that the decision was not supported by the evidence and was an abuse of the court's discretion, and (2) that termination of parental rights was not in the best interests of the minor child.

An appeal of a juvenile case is by trial de novo upon the record, and an order terminating parental rights must be supported by clear and convincing evidence. State v. Souza-Spittler, 204 Neb. 503, 283 N. W. 2d 48 (1979); State v. Hamilton, 204 Neb. 537, 283 N. W. 2d 66 (1979).

The transcript and bill of exceptions in this matter establish the following. Johnny Joe Mosier is the minor child of James Henry Mosier, Jr., and Dixie L. Burger. On August 30, 1977, upon the affidavit of the Deputy Lincoln County Attorney, the minor child was removed from the residence of his mother, Dixie Burger, and his then current stepfather, Thomas F. Burger. Thereafter, on September 2, 1977, a juvenile court petition was filed in the Lincoln County court alleging that he was a child within the meaning of section 43-202 (2) (b), R. R. S. 1943, as amended, in that he lacked proper parental care by reason of a fault or habit of his parents, guardian, or custodian.

On September 16, 1977, a hearing was held, at which time Dixie Burger and Thomas F. Burger were advised of the juvenile court petition, possible dispositions, and their statutory and constitutional rights. The Lincoln County Public Defender's office was appointed to act as guardian ad litem for the minor child.

An adjudication hearing was held September 23, 1977, at which time Dixie Burger, Thomas F. Burger, and the guardian ad litem for the minor child admitted the allegations contained in the juvenile court petition.

Pursuant to a stipulation by all parties, a disposition order was entered on September 23, 1977, termi-

nating all custodial rights of the stepfather, Thomas F. Burger, and providing that the care, custody, and control of Johnny Joe Mosier be placed in the Lincoln County Department of Public Welfare for a period of 1 year. Appellant was granted one visitation per month with the minor child and ordered to be solely responsible for the minor child's support in the amount of $125 per month, plus reasonable clothing, medical, and dental expenses, and was instructed that if she desired to regain the care and custody of her minor child, she should, during the 1-year period the child was in the custody of the Lincoln County Department of Public Welfare, undergo psychological and psychiatric counseling, cooperate with the Lincoln County Department of Public Welfare in helping her to establish an environment for the child that would be safe for his health and welfare, and submit to a psychological evaluation, the results of which were to be provided to the Lincoln County juvenile court.

On March 30, 1978, a motion to terminate parental rights was filed alleging that Dixie Burger and James H. Mosier, Jr., natural father of the minor child, (1) had abandoned the child for 6 months or more immediately prior to the filing of the motion, (2) had substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection, and (3) had, being financially able, willfully neglected to provide the child with necessary subsistence, education, or other care.

Insofar as applicable to this case, section 43-209, R. R. S. 1943, provides: "The court may terminate all parental rights between the parents * * * 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: * * * (2) The parents have substantially and continuously or repeatedly neglected the child

and refused to give the child necessary parental care and protection * * *."

The hearing on the motion to terminate parental rights was held June 15, 1978. Parental rights were terminated July 5, 1978. Among other findings in its termination order, the trial court found, "* * * that Dixie Burger has either repeatedly inflicted upon or condoned physical abuse and violence against the minor child * * *" and, "* * * Dixie Burger * * * has repeatedly neglected and refused to give the minor child necessary parental care and protection." The file, exhibits, and record of the dispositional hearing held September 23, 1977, were judicially noticed by the trial court upon the motion of the State without objection by the appellant. This evidence clearly and convincingly established that the appellant inflicted and allowed the infliction of extreme physical abuse upon Johnny Joe Mosier for an extended period of time prior to September 1, 1977. Appellant admitted the abuse. Photos and medical opinion established its severity and duration.

Appellant now contends that such evidence was irrelevant to the issues presented at the termination hearing for the reason that the trial court had entered its order on September 23, 1977, upon that evidence.

Such argument is frivolous and without merit. Section 27-401, R. R. S. 1943, provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The evidence of extreme physical abuse was relevant and clearly and convincingly established that the appellant substantially and continuously or repeatedly neglected Johnny Joe Mosier and refused to give him necessary parental care and protection.

It was in the best interests of Johnny Joe Mosier that the parental rights of Dixie Burger be terminated.

It is unnecessary to consider the remainder of appellant's contentions that the evidence was insufficient to show abandonment or a failure to provide the support inasmuch as parental rights may be terminated for any one of the six independent circumstances proscribed by section 43-209, R. R. S. 1943. State v. Duran, 204 Neb. 546, 283 N. W. 2d 382 (1979).

The judgment terminating the parental rights of appellant to Johnny Joe Mosier is affirmed.

AFFIRMED.

MICHAEL R. FORTIN, APPELLANT AND CROSS-APPELLEE, V. RICHARD L. HIKE, APPELLEE AND CROSS-APPELLANT.

287 N. W. 2d 681

Filed January 22, 1980. No. 42482.

1. **Admissions Against Interest: Witnesses: Statutes.** Admissions of a party to the litigation are excepted from the rule that a foundation for admission of inconsistent statements must be laid on cross-examination by affording a witness the opportunity to explain and deny the same. § 27-613, R. R. S. 1943.
2. **Admissions Against Interest: Evidence.** Inconsistent statements of a party are properly admissible as rebuttal evidence.
3. **Intoxicating Liquors: Motor Vehicles: Evidence.** In order that evidence of consumption of alcoholic liquor by the operator of a motor vehicle be sufficient to submit the issue of the driver's intoxication to the jury, there must exist some evidence of facts or circumstances or competent opinion, either lay or expert, from which the trier of fact could conclude that because of the consumption of alcoholic liquor the physical or mental faculties of the driver were impaired to any appreciable degree so as to affect the driver's ability to operate his motor vehicle as an ordinarily prudent and cautious driver would operate it.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for a new trial.

Jeffrey A. Silver and Weber Law Offices, for appellant.

Michael F. Kinney of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

CLINTON, J.

This is an action brought by Michael R. Fortin to recover damages for personal injuries suffered by him when the automobile he was driving collided with one driven by Richard L. Hike. The collision occurred at the intersection of two highways which was controlled by automatic traffic lights. The jury found against the plaintiff Fortin and in favor of the defendant Hike on a counterclaim. Fortin has appealed and Hike has cross-appealed. Each assigns various errors.

The collision occurred on February 19, 1977, at approximately 1:30 a.m., in Bellevue, Nebraska, at the intersection of U. S. Highway 73-75 and Cornhusker Drive. The Fortin vehicle was northbound on U. S. Highway 73-75. Hike was eastbound on Cornhusker Drive.

Fortin testified that when he was 20 feet from the intersection he had the green light. If that testimony was correct, then it may be inferred from the light change pattern testified to by a traffic signal engineer that the light was either green or yellow when he entered the intersection. He admitted that he never saw Hike's vehicle until an instant before impact and testified that he did not have time to stop or swerve.

Hike testified that when he was about a block and a half from the intersection the traffic light controlling Cornhusker Drive was green and that it was still green when he entered the intersection. He did not recall seeing the Fortin vehicle at all before the impact.

The photographic evidence makes plain that the

traffic lights controlling this particular intersection are readily observable.

The collision occurred in the southeast quadrant of the intersection. Fortin was stunned or briefly rendered unconscious by the impact. Hike was rendered unconscious.

Except for the parties to this action, there were no witnesses who saw the impact. One witness who arrived at the accident scene shortly after it occurred testified that Hike had an odor of alcohol on his breath. A hospital nurse and a deputy sheriff who arrived at the accident scene both testified that Fortin had a smell of alcohol on his breath. The nurse testified that his speech was slurred. Both drivers admitted drinking a couple of beers earlier that evening. No testimony was elicited concerning the effect of alcohol on either party and apparently no blood samples were taken or tested for alcoholic content.

Fortin assigns as error, among other things: (1) The court erred in not allowing rebuttal testimony of George Guenther as to statements which Hike allegedly had made to him after the accident. (2) The court erred in submitting to the jury the issue of Fortin having operated his motor vehicle while in an intoxicated condition. Hike, on his cross-appeal, asserts that the trial judge erred in ordering a remittitur of $3,900 of the $10,159.64 verdict which the jury awarded.

We find that the trial court erred in refusing to allow Guenther's testimony, and also erred in submitting to the jury the issue of the plaintiff Fortin having been in the operation of a motor vehicle while intoxicated. We, therefore, reverse and remand for a new trial.

We first confront the issue of the rejection of the rebuttal testimony. As already noted, Hike testified at trial that the light was green at the time he entered the intersection. After Hike had presented his

evidence in defense and in support of his counterclaim, Fortin offered the testimony from Guenther to the effect that Hike made a statement to the witness, the substance of which was that Hike was not looking at the traffic light as he entered the intersection and that he last saw the green light while still ½ block from the intersection. The trial judge ruled that this would be improper rebuttal since Hike had previously testified and was never asked during cross-examination if he had made the alleged prior inconsistent statement.

Admissions of a party are excepted from the rule that a foundation must be laid on cross-examination in order to make prior inconsistent statements of a witness admissible. Section 27-613, R. R. S. 1943, provides in part as follows: "(2) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in subdivision (4) (b) of section 27-801." In the recent case of Hyde v. Cleveland, 203 Neb. 420, 279 N. W. 2d 105, the same issue, proper use of rebuttal testimony, was presented. In that case the following rule was stated: "The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence and may be used as rebuttal evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay foundation for the admission of such evidence by cross-examination."

It was error for the trial court to refuse to allow rebuttal testimony of George Guenther, offered by Fortin.

Hike argues that even if the ruling was erroneous, it was not prejudicial because of the jury's implicit

finding that Hike had the green light when his vehicle entered the intersection, and that such finding is rather conclusively supported by the evidence. This contention is founded principally upon two portions of the evidence. Ronald Dooley, a state traffic signal engineer, testified that it was impossible for the traffic light for both U. S. Highway 73-75 and Cornhusker Drive to be green at the same time. The traffic lights are controlled by four sensors in the highways, three of which are 400 feet from the intersection and one of which is 430 feet from the intersection, as well as by additional sensors in the left turn lanes of U. S. Highway 73-75, which is the north and south highway. The pattern and timing of the lights depend upon both volume of traffic and upon the time when the sensors are activated by the traffic. Dooley testified as to which of the two vehicles would have the green light, depending upon various factual assumptions tied to the testimony of the two parties. Without detailed analysis, suffice it to say that the jury had to determine which of the two parties' testimony was correct before it could properly apply the expert testimony to the facts as it found them to be. Ultimate conclusions depended upon which of the parties the jury believed. Hence it would appear that impeaching testimony could be of considerable import to the jury.

There was also testimony from a disinterested witness who did not actually see the impact but who came upon the scene shortly after the collision. Her testimony was such that it was possible to infer the light was red to northbound traffic on U. S. Highway 73-75 at the time the collision probably occurred. The weight to be given that evidence was for the jury.

We cannot tell with certainty from the record whether the foregoing items of testimony were determinative factors in the jury findings and, therefore, we cannot say whether the impeaching testi-

mony would have made a difference in the verdict. The refusal to admit the impeaching testimony as an admission of Hike must, therefore, be deemed prejudicial error.

Fortin argues that the evidence was insufficient to allow the trial court to submit to the jury the issue of whether he was intoxicated at the time of the collision and whether that was a proximate cause of the accident.

A reading of the opinions of this court and others relative to the issue of drinking alcoholic liquors by, or the intoxication of, the operator of a motor vehicle as evidence of negligence, leads us to distinguish three factual situations: (1) There is evidence of consumption of alcoholic liquors by the operator of a motor vehicle and an absence of evidence from which the trier of fact might conclude that the drinking affected the safe operation of the vehicle, and there is no evidence of any other alleged negligent act. (2) There is evidence of consumption of alcoholic liquors, accompanied by other evidence of a negligent act or acts which may have proximately caused the accident. (3) There is evidence of consumption of alcoholic liquor by the driver, together with evidence of facts or circumstances or competent opinion, either lay or expert, from which the trier of fact could conclude that because of the consumption of alcohol the physical or mental faculties of the driver were impaired in any appreciable degree so as to affect the driver's ability to operate his motor vehicle as an ordinarily prudent and cautious driver would operate it.

In the first situation, the consumption of alcohol as a negligent act should not be submitted. Branch v. Wilkinson, 198 Neb. 649, 256 N. W. 2d 307; Raskey v. Hulewicz, 185 Neb. 608, 177 N. W. 2d 744; Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201. In the second situation, the consumption of alcohol alone is not evidence of negligence, but may be considered by

the trier of fact together with evidence of the other acts or omissions from which negligence may be inferred. Raskey v. Hulewicz, *supra*; Kaufman v. Tripple, *supra*; Langford v. Ritz Taxicab Co., 172 Neb. 153, 109 N. W. 2d 120; Schaffer v. Bolz, 181 Neb. 509, 149 N. W. 2d 334; Nisi v. Checker Cab Co., 171 Neb. 49, 105 N. W. 2d 523; Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147. In the third situation, intoxication is submissible as an independent act of negligence contributing to the accident. Raskey v. Hulewicz, *supra*; Kaufman v. Tripple, *supra*.

Where the evidence is conflicting, of course, the determination of the issue is one for the trier of fact. Nisi v. Checker Cab Co., *supra*; Gilliland v. Wood, *supra*.

In the case now before us, there was no evidence, either opinion or by way of description, of Fortin's conduct, or other facts and circumstances which would authorize the submission of the issue of Fortin's intoxication as independent evidence of negligence proximately causing the collision. Evidence of Hike's drinking (his own admission) coupled with evidence tending to show that he either failed to observe or deliberately drove through a red traffic light would authorize an instruction appropriate to the second evidentiary situation above described.

Because the cause must be remanded for a new trial, it is not necessary to consider other assignments of error made by Fortin or to consider Hike's cross-appeal.

REVERSED AND REMANDED FOR A NEW TRIAL.

EVELYN E. ULMER, APPELLEE AND CROSS-APPELLANT, V. EUGENE M. ULMER, APPELLANT AND CROSS-APPELLEE.
287 N. W. 2d 685

Filed January 22, 1980. No. 42541.

Divorce: Alimony. The fixing of alimony rests in the sound discretion of the District Court and in the absence of an abuse of discretion will not be disturbed on appeal.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Lloyd W. Kelly and Kelly, Kelly & Kelly, for appellant.

Luebs, Dowding, Beltzer, Leininger & Smith, for appellee.

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

WHITE, J.

In this marriage dissolution case, the respondent husband appeals from the decree of the District Court for Hall County and assigns three errors: The court made an inappropriate distribution of the property accumulated during the marriage; the court erred in failing to grant the respondent husband alimony; and the court erred in allowing an inadequate attorney's fee to respondent's counsel. We affirm.

The parties, at the time of the dissolution, had been married 37 years. Both parties worked while they were married. During the course of the marriage, petitioner received a total of $11,400 in inheritance from relatives. At the time of the dissolution, petitioner was employed as a schoolteacher in the Grand Island school system and was earning approximately $14,000 per year. The respondent received Social Security and government retirement benefits of approximately $350 per month from which a health insurance policy premium had been

previously deducted. He was self-employed as a carpet cleaner earning approximately $200 per month. There was a dispute among the parties as to whether the respondent was capable of increasing the earnings from his self-employed business or whether he failed to do so because he did not wish to pay additional income tax.

The court divided the marital property as follows: The petitioner was awarded a 1973 Ford automobile and the respondent a 1958 Chrysler automobile; the respondent was awarded all carpet cleaning equipment and miscellaneous tools which the petitioner testified had a value of approximately $3,000. The petitioner was awarded approximately $2,100 interest in a retirement annuity paid for by her out of her salary as a teacher. The court further directed that the home of the parties be sold and that $9,800 be first set off to the petitioner as inherited property and the balance divided equally between the parties. The respondent's attorney was awarded a fee of $200.

The respondent's first assignment of error is that the court did not make an appropriate property division of the parties. It appears that as nearly as possible, with the exception of the allowance for the inheritance, the court made an effort to divide the property evenly. We are not inclined to disturb that determination by the trial court.

The respondent next assigns as error the failure of the trial court to award alimony to him to be paid by petitioner. The fixing of alimony 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. The trial court obviously felt that the income of the parties was not so grossly disparate that one party ought to receive alimony payments from the other. We find no abuse of discretion.

The award of the attorney's fee is adequate and

likewise does not appear to be an abuse of discretion and will not be disturbed here.

The petitioner cross-appeals and assigns principally as error that the trial court erred in not allowing her the full amount of her inheritance. While the source of funds brought into a marriage is a consideration in the division of property, it is not an absolute. Absent an abuse of discretion, we do not disturb the trial court's division of property.

AFFIRMED.

AMES BANK, A CORPORATION, APPELLANT, V. HOWARD F. HAHN ET AL., APPELLEES.

287 N. W. 2d 687

Filed January 22, 1980. No. 42544.

1. **Fraud.** The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.
2. _____. The requirement of scienter is satisfied by alleging that the person making the statement knew the statement was false, or made it as a positive statement without knowledge as to whether it was true or false, and the false statement was made with intention that it should be acted upon.
3. **Attorney and Client.** A lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties.

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

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

Martin A. Cannon of Matthews & Cannon, P.C., for appellees Zweiback and Laughlin.

Kennedy, Holland, DeLacy & Svoboda, for appellee Hahn.

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

BOSLAUGH, J.

The plaintiff, Ames Bank, appeals from an order sustaining the demurrer of the defendant, Howard F. Hahn, and dismissing the action as to all defendants.

The amended petition alleged in its first cause of action that the defendant Hahn was a lawyer associated with and employed by the defendants, Warren S. Zweiback, Mark L. Laughlin, and Zweiback & Laughlin, a partnership; that on October 14, 1974, Bruce N. Miller, as president of E. G. Miller Realty Company, delivered a promissory note in the amount of $153,358.60 to the plaintiff; that Hahn and Zweiback & Laughlin represented Bruce N. Miller, a partner in Minnesota Candlewood Company; that on November 7, 1974, Hahn prepared two mortgages from Candlewood to the plaintiff which were intended to secure the E. G. Miller Realty Company note, but the mortgages described land not owned by Candlewood; that Hahn represented to the plaintiff that Candlewood owned the land described in the mortgages; that on February 18, 1975, E. G. Miller Enterprises, Inc., executed a warranty deed to Candlewood that had been prepared by Hahn but which did not describe the property the deed was intended to convey; that Hahn was in direct communication with the plaintiff in regard to these matters, and the plaintiff relied upon the misrepresentations made by Hahn; that the plaintiff does not know whether Hahn knew whether the representations he made to the plaintiff were untrue; that the plaintiff had been damaged because there was a balance of $148,358.60, plus interest, due on the note which the plaintiff was unable to collect because of the misrepresentations of Hahn. There was no allegation that Hahn knew the representations were false and no di-

rect allegation that the representations were made with the intention that they be acted upon.

In the second cause of action the amended petition alleged Hahn was negligent in that he should have known Candlewood was not the owner of the property described in the mortgages and the legal description in the deed was incorrect. The third and fourth causes of action alleged Zweiback, Laughlin, and the partnership were liable to the plaintiff. The prayers to all four causes of action sought a judgment against only Hahn.

The issue with regard to the first cause of action is whether the plaintiff was required to allege scienter or an intent to deceive. In Page v. Andreasen, 200 Neb. 641, 264 N. W. 2d 682, we said: "The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, *which was untrue and known to be untrue by the party making it*, or else recklessly made; that it was made with *intent to deceive* and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage." (Emphasis supplied.)

The plaintiff relies on Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427, and contends that it was not required to allege that the misrepresentation was made with intent to deceive. In the Campbell case we said: "In this connection, the burden is on the plaintiff to prove by preponderance of the evidence, the following essential elements constituting fraud and deceit: (1) That such defendant made a material representation; (2) that it was false; (3) *that, when made, such defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion*; (4) *that he made it with the intention that it should be acted on by plaintiff*; (5) that plaintiff acted in reliance on it; and (6) that he thereby suffered injury." (Empha-

sis supplied.) The requirement of scienter is satisfied by alleging that the person making the statement knew the statement was false, or made it as a positive statement without knowledge as to whether it was true or false, and the false statement was made with intention that it should be acted upon. See, 37 C. J. S., Fraud, § 19, p. 254; Prosser, Law of Torts (4th Ed.), § 107, p. 699, at p. 700.

The first cause of action alleged in this case was defective because the plaintiff failed to allege that the defendant knew the representation was false, or made the representation as a positive statement without knowledge as to whether it was true or false.

The issue in regard to the second cause of action is whether the amended petition alleged facts sufficient to establish any duty owed by Hahn to the plaintiff. A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff. A lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties. 7 Am. Jur. 2d, Attorneys at Law, § 167, p. 146; § 196, p. 161; 7 C. J. S., Attorney and Client, § 52b, p. 834; Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621 (1879).

The amended petition alleged that Hahn represented Bruce N. Miller, a partner in Candlewood, and that Hahn was in direct communication with the plaintiff. There was no allegation that Hahn was employed by the plaintiff, and there was no allegation of facts which would otherwise establish a duty from Hahn to the plaintiff.

Since the liability of Zweiback, Laughlin, and the partnership was dependent upon Hahn being liable to the plaintiff, and the amended petition failed to state a cause of action against Hahn, the action was properly dismissed as to all defendants.

The demurrers were properly sustained. The

judgment of the District Court is affirmed.

AFFIRMED.

DELBERT L. MATLOCK, APPELLANT, V. PATRICIA N. MATLOCK, APPELLEE.

287 N. W. 2d 690

Filed January 22, 1980. No. 42548.

1. **Divorce: Property.** The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case.
2. _____: _____. The court shall also have regard for the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities.
3. **Divorce: Property: Alimony.** How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved.

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

Kenneth R. Lang and Angle & Lang, for appellant.

Gordon B. Fillman and Fillman & Baumann, for appellee.

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

CLINTON, J.

This is an action for dissolution of marriage brought by the petitioner husband against the respondent wife. The court dissolved the marriage; awarded the petitioner the real estate that was held in joint tenancy; awarded the respondent a car, piano, and various household goods; and ordered petitioner to pay respondent the sum of $7,800 at the

rate of $300 per month. The petitioner now appeals to this court and argues that the $7,800 award is excessive. We affirm.

The parties were married November 16, 1974. The petitioner had three children, ages 13, 11, and 7, the issue of a previous marriage. No children were born to the Matlocks during their marriage. The parties have agreed through stipulation to a division of personal property.

The evidence establishes without dispute that residential property which was awarded to the petitioner by the decree was acquired with the proceeds of the sale of similar property owned by the petitioner and his first wife and which had passed to him at her death. The original source of the funds for the purchase of this property was real estate which was a gift from the parents of the first wife. The purchase price of the residential property which is involved in this action was $16,500. The evidence indicates that during the approximately 4 years of marriage, the value of that property had increased to at least $23,000.

At the time of the marriage of the parties, respondent was 27 years of age and the petitioner 42. Respondent was employed at the time of the marriage as deputy treasurer of York County, Nebraska, and continued that employment during the marriage. During that time she earned gross wages of about $19,000. Her net earnings during the period were about $15,000. The petitioner was regularly employed during the marriage and earned take-home pay of about $140 per week. He gave about $40 per week to the respondent for groceries and other necessities during the marriage. He paid the expenses of maintaining the home, such as taxes, insurance, utilities, and maintenance. The respondent testified that she used her net pay during the marriage not only for her own maintenance, but for that of the family, including food, transportation ex-

pense, music lessons for one of the daughters, gifts, and other items. She cared for the children during the marriage and performed the usual domestic duties.

During the course of the marriage the respondent's personal indebtedness increased to about $3,000 (the original amount not shown), which included repairs and maintenance on her car, the cost of a piano which was awarded to her, and other installment debts. She was directed by the decree to assume these obligations.

The petitioner argues that, in effect, the award to the respondent of $7,800 gives to her property which was a gift to himself and his first wife and that the property should be entirely excluded from consideration in determining any award to the respondent.

We have consistently held that rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466; Pfeiffer v. Pfeiffer, 203 Neb. 137, 277 N. W. 2d 575. The court shall also have regard for the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities. Campbell v. Campbell, 202 Neb. 575, 276 N. W. 2d 220. How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. Ulmer v. Ulmer, *ante* p. 351, 287 N. W. 2d 685.

The trial court did not abuse its discretion in making the award to the respondent. Respondent is

awarded an attorney's fee of $500 for the services of her attorney in this court.

AFFIRMED.

SAYER ACRES, INC., A CORPORATION, ET AL., APPELLANTS, V. MIDDLE REPUBLICAN NATURAL RESOURCES DISTRICT, A BODY POLITIC AND CORPORATE, APPELLEE.

287 N. W. 2d 692

Filed January 22, 1980. No. 42555.

1. **Eminent Domain: Damages: Juries: Witnesses.** In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury.
2. **Eminent Domain: Damages: Juries.** The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.
3. **Jurors: Waiver.** The right to challenge a juror for cause may be waived or lost by a lack of diligence. The failure to make appropriate inquiry as to the qualifications of prospective jurors on voir dire waives later objections based on facts that might have been disclosed by such inquiry.

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

Leonard P. Vyhnalek of McCarthy, McCarthy & Vyhnalek, for appellants.

C. Kenneth Spady and James A. Lane of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellee.

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

MCCOWN, J.

This is a condemnation proceeding in which the condemnor, Middle Republic Natural Resources

District, sought to acquire a water storage and flowage easement on lands owned by the appellant corporation and occupied by the individual appellants. The jury returned a verdict assessing the appellants' damages at $6,965. The condemnees have appealed.

The Middle Republican Natural Resources District commenced this proceeding to acquire a perpetual water storage and flowage easement upon the Sayers' land. The easement was to be used in connection with a floodwater retarding dam or structure which was constructed downstream from the Sayer land. The dam structure is not designed for permanent storage of water, but allows the floodwaters to pass through the structure at a slower rate over a period of days. At flood times the retarding dam has the potential of backing water up to the bed of Cedar Creek which flows across the length of the Sayer land. The Sayer land involved is a 624-acre tract of pasture. The easement to be taken by the district consists of 13.6 acres of the creek bed.

The evidence established that with the flood retention dam in place a 4½-inch rain would be required to back the water up to the Sayer land. Such a rain would be a 60-year rain and if a 4½-inch rain were received, the water would be off the Sayer land in approximately 2 days time.

In the proceeding in the county court the appraisers made an award of $8,912.50 to the Sayers. The Sayers appealed to the District Court.

In the District Court the expert witness for the district testified that the difference in the value of the land before and after the taking was $5,340. The expert witness for the Sayers testified that the difference in value was $30,481, and three officers of the Sayer corporation testified the difference in value was $41,553. The jury viewed the premises prior to the introduction of evidence and testimony, and at the conclusion of the trial returned its verdict for $6,965. The Sayers have appealed.

The appellants contend that the jury verdict was inadequate and clearly wrong. There is no contention that the instructions were wrong, that evidence was improperly received, nor that any expert witness was not qualified to give the opinion which he gave.

In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Harmony Lanes v. State, 193 Neb. 826, 229 N. W. 2d 203.

The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Ward v. Nebraska Electric G. & T. Coop., Inc., 195 Neb. 641, 240 N. W. 2d 18. In the case now before us the jury viewed the premises, and saw and heard the witnesses. The verdict of the jury is within the range of the evidence and testimony and we cannot say it is clearly wrong.

The appellants also contend that the verdict must be set aside because it was discovered after trial and verdict that one of the jurors had a brother who was a member of the board of directors of the condemnor district. There is no contention that the appellants did not have full and ample opportunity to examine all the jurors at the time of voir dire. There can be no doubt that a party has the right to examine jurors for possible disqualification on such grounds as are asserted here.

We have consistently held that the right to challenge a juror for cause may be waived or lost by a lack of diligence. The failure to make appropriate inquiry as to the qualifications of prospective jurors on voir dire waives later objections based on facts that might have been disclosed by such inquiry. Selders v. Armentrout, 192 Neb. 291, 220 N. W. 2d

222. By passing the jurors for cause the appellants waived any objection to their selection as jurors.

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

AFFIRMED.

JOY ELLEN KENNEDY, APPELLEE, V. KEITH VERL KENNEDY, APPELLANT.

287 N. W. 2d 694

Filed January 22, 1980. No. 42560.

1. **Motions, Rules, and Orders: Judges.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
2. **Motions, Rules, and Orders: Judges: Appeal and Error.** Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.
3. **Equity: Judges: Appeal and Error.** Ordinarily, where the action is in equity and is tried de novo in this court, a claim that the trial judge was disqualified for bias and prejudice is not material.
4. **Divorce: Parent and Child: Jurisdiction.** Ordinarily, jurisdiction over the custody of a child in a divorce proceeding terminates when the child reaches his majority.
5. **Divorce: Parent and Child: Appeal and Error.** The determination of the trial court with respect to changing the custody and support of minor children will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or the determination is clearly against the weight of the evidence.

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

Stanley D. Cohen, for appellant.

No appearance for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolu-

tion of a marriage. By a judgment rendered April 13, 1977, the trial court dissolved the marriage, divided the marital property, awarded custody of the minor children of the parties, and awarded child support to the petitioner.

On October 12, 1977, the petitioner filed an application alleging that the respondent had failed to comply with the April 13, 1977, judgment. On October 28, 1977, the respondent filed a petition to modify the decree in regard to custody and child support. The application of the petitioner and the petition of the respondent were consolidated for hearing on November 8, 1977. The trial court determined the amount of child support due the petitioner from the respondent; settled the dispute between the parties concerning certain specific items of personal property; directed that the parties submit to a family counseling program; and took the matter of custody and visitation rights under advisement for 90 days.

On May 3, 1978, the respondent filed a second petition to modify the decree, alleging that the petitioner should be required to assume a share of the income tax liability for 1977 resulting from the property division. In September 1978 the respondent moved to quash writs of execution which the petitioner had caused to be issued. The respondent also moved for an order nunc pro tunc to amend the decree of April 13, 1977, so as to conform it to the terms of the child custody provisions of the stipulation as made in open court on April 8, 1977, and approved by the trial court at that time.

The petition to modify the decree filed May 3, 1978, and the two motions were heard on September 14, 1978. The trial court found that the judgment of April 13, 1978, with regard to the division of property was final and not subject to modification, and that the motions to quash the executions should be overruled. The other matters pending were continued until November 21, 1978.

On November 15, 1978, the respondent moved to disqualify Judge Reimer from hearing any further matters in the case.

On November 21, 1978, Judge Reimer overruled the motion to disqualify him from further participation in the case. The petition to modify the decree in regard to custody and child support was dismissed and the motion for an order nunc pro tunc was overruled. The respondent has appealed.

The assignments of error relate to the ruling on the motion to disqualify the trial judge; the motion to amend the decree nunc pro tunc; and the custody of the children.

A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Franks v. Franks, 181 Neb. 710, 150 N. W. 2d 252. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law. State v. Davis, 198 Neb. 823, 255 N. W. 2d 434. Ordinarily, where the action is in equity and is tried de novo in this court, a claim that the trial judge was disqualified for bias and prejudice is not material. Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721; Franks v. Franks, *supra*.

The principal evidence submitted in support of the motion to disqualify was the testimony of the respondent. The pleadings filed in the District Court were offered and received and it was agreed that a transcript of the proceedings in the case to date would be considered as received in evidence. There was an offer of proof concerning a conversation between the trial judge and children involved in another case, but the offer was so vague and incomplete that it was impossible to determine what relevancy, if any, the conversation might have had in regard to the issues in this case.

The respondent testified generally about matters

concerning the case with which he was dissatisfied. He had married Wilma Laura Murdoch who was divorced from John William Murdoch. In the Murdoch case custody of the children had been awarded to Mr. Murdoch and, apparently, the respondent felt that his own case had been prejudiced by the evidence and events in the Murdoch case. At the hearing on November 8, 1977, the respondent admitted that he and Laura, his present wife, had lived together for approximately 5 months before they had been married.

The respondent's testimony tended to reflect more dissatisfaction with his counsel than with the trial court, although he did testify that he thought the trial court was very biased against him and that he could not receive a fair and impartial hearing from the trial court.

The record in this case shows that the judgment entered on April 13, 1977, was primarily the result of stipulations between the parties. After the judgment had been in effect for some time the respondent became dissatisfied with the judgment and attempted to modify the property division and custody arrangement to which he had agreed. The respondent did not perform his obligations under the judgment and, apparently, his counsel had difficulty in obtaining performance from the petitioner as to some items. This was more of a reflection upon the parties and their counsel than it was upon the trial court. As we view the record, it does not support the respondent's contention that the trial judge should have disqualified himself. We find no error in the ruling on the motion.

The principal controversy concerning the custody of the children involves Patrick, the son of the parties, who was born November 8, 1960. Patrick became 19 years of age on November 8, 1979, approximately 1 month before this case was heard in this court. Since Patrick has now reached his majority

all disputes concerning his custody have become moot and do not require further consideration. § 38-101, R. R. S. 1943. Ordinarily, jurisdiction over the custody of a child in a divorce proceeding terminates when the child reaches his majority. 27B C. J. S., Divorce, § 314, p. 488. See, also, Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407.

With respect to Robyn, the daughter of the parties, who was born June 21, 1964, the judgment provided that custody was awarded to the petitioner with reasonable rights of visitation in the respondent. Child support was fixed at $200 per month plus one-half of medical bills. These provisions conform to the stipulation made on April 8, 1977, and approved by the trial court at that time.

The record shows that in recent years the respondent has not enjoyed a favorable relationship with his children and has had difficulty in exercising his rights of visitation. This appears to be due somewhat to fault on the part of both parties. The respondent is entitled to reasonable rights of visitation, and the trial court has preserved these rights. For these rights to be effective it will be necessary for the respondent to make a greater effort to establish a satisfactory relationship with his daughter.

The determination of the trial court with respect to changing the custody and support of minor children will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or the determination is clearly against the weight of the evidence. McCurry v. McCurry, 202 Neb. 235, 274 N. W. 2d 865. There is no evidence in the record of a change in circumstances which would indicate that a change in the custody of Robyn should be made at this time.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELMER A. CHAPMAN, APPELLANT.
287 N. W. 2d 697

Filed January 22, 1980. No. 42724.

1. **Criminal Law: Statutes: Sentences.** Section 39-669.07, R. R. S. 1943, governs the sentence limits which the court may impose for violations of that section.
2. **Criminal Law: Misdemeanors: Habitual Criminals.** Misdemeanor offenses which arise to felony status by virtue of repetition may not act as a trigger conviction for purposes of determining whether the defendant may be given an enhanced penalty under the Habitual Criminal Act.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded with directions.

Michael D. Gooch, 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.

WHITE, J.

Defendant, Elmer A. Chapman, was charged with third offense operation of a motor vehicle while under the influence of alcoholic liquor and as being a habitual criminal. Evidence was introduced at trial to show police observed the defendant driving in an erratic manner on August 2, 1978. When the police arrived, the defendant was out of the car. Evidence was also introduced that the defendant's speech was slurred and his eyes were bloodshot. After trial by jury, a verdict of guilty to the driving while intoxicated charge was returned. At a later hearing, evidence was received of three previous convictions of the defendant for driving while intoxicated and on the basis of this evidence, the court found that the current offense was a third offense. An additional hearing was held on whether the defendant was a

habitual criminal. The defendant had previously been convicted of malicious destruction of property and driving while intoxicated, third offense. Based upon evidence of these two convictions for a felony, for each of which he was sentenced to a term of not less than 1 year and committed to prison in this state, the court determined the defendant should be sentenced as a habitual criminal under section 29-2221, R. R. S. 1943. Defendant was sentenced to a term of 10 years in the Nebraska Penal and Correctional Complex with credit for 22 days served in jail. We reverse and remand.

Defendant contends the trial court erred in sentencing him as a habitual criminal since the recidivist statute provides for a disproportionate penalty contrary to law. His position is that the Legislature has established a proportionate penalty for the operation of a motor vehicle by a person who is under the influence of alcoholic liquor, third offense. Prior to the new criminal code, that penalty was 1 to 3 years imprisonment. § 39-669.07, R. R. S. 1943.

Chapman attacks the sentence resulting from application of the habitual criminal statute on constitutional grounds. Article I, section 15, of the Constitution of Nebraska, provides in part: "All penalties shall be proportioned to the nature of the offense * * *." While arguably the sentence is severe in proportion to the offense charged, we do not reverse on this ground. The recidivist statute has been upheld repeatedly against almost every conceivable constitutional challenge, including due process, double jeopardy, and cruel and unusual punishment. State v. Losieau, 184 Neb. 178, 166 N. W. 2d 406 (1969); State v. Harig, 192 Neb. 49, 218 N. W. 2d 884 (1974). This court has concluded the recidivist statute comprises permissible legislative judgment on sentencing. State v. Konvalin, 179 Neb. 95, 136 N. W. 2d 227 (1965); Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82 (1940).

Although we do not find the defendant's constitutional attack persuasive, we do disagree with the trial court's application of the habitual criminal statute. The threshold question is whether a defendant currently convicted of driving while intoxicated, third offense, and convicted of two previous felonies may be sentenced as a habitual criminal. This court is reluctant to apply an expansive reading to the Habitual Criminal Act for the reasons set forth.

For the first time, this court faces the question of whether a previous conviction of an offense made a felony solely by reason of a previous conviction may be utilized as a basis for an adjudication of habitual criminality under the habitual criminal statute. We hold that offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute "felonies" within the meaning of prior felonies that enhance penalties under the habitual criminal statute.

The weight of authority is against double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute. Goodloe v. Parratt, 605 F. 2d 1041 (1979). As pointed out by the Eighth Circuit Court in Goodloe, these decisions do not rest on federal constitutional grounds. The issue of whether, upon conviction of a misdemeanor, sentence could be imposed on a felony charge under a habitual criminal statute rests on an interpretation of state law. United States ex rel. Glenn v. Pate, 406 F. 2d 68 (7th Cir., 1969).

In State v. Goodloe, 197 Neb. 632, 250 N. W. 2d 606 (1977), this court said that sentencing a defendant as a habitual criminal, charged with willful and reckless driving and with operating a motor vehicle to avoid arrest, did not violate the defendant's constitutional guaranties. Goodloe did not raise the question of whether the Legislature intended a third or subsequent conviction of the misdemeanor to be a

"trigger" felony conviction for the application of the Habitual Criminal Act.

The statute prohibiting driving while under the influence of alcoholic liquor, section 39-669.07, R. R. S. 1943, specifically provides for a penalty within the terms of the statute. The applicable section provides: "* * * (3) if such conviction is for a third offense, *or subsequent offense thereafter,* such person shall be imprisoned * * * for not less than one year nor more than three years * * *." (Emphasis supplied.) On the basis of the specificity of the statutory language, we conclude that the Legislature intended that convictions for third offense and all subsequent offenses under section 39-669.07 should be treated similarly. Several states have held that penalty enhancement provisions set forth for subsequent offenses of specific crimes must be used when applicable *instead* of sentencing under a habitual criminal act, implying that both statutes may not be used for double penalty enhancement in sentencing for one offense. Goodloe v. Parratt, *supra*; State v. Heyward 90 N. M. 780, 568 P. 2d 616 (1977); Lloyd v. State, 139 Ga. App. 625, 229 S. E. 2d 106 (1976); State v. Loudermilk, 221 Kan. 157, 557 P. 2d 1229 (1976); Willeford v. State, 454 S. W. 2d 745 (Tex., 1970); Broome v. State, 440 P. 2d 761 (Okla., 1968). The American Bar Association has condemned the enhancement of a felony term on the basis of prior misdemeanors on the rationale that misdemeanors by nature do not threaten the security of the public to the same extent as felonies. ABA Standards Relating to Sentencing Alternatives and Procedures, Commentary, § 3.3 (f), p. 167.

The language of section 39-669.07 (3), R. R. S. 1943, specifically exempts offenders such as Chapman from the operation of the habitual criminal provision.

We conclude the Legislature has established the penalty for operation of a motor vehicle by a person

who is under the influence of alcoholic liquor in section 39-669.07, R. R. S. 1943. For this reason, the sentence of the trial court is reversed and the cause is remanded with directions to impose an appropriate sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., concurring in the result.

I concur in the portion of the opinion which is founded upon the language of section 39-669.07, R. R. S. 1943. It is clear to me that the language: ". . . (3) if such conviction is for a third offense, or subsequent offense thereafter, such person shall be imprisoned in the Nebraska Penal and Correctional Complex for not less than one year nor more than three years . . ." clearly and unambiguously indicates the legislative intention that the habitual criminal act not apply for convictions under section 39-669.07, R. R. S. 1943, and the maximum sentence for all subsequent offenses is 3 years. Under the new Criminal Code, the maximum penalty would be 5 years. § 28-105, R. S. Supp., 1978.

WALTER B. REMINGTON AND HARRIETT ANNE REMINGTON, HUSBAND AND WIFE, APPELLEES, V. ROBERT BRYAN AND HILDA BRYAN, APPELLANTS.

288 N. W. 2d 253

Filed January 29, 1980. No. 42277.

1. **Verdicts: Trial.** A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Pleadings: Evidence: Trial.** A motion to amend the pleadings to conform to the evidence, made at the close of all evidence, rests within the sound judicial discretion of the trial court either to per-

mit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment.

3. **Contracts: Damages.** Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects.
4. **Pleadings.** Under the Nebraska system of code pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Martin A. Cannon of Matthews & Cannon, P.C., for appellants.

Warren S. Zweiback and Pat Lamberty of Zweiback, Brady, Kasher & Festersen, P.C., for appellees.

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

STUART, District Judge.

This case is an appeal by the defendants, Robert and Hilda Bryan, from a jury verdict and judgment entered thereon in favor of the plaintiffs, Walter and Harriett Remington, in the amount of $10,000, representing damages for a breach of warranty in connection with the building of a new home. We affirm.

The parties entered into a contract on August 22, 1973, for plaintiffs to buy a home then under construction by defendants. The house was completed and was conveyed to the plaintiffs on November 20, 1973. Beyond these facts there is considerable difference in the evidence with reference to the transaction as related by the parties. However, the evidence was such that a jury could find that at the time of the contract the defendants emphasized the quality of the workmanship to go into the house, and further expressly warranted that they would stand behind their work and that following the closing date they would guarantee repairs for 1 year, which guar-

antee included workmanship and any defects which might arise. Prior to the closing date the plaintiffs listed 29 defects and the defendants agreed to fix them. However, after these defects were not repaired and after a second request, the defendant Robert Bryan was quoted as saying, "I won't put another damn nickel in it." On the day of closing, November 20, 1973, the defendants again assured the plaintiffs that the defects would be corrected and the house was conveyed to the plaintiffs and payment made to the defendants. Shortly after the closing date the plaintiffs observed that the defects had not been corrected and Mrs. Remington contacted Mrs. Bryan, at which time Mrs. Bryan was quoted as saying, "Bob is not going to spend another dime and he is not going to do anything more." On December 11, 1973, after a snowstorm, the plaintiffs discovered that snow had blown into the attic, melted, and the resulting water caused damage to the interior of the house. Plaintiffs again contacted defendants and defendants conceded that the snow blew in because of failure to install flashing in the break in the gambrel roof. Defendants caused this flashing to be installed immediately, but did not repair the damage to the interior of the house, and subsequent snowstorms caused further snow to be blown in and the melting thereof resulted in further damage.

In late January 1974 plaintiffs caused their attorney to send a letter to defendants listing 30 defects and requesting that the defendants make the necessary repairs. Defendants did not contact plaintiffs, nor did they make any of these repairs. Plaintiffs filed this suit on March 27, 1974, listing in the petition 31 alleged defects. After moving into the house in April 1974 plaintiffs employed a Mrs. Herrick to inspect the house. She made a list of 111 claimed defects, which list Mrs. Remington gave to Mr. Bryan in May 1974, at which time Mr. Bryan and his attorney inspected the house and referred to the com-

plaints in this list.

The case came on for trial in June 1978. The complaint lists of November 1973 and May 1974 (the "Herrick" list) were received in evidence, but the list of January 1974 (which was incorporated in the petition) was not admitted in evidence. At the conclusion of plaintiffs' case the plaintiffs moved to file an amended petition which included the "Herrick" list of defects, and the court allowed this amended petition to be filed.

Defendants have assigned 15 errors that are argued in their brief in 7 groupings. They will be considered in the same manner.

Defendants complain that it was error to overrule their motion for a directed verdict. They contend that the parties agreed that the warranty was a promise to remedy any defect within 1 year of closing upon notice and request by plaintiffs; that every defect brought to defendants' attention and which they were allowed to attend to had been remedied; and that with regard to the remaining defects defendants were not allowed to remedy them or that access was refused by plaintiffs. However, with the conflict in evidence by different witnesses, a jury could have found the facts as set forth above. The defendants admitted they did not repair the damage caused by the melting snow blown in the attic on December 11, 1973. In addition to this, the defendants admitted they received the demand to repair sent by plaintiffs' attorney in January 1974 and did not make such repair. The defendants attempt to justify this by a claim that plaintiffs would not permit them to enter the home. Mrs. Remington admitted on cross-examination that certain subcontractors telephoned her with regard to the house, but she never admitted that she refused admittance for the defendants or some of their subcontractors to repair the home. All witnesses agree that Mr. Bryan was admitted to the house and inspected it in May 1974 and did not

offer to repair any of the claimed defects. The rule is: " 'A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.' Kortus v. Jensen, 195 Neb. 261, 237 N. W. 2d 845 (1976)." Anderson v. Moore, 202 Neb. 452, 275 N. W. 2d 842.

Upon the evidence introduced, the jury could reasonably find that the plaintiffs did notify the defendants of true defects and that the defendants refused or neglected to correct those defects. Therefore, the trial court was correct in refusing a motion for a directed verdict.

The defendants next complain that the court should not have allowed the plaintiffs to amend their petition at the time of their rest to include a cause of action based upon express warranty and to include the list of complaints known as the "Herrick" list. "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." § 25-852, R. R. S. 1943.

The parties agree that the warranty was to the effect that the defendants would correct any defects for 1 year. Since the defendants admit that this ex-

press warranty was made, the allowing of this amendment was within the discretion of the court. The jury was justified in believing that Mrs. Remington delivered the "Herrick" list to Mr. Bryan when he and his attorney came to look at the house in May 1974. The "Herrick" list was not a surprise to the defendants. The list of claimed defects of January 1974 (which is identical to the list attached to the petition except for defect No. 31) was not admitted in evidence, and it was within the court's discretion in the interests of justice to allow the plaintiff to amend their petition to include the "Herrick" list.

The defendants next complain that the court's instruction No. 2 did not correspond with the plaintiffs' petition, as amended. We have examined the instruction given and it appears to us that the court did fairly reflect the allegations of the plaintiffs' petition, as amended, in instruction No. 2.

The defendants next complain of the admission of the "Herrick" list and the refusal of defendants' cautionary instruction No. 7; the refusal to eliminate the items on the "Herrick" list for which specific amounts of cost of repair had not been received in evidence; the refusal to give defendants' requested instruction No. 4; and the giving of the court's instruction No. 14.

The court's instruction No. 14 is a direct quotation of NJI 2.12, defining the preponderance of evidence, and is a standard instruction. Probably, the defendants are attempting to complain about the giving of instruction No. 15 which reads: "You are instructed that if you find for the plaintiffs and against the defendants under either or both theories of recovery, you must then proceed to find and determine the amount of the recovery, which is determined where the construction of a house is substantially performed, then damages recoverable because of defective workmanship or unsuitable materials is measured by the reasonable costs of remedying the

defects or omissions.

"Whether any of the elements of damage have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guess, or conjecture." This instruction would seem to set forth correctly the measure of damages of the defects to be repaired. "Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects." Stungis v. Union Packing Co. of Omaha, Inc., 196 Neb. 126, 241 N. W. 2d 660.

The gist of defendants' complaint is that the witness Herrick did not assign repair costs to remedying certain defects, simply noting the defects and saying the plaintiffs would just have to "live with them." Defendants urge that the court should have instructed that "The measure of damages, when a contractor's violations result in defects which cannot be remedied without reconstruction, is the difference between the value of the structure and the value it would have had if built according to the contract" and cite in support thereof Jones v. Elliott, 172 Neb. 96, 108 N. W. 2d 742.

The plaintiffs did not offer evidence of the amount of damage caused by these defects that "could not be remedied." However, the verdict is supported by evidence of damages, as testified to by plaintiffs' witnesses, with regard to alleged defects that could be repaired. It would have been error to give an instruction setting forth a measure of damages not supported by the evidence. The court was correct in refusing to give such a requested instruction.

We have examined the defendants' requested instruction No. 4 and find that the jury was sufficiently cautioned with regard to the standards to be considered in determining what was indeed a defect by the court's instruction No. 9.

The defendants next complain of the court's giving of instruction Nos. 5 and 8 in which the court set forth the requirements for recovery under an express warranty. The defendants' complaint is that the parties agreed that there was an express warranty wherein the "defendants promised that they would cause repair to be made at no cost to plaintiffs for any defect of material or workmanship of which they were notified within one year of the closing on November 20, 1973." Defendants contend that where the parties have agreed on a fact in issue, the fact is established as a matter of law, and to submit the issue to the jury is error. This is a correct statement of the law, but the giving of these instructions certainly was not prejudicial to the defendants. The court required the jury to find that an express warranty existed (among other things) before finding for the plaintiffs. This requirement constitutes harmless error.

Defendants' 14th assignment of error is the giving of instruction No. 13, which reads as follows: "Plaintiffs would be required to give defendants a reasonable opportunity to perform their warranty to repair or replace defective construction or material, but plaintiffs were not required to perform a useless act, if a reasonable person would under all of the circumstances of the case know that requests would not be met with performance, then requests would not be required." Defendants contend that the plaintiffs pleaded notice and demand for repairs to the house, and therefore were not entitled to an instruction also allowing them to recover even if they did not give such notice and demand.

Under the Nebraska system of code pleading, "The petition must contain * * * a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition * * *." § 25-804, R. R. S. 1943. Plaintiffs' petition conformed to this code requirement and adequately informed

the defendants of plaintiffs' cause of action. The court's instruction fairly reflects the law. The giving of the instruction allowing plaintiffs an additional theory of recovery under the facts was not error. Under the Nebraska system of code pleading, the plaintiff is required to plead the facts, not the theory of recovery.

Lastly, the defendants contend that the plaintiffs inspected the defendants' own home prior to entering into the contract and that the buyers cannot complain that their house was "defective" unless its construction varied from the sample. It is true that when plaintiffs were shown defendants' home, the defendants told the plaintiffs that the house being built was a "mirror image" of that house except for exterior detail. However, Mr. Bryan also told the plaintiffs that he was an exclusive builder, one allowed to build in "Regency," a subdivision in Omaha, the location of the house under construction. Defendants emphasized the quality of workmanship and gave the express warranty as noted above. Under such facts it is not necessary to prove that the "defects" were different from the "show house," but it is sufficient if it is shown that the house in question was not constructed in a good workmanlike manner or that defective materials were installed.

The case was tried to a jury, the jury returned a verdict for the plaintiffs, and the plaintiffs are entitled to this verdict.

AFFIRMED.

DIESEL SERVICE, INC., A NEBRASKA CORPORATION, APPELLANT, V. ACCESSORY SALES, INC., APPELLEE.

288 N. W. 2d 258

Filed January 29, 1980. No. 42372.

1. **Appropriation of Payments.** Where payments are made on an open account, and no appropriation thereof has been made by either party before a controversy has arisen concerning them, the law will apply them in discharge of the earliest items.
2. **Appropriation of Payments: Trial.** The debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and a fortiori at the time of the trial.
3. **Contracts: Payments: Time.** Where a creditor has treated a debtor's account as an open or running account by debiting purchases and crediting payments and showing the balance due after each entry, he may not reconstruct the account after a dispute has arisen by crediting particular payments to particular purchases so as to claim a breach of an agreement by the debtor to pay for purchases within 30 days.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Reversed and remanded for a new trial.

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

Donald J. Tedesco, for appellee.

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

BOSLAUGH, J.

This was an action for damages brought by the plaintiff, Diesel Service, Inc., against the defendant, Accessory Sales, Inc. The action arose out of a controversy concerning a distributorship agreement between the parties in which the plaintiff was granted an exclusive territory for the distribution of the R-W precleaner, an air filter or cleaner device used on

diesel engines.

The agreement, which was entered into on November 16, 1966, provided that the plaintiff would pay promptly for all equipment purchased from the defendant in accordance with the terms of the agreement. The agreement further provided that in the event either party breached the agreement, and the breach continued unremedied for 60 days after notice of the breach by the party not in default, the party not in default, at its option, might terminate the agreement by written notice to be effective 10 days after service. The agreement provided specifically that time of payment and performance was of the essence of the agreement.

The terms of payment specified in the agreement were as follows: "Cash discount 2 per cent 10th and 25th, net 30; which means a cash discount of 2 per cent as to all items received between the 25th of the month and the 10th of the following month, and paid by the 10th of such following months, and such a discount of 2 per cent of all items received between the 10th and 25th of each month if paid by the 25th of that month with net price being due in 30 days."

The evidence shows that the plaintiff developed a large market for the defendant's product in the territory granted to the plaintiff, but as the volume of business increased the plaintiff did not keep its account with the defendant current. On December 5, 1973, the defendant sent a 60-day notice of default to the plaintiff. A notice of termination was not sent following this notice, and in its answer the defendant admitted the plaintiff remedied the breach by payment of "an amount sufficient to bring its account current."

On January 27, 1975, the defendant again sent a 60-day notice of default to the plaintiff and a 10-day termination notice on March 28, 1975. The principal issue in the case is whether in fact the plaintiff was in default on March 28, 1975, so that the defendant

could terminate the agreement.

The parties continued to do business with each other after April 7, 1975, and the defendant continued to fill orders from the plaintiff until April 21, 1975.

On April 21, 1975, at about 7:30 a.m., Len Cranston, the only salesman employed by the plaintiff, came to the plaintiff's office and notified Daniel E. Kinnison, the president and sole stockholder of the plaintiff, that he was quitting. Cranston then immediately went to the defendant's office and spent the day telephoning customers of the plaintiff to tell them the plaintiff was no longer a distributor for the defendant's product, that dealers could now buy directly from the defendant, and Cranston was now employed by the defendant. On the same day the defendant mailed 500 letters to the plaintiff's customers telling them the plaintiff was no longer a distributor of the defendant's product and the product could now be purchased directly from the defendant. Before Cranston told Kinnison that he was quitting, he had the secretaries employed by the defendant copy the information in the customer books Cranston had used when he was on the road for the plaintiff.

On the same day, April 21, 1975, after Cranston had notified Kinnison that he was quitting, Thomas Wilson, the president of the defendant, came to the plaintiff's office and told Kinnison the contract was terminated. The last sale and delivery of the product from the defendant to the plaintiff took place that day.

When Cranston went on the road for the defendant, he picked up the plaintiff's catalogs, destroyed them, and substituted the defendant's catalogs for the plaintiff's when he called on customers.

This action was commenced on December 22, 1977. The plaintiff alleged that Thomas Wilson and the defendant conspired with Cranston to injure the business of the plaintiff and acquire its customers; that

the defendant owed the plaintiff $16,832.21 for volume discounts; that the defendant wrongfully breached the distributorship agreement; that the agreement had not been lawfully terminated; that the plaintiff had been damaged in the amount of $818.75 because the defendant had converted the plaintiff's catalogs; and that the plaintiff had been damaged by loss of business because of the conversion of its catalogs. The petition prayed for $16,832.21 for volume discounts, $818.75 for the converted catalogs, and general damages with interest, costs, and an attorney's fee.

The defendant's answer alleged that the terms of each order were specified on the invoice; that the plaintiff breached the distributorship agreement by failing to keep its account current; that the agreement for volume discounts had been terminated because of the plaintiff's delinquencies; that the agreement had been terminated by the March 28, 1975, notice of termination; that there had been an accord and satisfaction between the parties; and that the defendant had not converted the plaintiff's catalogs. The defendant also counterclaimed for alleged unfair competition by the plaintiff after the agreement had been terminated.

The case was submitted to the jury by a form of special verdict which contained eight questions. By its verdict the jury found the defendant had not conspired with Cranston to injure the plaintiff's business; the plaintiff had breached the agreement by failing to pay promptly and did not correct the default within 60 days after notice; the defendant had not waived the breach of the agreement by the plaintiff; there had been no accord and satisfaction; the defendant had converted the plaintiff's catalogs and the plaintiff had been damaged in the amount of $3,000 because of the conversion of its catalogs; and the plaintiff had not been damaged because of the defendant's "bad faith" or "without cause" termina-

tion of the contract.

The trial court entered judgment for the plaintiff on the verdict. Later, on the defendant's motion to set aside the judgment or verdict, the trial court granted a remittitur for that portion of the verdict in excess of $800. The plaintiff then filed its notice of appeal.

The facts concerning the products purchased by the plaintiff from the defendant and the payments by the plaintiff to the defendant are not in dispute. The evidence shows the defendant kept its books by debiting the plaintiff's account with purchases, crediting the account with payments "On acct," and showing the balance due after each entry. Thus, the plaintiff's account was treated as an open or "running" account by the defendant. The defendant made no attempt to account for each invoice separately and did not treat each invoice as a separate account. The defendant's method of accounting applied the plaintiff's payments to the earliest purchases and was fully in accord with the terms of the contract.

Under the terms of the distributorship agreement, the plaintiff was required to pay for products purchased within 30 days of the purchase. The evidence shows the plaintiff was in default on January 27, 1975, because on that date it owed the defendant an amount greater than the amount due for products purchased within the preceding 30 days. However, during the next 60 days the plaintiff made sufficient payments to the defendant so that at the end of the 60-day period the amount due the defendant was less than the amount due for products purchased within the preceding 30 days. Thus, the evidence shows as a matter of law that the plaintiff was not in default on March 28, 1975, and the defendant had no right to terminate the contract.

This is in accord with the general rule as to application of payments between debtors and creditors.

In State v. Hill, 47 Neb. 456, 66 N. W. 541, this court said: "The rule deducible from the authorities in regard to the application of payments may be summarized as follows: A debtor paying money has the right to direct its application, but if he fails to do so, the creditor may make the application at any time before suit is brought. (Robinson v. Doolittle, 12 Vt., 246; Wendt v. Ross, 33 Cal., 650; McCune v. Belt, 45 Mo., 174; United States v. Kirkpatrick, 9 Wheat. [U. S.], 720.) It is equally well settled that where payments are made on an open account, and no appropriation thereof has been made by either party before a controversy has arisen concerning them, the law will apply them in discharge of the earliest items. (Lazarus v. Friedheim, 11 S. W. Rep. [Ark.], 518; Pierce v. Knight, 31 Vt., 701; Milliken v. Tufts, 31 Me., 497; Wendt v. Ross, 33 Cal., 650; Thurlow v. Gilmore, 40 Me., 378; Harrison v. Johnston, 27 Ala., 445; Hersey v. Bennett, 9 N. W. Rep. [Minn.], 590; United States v. Kirkpatrick, 9 Wheat. [U. S.], 720; Jones v. United States, 7 How. [U. S.], 684.) In the last case the rule was applied to a running account between the United States and a postmaster. In United States v. Kirkpatrick, *supra,* Judge Story in delivering the opinion of the court said: 'The general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and a fortiori at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjudged than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits

are to be deemed payments pro tanto of the debts antecedently due.' '' See, also, State ex rel. Spillman v. Security State Bank, 116 Neb. 526, 218 N. W. 407.

The defendant produced an expert witness who testified that the plaintiff was in default on March 28, 1975. He arrived at this conclusion by reconstructing the defendant's books and applying particular payments to particular invoices. By this method it was possible to identify certain invoices as being unpaid for more than 30 days. This witness admitted, however, that the plaintiff was not in default if all purchases were debited to the account and all payments credited as in fact the account had been kept.

There was nothing in the agreement that required the plaintiff to pay each invoice separately, and the defendant's method of bookkeeping demonstrated that it did not so interpret the agreement. The plaintiff's obligation under the agreement was to pay for products purchased within 30 days. On March 28, 1975, the plaintiff had remedied the default because its indebtedness to the defendant was less than the amount due for products purchased within the preceding 30 days.

After the dispute had arisen, the defendant had no right to change its application or appropriation of the payments which the plaintiff had made to its account.

By instruction No. 4 the trial court advised the jury that the plaintiff was required to pay "each invoice" within 30 days and the plaintiff was in default if it "owed defendant on an invoice 30 full days or more past its shipping date." The instruction was erroneous because it interpreted the contract to mean that each invoice was to be treated separately. More importantly, since there was no issue for the jury in that regard, the jury should have been instructed that the plaintiff was not in default on

March 28, 1975, and the defendant's wrongful attempt to terminate the contract was a breach of the contract.

It is unnecessary to discuss the plaintiff's other assignments of error except that a remittitur was improper under the facts and circumstances in this case. The verdict of $3,000 for the destruction or conversion of the plaintiff's catalogs indicated that it was probable the jury did not understand the manner of the submission of the case and the verdict was a result of error or mistake.

Since the evidence does not support the verdict the judgment must be reversed and the cause remanded for a new trial. The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion because I believe it misuses, in a manner which is without precedent, the principles of law pertaining to application of payments, and it does so in such a way as to change and modify the plain and unambiguous terms of the written contract between the parties.

The majority opinion, in its second and third paragraphs, summarizes the contractual provisions relative to payment and the right to terminate for unremedied delay in payment.

The trial court instructed the jury as follows: "The Court has determined, as a matter of law, and you must accept it as such, that the contract required plaintiff to 'pay promptly'; that 'pay promptly', in this case, means pay each invoice no later than 30 full days from shipping date; that if plaintiff, on January 27, 1975, owed defendant on an invoice 30 full days or more past its shipping date and if plaintiff, on the 61st day following its receipt of the demand letter of January 27, 1975, owed defendant on an invoice 30 full days or more past its shipping date,

even though it not be an invoice owed on January 27, 1975, plaintiff is deemed to have breached the contract and defendant was entitled to terminate the contract unless (a) Its right to so terminate had been waived, or, (b) Its exercise of its right to terminate was in bad faith in furtherance of or pursuant to a conspiracy as alleged by the plaintiff." That instruction correctly interprets the contractual provision and the majority does not contend otherwise. Rather, the majority in effect says that the manner in which the defendant kept its books changed the terms of the contract.

The issues of whether the right to terminate had been waived and whether the termination was in bad faith and in furtherance of a conspiracy were submitted to the jury and on these factual issues the jury found for the defendant, Accessory Sales, Inc. Likewise, there was submitted to the jury the factual determination of whether the plaintiff had failed to pay promptly and in accordance with the terms of the contract as interpreted by the court and that factual issue was resolved in favor of the defendant.

The contract clearly provided that each invoice was to be paid within 30 days of date. It also provided that if default was not remedied within 60 days, then the party not in default could give notice of termination. Termination was effective 10 days after notice.

The plaintiff so understood the contract. The testimony of the plaintiff's owner was as follows: "Q. So you understood that you were to pay 30 days after the date of the invoice? A. Yes. Q. And the contract so provides? A. The contract provides, that was the way we understood it."

The record clearly establishes that the plaintiff was delinquent in its payments during most of the period of the dealings of the parties and that the amounts were substantial. It supports the conclusion that the defendant determined it could no longer

continue in effect to finance the plaintiff's operations by prolonged extensions of credit beyond contract terms. This factual issue, as we noted, was decided by the jury in favor of the defendant. It found that there was no waiver and there was no bad faith in termination.

The record shows that the defendant kept only one ledger for the plaintiff's account. On that record, each sale to the plaintiff was separately listed by date, invoice, and the charges for each invoice. The record indicates that when the plaintiff paid, it seldom paid by single invoice but paid them in groups, for example, three invoices at a time. When the defendant entered the payment on the ledger, it recorded the date and amount of the total payment but did not identify the invoices paid. The ledger showed a running balance of the total owed.

It was possible, however, to relate the payments to the invoices by adding invoices and comparing the amounts of the payments. This the accountant did in preparing the exhibits supporting his testimony. The plaintiff in no way relied upon, nor was it prejudiced by, the way in which the defendant recorded the payments. It acknowledged that it was in default more than it was current.

The instruction left to the jury the determination of whether there was a default within the meaning of the contract as the court had interpreted it. The instruction merely states what the unambiguous terms of the contract were. The interpretation of an unambiguous contract is for the court as a matter of law. Smith v. Wrehe, 199 Neb. 753, 261 N. W. 2d 620; Grantham v. General Tel. Co., 191 Neb. 21, 213 N. W. 2d 439.

Neither the plaintiff nor the majority opinion cites any authority for the use it makes of the application of the payment doctrine in this case. The sole authority cited by the court is State v. Hill, 47 Neb. 456, 66 N. W. 541. That case involved several differ-

ent debts and the rights of third parties, and there was no agreement of the contracting parties as to application. In this case, the contract specifically provided that payments were to be made by invoice within 30 days. Payments were, in fact, made by invoice. The failure of the defendant in this case to record invoice numbers at the time payments were made did not change the fact. In any event, the factual determination was left to the jury and it decided adversely to the plaintiff. The plaintiff did not suffer by the way the defendant made the records. The plaintiff had its own records and knew what it had paid and how it was delinquent.

The rule applying payments to the oldest items has no application when the parties have contracted otherwise. The court must, in that case, apply payments in accordance with the intentions of the parties. 70 C. J. S., Payment, § 72 b, nn. 87, 88, p. 277.

In Ford Hardwood Lbr. Co. v. Bryant, 178 Ark. 807, 13 S. W. 2d 1, the court said: "The doctrine as to the application of payments is stated by this court as follows: 'The general rule is that, where neither debtor nor creditor makes an appropriation at the time of payment, the law applies it to the liabilities of earliest date. The reason is because that course is presumed to conform to the intention of the creditor. Kline v. Ragland, 47 Ark. 119, 14 S. W. 474. If there is any particular reason for a different appropriation, the rule does not apply. Thus, where cotton covered by a mortgage is delivered to the mortgagee, with authority to sell and retain the proceeds, the law appropriates the payment to the discharge of the mortgage debt, because the parties have impliedly agreed in advance how the proceeds shall be disposed of. * * * Whenever the relation of the parties or the nature of the account or transaction between them shows that an appropriation of payments to the earliest items of the account would do injustice between them or fail to conform to their

understanding or agreement, another application is made.' Faisst v. Waldo, 57 Ark. 270, 21 S. W. 436." The first in, first out rule has no application where it would produce inequitable results. Lowden v. Northwestern Nat. Bank & Trust Co., 84 F. 2d 847.

In this case, inequitable results come about because the defendant is deprived of the benefit of its contractual provisions and no equity on the plaintiff's behalf requires a different application than that provided for by the contract. The record shows that the defendant extended credit to the plaintiff for a considerable period of time in a more generous fashion than the contract provided. This gives the plaintiff no equities. This is not a case of an ordinary open account where there was no antecedent agreement as to how payment was to be made.

I would affirm.

SHERMAN COUNTY BANK, A CORPORATION, APPELLEE, V. FLOYD H. KALLHOFF, APPELLEE, IMPLEADED WITH SANDHILL IMPLEMENT, INC., A CORPORATION, APPELLANT.

288 N. W. 2d 24

Filed January 29, 1980. No. 42466.

1. **Security Interests: Time: Uniform Commercial Code.** The purchase money priority provided for in section 9-312, U. C. C., is an exception to the first to file rule, and should be applied only in strict accordance with the limitations in the Uniform Commercial Code.
2. **Sales: Time: Uniform Commercial Code.** Under the Uniform Commercial Code, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, unless otherwise explicitly agreed.
3. **Evidence: Appeal and Error.** Error may be predicated upon a ruling which excludes evidence, even though no offer of proof was made, when the substance of the evidence was apparent from the context within which questions were asked.

Appeal from the District Court for Custer County:

KEITH WINDRUM, Judge. Reversed and remanded for a new trial.

John P. Heitz, for appellant.

Shaughnessy, Shaughnessy & Shaughnessy and W. Gerald O'Kief, for appellee Sherman County Bank.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL and KELLY, L. W., JR., District Judges.

KELLY, L. W., JR., District Judge.

This is an appeal from the District Court for Custer County, Nebraska. The trial court held that, in a replevin action, the right to possession of certain farm equipment was in the plaintiff. The defendant, Sandhill Implement, Inc., has appealed. We find that the action of the trial court should be reversed and the cause remanded for a new trial.

The question presented in this case is one of determining priority of liens upon the farm equipment involved in this matter under the Uniform Commercial Code. The facts disclosed by the record show that on March 1, 1972, one R. L. Moody executed a security agreement in favor of the plaintiff bank as security for the bank financing of Moody's farming operations. The financing statement perfecting the security interest was filed with the county clerk of Valley County by the bank on March 29, 1972, and subsequently with the county clerk of Custer County. The security agreement contained what is often referred to as an "after acquired property" clause, which granted the bank a security interest in all property subsequently acquired by Moody which involved his farming operation.

On the 15th day of August 1975, R. L. Moody entered into a retail installment contract and security agreement with the implement company. The farm equipment purchased was a power unit, combine, and 4-row corn head. This is the property in which right of possession is in question here. The install-

ment contract and security agreement was a form type of agreement with various blanks filled in. In the body of the form is a statement, "[D]elivery and acceptance of which Buyer hereby acknowledges." The financing statement on the power unit was filed in the clerk's office on the 8th day of September 1975. The financing statement on the combine and corn head was filed on the 9th day of October 1975.

Subsequently Moody experienced financial difficulties and the farm equipment involved herein was sold to the defendant, Floyd Kallhoff. A bill of sale was executed by Moody to Kallhoff on the 4th day of March 1976. On the 6th day of March 1976, Kallhoff entered into a retail installment contract with the implement company for the same described equipment. On the same date Kallhoff also executed a financing statement securing the implement company on the equipment, and the financing statement was filed with the county clerk on March 10, 1976.

The first question to be resolved is, does the implement company have a "purchase money security interest?" Section 9-107, U. C. C., states as follows: "A security interest is a 'purchase money security interest' to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price; or (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used."

The implement company appears to be the seller of the equipment to both Moody and Kallhoff. To such an extent it would appear that the implement company did have a "purchase money security interest" in the property in question.

Section 9-312, U. C. C., sets priorities for conflicting security interests in the same collateral. Subsection (4) of this section reads as follows: "A purchase money security interest in collateral other than inventory has priority over a conflicting secur-

ity interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter."

The problem in this case arises over the question of fact as to whether or not the implement company perfected its "purchase money security interest" within 10 days of the date of possession of the collateral.

The bank argues that the date of possession was the 15th day of August 1975, for the reason that the purchaser Moody acknowledged delivery on that date by signing the installment sales contract. The District Court so held.

During the trial of this case a witness, who was a representative of the implement company, was asked the following question: "Was the property listed on Exhibit 11 there — was that delivered to Mr. Moody on August 15th, 1975 the date of the agreement?" Objection was made by counsel for the bank on the basis of relevance and this objection was sustained by the trial court. The question was going to the crux of the controversy as to whether or not the implement company had perfected its "purchase money security interest" within 10 days of the date of possession by the purchaser. The question was certainly relevant and the witness should have been permitted to answer.

The relevance as to the date of physical possession has been previously pointed out by this court. The same question was presented to this court in the case of North Platte State Bank v. Production Credit Assn., 189 Neb. 44, 200 N. W. 2d 1, which case neither of the parties has cited in his brief or argument to this court. Our court pointed out the importance of the date of actual physical possession, stating as follows: "This interpretation is well stated in 2 Coogan, Hogan & Vagts, Secured Transactions Under the Uniform Commercial Code, section 19.02 (3) (a),

p. 1979, wherein it is stated: 'The time at which the debtor receives possession *starts the running* of the ten-day grace period for perfection. Problems will undoubtedly arise as to when the debtor "receives possession" of the collateral. The Code does not offer a specific definition of the term, but there are indications that actual delivery to the buyer or to a third party is crucial. *It is important to realize that this priority rule turns on the more easily ascertained time of receipt of possession and not upon the time the debtor obtains "rights" in the collateral.*' (Emphasis supplied.)

"The very purpose of the 10-day grace period was to relieve from the rigidity of a requirement of a loan first and acquisition second or simultaneousness of receipt of possession and execution of the loan. At the same time the integrity of the transaction had to be guaranteed by an ascertainable standard related to the receipt of possession, and the retroactive granting of priority over the first to file and the first to advance funds. See II Gilmore, Security Interests in Personal Property, § 29.2, p. 782."

The bank argues that no offer of proof was made to establish what answer would be given by the witness, and that by virtue thereof and the failure to make the offer of proof, the defendant should be precluded from alleging this issue as error on the part of the trial court. There is no question but what the better trial practice is always to make an offer of proof when evidence is excluded. The question then becomes as to whether or not this is absolutely necessary in order to raise the issue as error in this court.

Section 27-103, R. R. S. 1943, known as Rule 103 under the recently enacted Rules of Evidence which were in effect at the time of this trial, reads as follows: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and: * * * (b) In case the ruling is one excluding evidence, the sub-

stance of the evidence was made known to the judge by offer *or was apparent from the context within which questions were asked.*" (Emphasis supplied.) There can be no doubt but what a substantial right of the defendant was affected by the excluding of the evidence which may have tended to show the filing of the purchase money security interest within the 10-day period of time allowed after date of possession. The substance of the evidence was certainly apparent from the context in which the question was asked for the reason that the defendant was attempting to establish the date of physical possession by Moody, under which the defendant claims his priority in the equipment in question.

We therefore conclude that the judgment should be reversed and the cause remanded for a new trial to determine the date of actual physical possession by the original purchaser of the equipment involved in this action.

REVERSED AND REMANDED FOR A NEW TRIAL.

WEST FORT RESIDENTS ASSOCIATION, A NONPROFIT CORPORATION, APPELLEE, V. HOUSING AUTHORITY OF THE CITY OF OMAHA ET AL., APPELLANTS.

288 N. W. 2d 27

Filed January 29, 1980. No. 42557.

1. **Parties: Standing.** Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
2. **Municipal Corporations: Injunction.** A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.

Appeal from the District Court for Douglas County:

SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

Steven J. Riekes and Michael J. Rubach of Richards, Riekes, Brown & Zabin, P. C., for appellants.

William E. Gast, for appellee.

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

PER CURIAM.

The Omaha Housing Authority appeals from a judgment enjoining it from developing or completing a proposed housing project at a site outside the city limits of Omaha, Nebraska, at 91st Avenue and Ellison Street in Douglas County, Nebraska.

The plaintiff, West Fort Residents Association, is a nonprofit corporation organized under the laws of Nebraska. Its members are citizens of Douglas County, Nebraska. It commenced this action on June 9, 1978, to prevent the Housing Authority and the Omaha Housing Development Corporation from proceeding with the housing project which the defendants proposed to construct and establish outside of Omaha, Nebraska. The development corporation is a nonprofit corporation which was organized by the Housing Authority to assist the Housing Authority in financing housing projects.

The trial court granted a temporary injunction on June 9, 1978. The defendants filed separate demurrers to the petition alleging the plaintiff lacked capacity to sue and that the petition did not state facts sufficient to constitute a cause of action against the defendants. The demurrers were overruled and the defendants elected to stand on the demurrers. Judgment was then entered making the injunction permanent.

The defendants' first assignment of error alleges that the plaintiff lacked standing to sue. Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real in-

terest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. Stahmer v. Marsh, 202 Neb. 281, 275 N. W. 2d 64.

A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation. Cunningham v. Exon, 202 Neb. 563, 276 N. W. 2d 213; Holland v. Brownville Grain Co., 174 Neb. 742, 119 N. W. 2d 304; Martin v. City of Lincoln, 155 Neb. 845, 53 N. W. 2d 923; Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776.

There is nothing in the record in this case to show that the plaintiff had any interest of any nature in the controversy. In fact, there is nothing to show that the members of the plaintiff, none of whom are parties, had any interest in the controversy. The petition was subject to demurrer because it failed to show that the plaintiff had any standing to sue.

It is unnecessary to consider the other assignments of error. The judgment is reversed and the cause remanded with directions to sustain the defendants' demurrers.

REVERSED AND REMANDED WITH DIRECTIONS.

DIANA WAHLERS, APPELLEE, V. STANLEY S. FRYE, APPELLANT.

288 N. W. 2d 29

Filed January 29, 1980. No. 42570.

1. **Statutes.** Statutes pertaining to the same subject matter should be construed together. Such statutes, being in pari materia, must be construed as if they were one law and effect given to every provision.
2. **Statutes: Legislature.** In enacting a statute the Legislature must

be presumed to have knowledge of all previous legislation upon the subject.

3. **Statutes: Legislature: Paternity.** The Legislature having failed to provide for a procedure to determine paternity under section 42-762 et seq., R. R. S. 1943, the Revised Uniform Reciprocal Enforcement of Support Act, it is necessary to look to the general paternity statutes, and in particular section 13-112, R. R. S. 1943, and the alleged father is entitled to a jury trial on the issue of paternity at his request.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Reversed and remanded for a new trial.

Charles E. Mock of Johnson & Mock, for appellant.

Daniel A. Smith of Stanek & Smith, for appellee.

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

HASTINGS, J.

This was an action brought by plaintiff, a resident of the state of Iowa, against defendant, a resident of Nebraska, under section 42-762 et seq., R. R. S. 1943, the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), to compel defendant to pay support money for plaintiff's minor child. Defendant denied paternity and filed a motion requesting a jury trial on the issue of paternity. His motion was overruled and trial was had to the court alone, resulting in a judgment adverse to the defendant. Defendant has appealed, contending the court was in error in refusing his request for a trial by jury.

Section 42-788, R. R. S. 1943, provides in part as follows: "If the obligor asserts as a defense that he is not the father of the child for whom support is sought, and it appears to the court that the defense is not frivolous, * * * the court may adjudicate the paternity issue." There is no section of RURESA setting forth the procedure to establish paternity. However, the general statutes relating to children born out of wedlock, and in particular section 13-112,

R. R. S. 1943, had been in effect some 30 years preceding the enactment of RURESA. That specific section sets forth the procedure to establish paternity: "The method of trial shall be the same as that in other civil proceedings except that the trial shall be by the court without a jury unless a jury be requested by the alleged father."

"Statutes pertaining to the same subject matter should be construed together. Such statutes, being pari materia, must be construed as if they were one law and effect given to every provision. * * * In enacting a statute the Legislature must be presumed to have knowledge of all previous legislation upon the subject." Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860 (1960).

Applying the foregoing rules of statutory construction, it is clear that RURESA failed to provide for a procedure to determine paternity. Therefore, it is necessary to look to the procedure provided for in the general paternity statutes. Accordingly, we hold that where it is necessary to determine paternity in an RURESA proceeding under the provisions of section 42-788, R. R. S. 1943, the alleged father is entitled to a jury trial on that issue at his request.

Accordingly, the judgment of the District Court is reversed and the cause is remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., dissents.

GLENN E. BOTSCH ET AL., APPELLANTS, V. LEIGH LAND COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

288 N. W. 2d 31

Filed January 29, 1980. No. 42601.

1. **Equity: Dismissal: New Trial.** The general rule in an equity case, where a motion to dismiss at the close of plaintiff's case is

erroneously sustained, requires that the cause be remanded to the trial court for a new trial.

2. **Pleadings: New Trial.** At such new trial, amendments to the pleadings not inconsistent with the opinion directing the remand should be allowed, and the trial court may decide the case on the record already made, or may take additional evidence or try all issues de novo.
3. **New Trial: Nuisances: Damages: Time.** In seeking temporary damages as a result of a nuisance, where plaintiffs on a retrial are limited by the trial court in the presentation of evidence to the time period covered by the first trial, there is no prejudice to the plaintiff when the opportunity exists to dismiss the pending suit and refile the same covering the extended time period, or to file a separate action for the alleged later-arising damages.
4. **Appeal and Error.** Error without prejudice appearing from the record does not entitle appellant to a reversal on appeal.
5. **Equity: Appeal and Error: Supreme Court.** A question of fact arising in an equitable action is reviewed de novo by the Supreme Court, but in determining the weight to be given the evidence, it will consider the fact that the trial court observed the witnesses and their manner of testifying.
6. **Equity: Damages: Supreme Court.** Where such question of fact involves the assessment of money damages, the Supreme Court will not set aside such judgment if it is within the range of the evidence and is not arbitrary.
7. **Appeal and Error: New Trial: Evidence.** Where, on appeal, findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court, and the Supreme Court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial.
8. **Equity: Nuisances: Injunction.** A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance thereby, unless it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly.

Appeal from the District Court for Colfax County: ORVILLE L. COADY, Judge. Affirmed as modified and remanded with directions.

William A. Wieland of Healey, Brown, Wieland & Kluender, for appellants.

Joseph Ginsburg and Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellees

Leigh Land Co., Langemeier, and Wagner.

Steven J. Flodman and Barlow, Johnson, DeMars & Flodman, for appellees Leroy and Imogene Folken.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ., and Rist and Blue, District Judges.

HASTINGS, J.

Plaintiffs appeal from an order entering a mandatory injunction which requires defendants to drain four waste disposal ponds, prohibits them from ever using the ponds to hold any "mix of cattle manure and water," and awards plaintiffs a judgment for $4,800 for temporary damages suffered by plaintiffs "during past years to date of trial."

This is the second appearance here of this case. Our first opinion appears under the same title at 195 Neb. 509, 239 N. W. 2d 481 (1976), wherein the facts are set forth in considerable detail. In the trial upon which our first opinion was based, the trial court sustained defendants' motion to dismiss plaintiffs' petition at the close of plaintiffs' case on the theory that as a matter of law a nuisance did not exist. We found that the trial court was in error and reversed and remanded for further proceedings.

Following the remand, the cause, for all practical purposes, was submitted to the trial court on the bill of exceptions from the first trial. Plaintiffs assign as errors the refusal of the trial court to allow the filing of an amended petition; denial of plaintiffs' request to present additional evidence relative to the time period between conclusion of the original trial on December 6, 1974, and the further proceedings held on April 26, 1978; consideration by the court of matters not in evidence; failure to enjoin the feedlot operation entirely or in such a manner as to constitute a nuisance; and inadequacy of damages.

In our former opinion, we said: "Prima facie, the

existence of the conditions revealed by the record in this case clearly establishes that defendants' feeding activities, as operated, constituted a nuisance. The odors generated by the lagoons and the manure dust, together with the insects resulting from failure to remove manure, have rendered plaintiffs' premises well-nigh uninhabitable * * *." In conclusion we said: "On the evidence thus far submitted, it appears that the lagoons and the manner of handling manure constitute a nuisance. Defendants have not as yet introduced evidence and it may be that they can successfully rebut plaintiffs' evidence of a nuisance. If no nuisance is finally established, judgment must be for the defendants; however, if a nuisance is finally established but *it is shown that the nuisance-creating factors may be dispensed with by enlarging or otherwise handling the lagoons, removing manure or other means,* then the nuisance only but not the feeding business would be subject to injunction. The judgment of the District Court is reversed and the cause remanded for further proceedings." (Emphasis supplied.)

In the face of this mandate, the plaintiffs filed a motion for leave to file an amended petition which eliminated all reference to injunctive relief, but retained the prayer for damages. Upon objection by defendants, the court denied plaintiffs' leave. Additionally, upon a finding that plaintiffs had indicated no intention of offering new evidence covering the period up to the time of the original trial, but only as to damages since that time, the trial court limited the taking of evidence to the years 1969 through 1974. It further decreed that no findings or judgment would be made concerning the years following 1974, the date of the original trial. Immediately following those rulings and on the 26th day of April 1978, further proceedings were had. Plaintiffs offered the bill of exceptions from the former trial, and although defendants insisted that this was not necessary be-

cause the present proceeding was part of the original trial, they voiced no objections, and it was received. Plaintiffs then made an offer of proof concerning evidence of continuing damages due to odors, flies, and dust covering the period from the original trial to the then present time, April 26, 1978. Upon objection by defendants, the offer was refused by the court. Plaintiffs rested, as did the defendants who offered no evidence at all.

The general rule in an equity case, where a motion to dismiss at the close of plaintiff's case is erroneously sustained, requires that the cause be remanded to the trial court for a new trial. Marco v. Marco, 196 Neb. 313, 242 N. W. 2d 867 (1976). Thereafter, in the sound discretion of the trial court, amendments to the pleadings not inconsistent with the opinion directing the remand should be allowed, and the trial court may decide the case on the record already made, or may take additional evidence or try all issues de novo. Miller v. Ruzicka, 111 Neb. 815, 198 N. W. 148 (1924); Pinkham v. Pinkham, 60 Neb. 600, 83 N. W. 837 (1900).

In spite of the foregoing rules, it is apparent that plaintiffs were prejudiced in no manner. They were permitted to submit their case to the court on the issue of damages. They were allowed to tender all the evidence they desired up to December 6, 1974, and this they accomplished by the voluntary offer and reception of the original bill of exceptions. Although they were denied the opportunity to adduce evidence of damages from that date forward, the way remained open to them to dismiss their pending lawsuit and refile the same, or they could have filed, and still may file, a separate action for those alleged later-arising damages. Error without prejudice appearing from the record does not entitle appellant to a reversal on appeal. Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866 (1977).

Plaintiffs contend that the trial court's assessment

of damages was erroneous and the result of "passion, prejudice, mistake, or some other means not apparent in the record." This being a question of fact in an equitable action, we review it de novo, but in determining the weight to be given the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying. Doyle v. Union Ins. Co., 202 Neb. 599, 277 N. W. 2d 36 (1979). The only evidence as to damages was revealed by testimony of discomfort and annoyance due to odors, flies, and blowing manure dust. There was no specific or direct evidence of permanent deterioration of values or the incurring of special costs or expenses. The finding of damages by the trial court was within the range of the evidence and was not arbitrary. Doyle v. Union Ins. Co., *supra*.

Finally, was the injunction as granted sufficient to abate the nuisance? In this case, we found that "Prima facie, the existence of the conditions revealed by the record in this case clearly establishes that defendants' feeding activities, as operated, constituted a nuisance." Botsch v. Leigh Land Co., 195 Neb. 509, 239 N. W. 2d 481 (1976). " 'Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, * * *.' " Bezdek v. Patrick, 170 Neb. 522, 103 N. W. 2d 318 (1960).

" 'A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or

skill can effect a remedy or that the owners cannot be induced to conduct it properly.' " Botsch v. Leigh Land Co., *supra*. In this case, having found the existence of a nuisance, we offered the defendants the opportunity to demonstrate how they could dispense with the nuisance-creating factors. They refused to present any evidence and thereby chose not to accept this opportunity. Accordingly, the only conclusion we can draw from the record is that the defendants, faced with the alternatives expressed and implied by our former opinion, are of a mind that the "nuisance-creating factors" may not be dispensed with by any "other means." Accordingly, the trial court should have entered an order enjoining the defendants from operating the feedlot in any manner until and unless they can demonstrate, upon proper application and showing, that the same can be done without injury and harm to the plaintiffs as it now exists. It is directed to enter such an order.

The judgment of the District Court is affirmed, except as modified herein, and the cause is remanded with directions to enter an order enjoining the defendants' operations as specified above.

AFFIRMED AS MODIFIED AND
REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR D. CARTER, APPELLANT.
288 N. W. 2d 35

Filed January 29, 1980. No. 42692.

1. **Criminal Law: Evidence: Verdicts.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Criminal Law: Double Jeopardy: Waiver.** The defense of former jeopardy, including that form thereof sometimes described as collateral estoppel, may be waived by failure to assert the defense and offer proof thereof in the trial court.

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

Dennis R. Keefe, Lancaster County Public Defender, and Rodney J. Rehm, 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.

CLINTON, J.

The defendant, Arthur D. Carter, was charged with burglary in having willfully broken into and entered the Pioneers 66 station at 48th Street and Pioneers Boulevard in the city of Lincoln, with the intent to steal property of value, all in violation of section 28-532, R. R. S. 1943. He entered a plea of not guilty, waived a jury trial, and consented to be tried by the court. He was found guilty and sentenced to a term of 1 to 2 years in the Nebraska Penal and Correctional Complex.

On appeal to this court defendant argues that the proof is not sufficient to show he had the intent to permanently deprive the owner of an automobile taken in the burglary and that the evidence is otherwise insufficient to support the finding of guilty.

The evidence (testimony of an accomplice, together with corroborating circumstances) was sufficient for the trier of fact to find that defendant and a friend, Kleitsch, during the early morning hours of August 16, 1978, were on their way to their respective homes on a motorcycle owned by defendant. The motorcycle ran out of gasoline. The defendant pushed the vehicle to the Pioneers 66 station, which was closed and locked. The two men attempted to

get gasoline from the pump hoses. Their efforts being unsuccessful, defendant threw a concrete block into the glass of the station door, entered, and then drove an automobile out through the unopened door. Later, a tire on that automobile went flat and the car was abandoned. Another automobile was taken, which was later found abandoned near defendant's home.

Defendant denied taking any part in the events described. His story was that he refused to participate in the burglary or in the use of the automobiles and that he walked all the way to his home in northwest Lincoln, some 10 miles from the station. He testified that Kleitsch committed all the acts involved.

The crime of burglary is complete when there is a breaking and entering with a requisite intent, in this instance, to steal. No actual theft or asportation of property is required. State v. Eynon, 197 Neb. 734, 250 N. W. 2d 658.

The evidence outlined was clearly sufficient to permit the trier of fact to find that the defendant entered with the intent to steal. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Tiff, 199 Neb. 519, 260 N. W. 2d 296; State v Eagle Deer, *ante* p. 249, 286 N. W. 2d 770.

Defendant argues, however, that his intention not to steal is established as a matter of law because he had earlier been found guilty of the wrongful use of an automobile in the taking of the vehicle which was involved in the transaction of August 16, 1978. His contention seems to be that a finding of guilty on the wrongful use charge is a conclusive determination of

the intent of the defendant when he entered the building. Defendant's position would appear to be that there exists that type of former jeopardy sometimes referred to as collateral estoppel, although he does not use that analysis.

The defendant's position is not meritorious for several reasons. Neither theft nor, in this instance, the taking of the automobile for temporary use is a lesser-included offense of burglary. A lesser-included offense is one, the elements of which include some, but not all, of the elements of the greater offense, i.e., the lesser is fully embraced in the greater. State v. Tamburano, 201 Neb. 703, 271 N. W. 2d 472. As we have earlier noted, larceny, which includes asportation (as does wrongful use of an automobile), is not included within the crime of burglary. Neither an acquittal nor a conviction of a larceny committed in the course of a burglary bars a prosecution for the crime of burglary. The People v. Woolsey, 399 Ill. 617, 78 N. E. 2d 237; Cambron v. State, 191 Ind. 431, 133 N. E. 498; Williams v. State, 205 Md. 470, 109 A. 2d 89; State v. Wiley, 173 Md. 119, 194 A. 629; People v. Snyder, 241 N. Y. 81, 148 N. E. 796; People v. Mignogna, 54 N. Y. Supp. 2d 233; People v. Mangano, 269 App. Div. 954, 57 N. Y. Supp. 2d 891, affirmed 296 N. Y. 1011, 73 N. E. 2d 583; Cooper v. State, 154 Tex. Crim. 182, 226 S. W. 2d 122; Alarcon v. The State, 92 Tex. Crim. 288, 242 S. W. 1056; State v. Beaman, 143 Wash. 281, 255 P. 91; State v. Louden, 21 N. J. Super. 497, 91 A. 2d 428. The rule that a person cannot twice be put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act because the constitutional inhibition is directed to the identity of the offense and not to the act. State v. Goodloe, 197 Neb. 632, 250 N. W. 2d 606.

The defendant's argument is similar to that made in State v. Eagle Deer, *supra*, where the defendant

was charged with burglary and the stealing of an automobile. The factual situation was similar to that involved in this case. The jury found the defendant guilty of wrongful use of an automobile (a lesser-included offense of auto theft), as well as guilty of the burglary charge. It was argued that the verdicts on the two charges were inconsistent. We said: "The evidence was also legally sufficient for the jury to have found the defendant guilty of stealing the automobile, but the fact that he was found guilty of only the lesser-included offense of wrongful use of the automobile on count II does not make the guilty verdict on count I inconsistent or invalid." Neither double jeopardy nor collateral estoppel is applicable under the circumstances which the defendant asserts exist here.

A second reason the contention cannot be upheld is because the issue was not raised in the lower court and has been waived. No proof of a prior conviction was offered or introduced at trial or even mentioned. No plea of former jeopardy was even tendered. The sole reference in the record to a prior conviction was at the time of sentencing when the trial judge made comments, apparently related to the presentence investigation, which lead to the inference that the defendant had been convicted of wrongful use of automobiles on the day in question. The defense of collateral estoppel, if it could be said to exist, was waived. Haddad v. United States, 349 F. 2d 511; State v. Birkestrand, 239 N. W. 2d 353 (Iowa, 1976).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ART HADLEY, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. CONNIE MARKER, APPELLANT.
288 N. W. 2d 37

Filed January 29, 1980. Nos. 42721, 42720.

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

Michael Kelley of Kelley & Kelley, for appellants.

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

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

KRIVOSHA, C. J.

The following actions were tried separately in the District Court for Dodge County, Nebraska, but for purposes of appeal were consolidated. They are identical in all material respects and therefore will be considered here as one.

These matters come before the court on appeal from a conviction for violations of the Securities Act of Nebraska. The appellant, Art Hadley, pleaded guilty to 20 counts of violating sections 8-1102 and 8-1117, R. R. S. 1943, and the appellant, Connie Marker, pleaded guilty to 5 counts of violation of the same sections. Each individual violation was, under the statute in effect at the time of the acts in question, punishable by a fine of not more than $5,000 or imprisonment for not more than 3 years, or by both such fine and imprisonment. The trial court sentenced the appellant Hadley to a term of 1 to 3 years in the Nebraska Penal and Correctional Complex on each of 20 counts, to run concurrently, and the appellant Marker to 1 year imprisonment in the Nebraska Center for Women on each of 5 counts, said terms to run concurrently. We have carefully

reviewed the record and believe the judgment of the trial court was in each instance correct and should be affirmed.

The evidence is virtually without dispute. The appellants and each of them engaged in an admitted scheme to sell to residents of the State of Nebraska unregistered securities in a project called "Camelot Cultivars." The plan contemplated the planting and cultivating of walnut trees, including spraying, fertilizing, and irrigating them. While the evidence discloses that some of the trees were planted, the evidence further discloses that the man who was to take care of the trees was never paid by the appellants to do the necessary work. Further, the evidence discloses that the project had little or no chance of success, that the appellants knew the project had little or no chance of success, and more importantly, that the interests in the project, which were securities, were not registered with the Department of Banking of the State of Nebraska as required by law.

The evidence further discloses that the appellants and each of them collected from investors some $55,000, of which more than $40,000 went directly into the pockets of the appellants. All the money invested was lost by the investors.

The evidence further discloses that at the very outset of this project the appellants were advised by their attorney of the need to register the securities, and later in 1977 appellants had a meeting with Mr. Barry Lake who was in charge of the securities division of the Nebraska Department of Banking. They were advised at that time that they were selling an unregistered security, were requested to withdraw the offering, tender back the money collected, and register the securities in accordance with law. Notwithstanding that warning from the Department of Banking and the offer to permit the appellants to correct the situation, appellants continued to sell the

securities without making any efforts to comply with the securities law or to make the investors whole.

Appellants assign three errors: (1) They maintain the trial court abused its discretion and erred in sentencing the appellants to an excessive term of imprisonment; (2) they maintain the trial court erred in relying upon a presentence report which was presented in an incomplete and prejudicial form; and (3) they maintain the trial court erred in considering testimony presented at the sentencing where insufficient notice that such testimony would be offered had been given to the appellants. For reasons which we will more fully explain hereinafter, the assignments are wholly without merit.

On March 26, 1979, the appellants appeared before the court with counsel of their choice and after careful inquiry by the court as to the consequences, voluntarily entered pleas of guilty to the various charges. The appellants appeared again in District Court on April 5, 1979, with their attorney, at which time the State offered evidence concerning the crimes as part of the sentencing procedure.

At that hearing on April 5, 1979, and without objection, the State was permitted to introduce evidence concerning the background and history of the offenses for which the appellants had previously entered pleas of guilty. At the conclusion of the evidence, the court asked appellants' counsel whether he had "anything at this time * * * or later?" Counsel replied, "Nothing now." The record further reflects that counsel at no time requested a continuance nor asked for an opportunity to cross-examine the witnesses called by the State. Nor did the appellants request additional time in order to produce any additional or countervailing evidence.

The parties again appeared before the court some 14 days later on April 19, 1979. The record indicates that no effort was made by appellants' counsel to produce any additional evidence prior to sentencing.

In making this observation, we do not intend in any manner to be critical of appellants' counsel, who was other than present counsel, but simply point out that if in fact there was some evidence which the appellants believed could be introduced, adequate opportunity was given them to do so. At the sentencing hearing on April 19, 1979, the court inquired of appellants' then counsel as to whether he had received a copy of the presentence report. He indicated that he had seen a copy of the report. The court then said, "Are there any changes, corrections or additions that should be made at this time?" Counsel responded, "No, not that I can think of." The report, in both cases, recommended that probation not be granted and that each appellant be incarcerated for some period of time.

With regard to the appellants' contention that the trial court erred in relying on the presentence report which was presented in an incomplete and prejudicial form, the evidence simply does not support that claim. Appellants were given every opportunity to correct or amend the presentence report and to present any evidence they desired. They chose not to do so. The only contentions made by appellants at the time of sentencing was a claim that if given an opportunity and placed on probation they would make restitution. There was no evidence, however, to support that claim. No plan was offered nor had any efforts been made by the appellants to make restitution voluntarily, though adequate time existed had they intended to do so. Moreover, the presentence report indicated that the appellant Hadley was presently employed at a job paying $115 per week and was delinquent in the payment of child support to the children of his first marriage. The court had no reason to rely on or believe that a sentence of probation would result in restitution being made. Likewise, no evidence was offered on behalf of the appellant Marker as to how or in what

manner restitution might be made. The appellants had every opportunity to present a plan or such other evidence as they desired to indicate how and in what manner restitution would be accomplished. They simply failed to do so. There is no evidence to support the claim that the presentence report was either incomplete or prejudicial.

Appellants further maintain that the trial court erred in considering testimony presented at the sentencing where insufficient notice had been given to the appellants. The record, however, discloses that the evidence was introduced without objection and that the appellants' counsel was afforded an opportunity to present any further evidence, either at that time or at a later time, but elected not to do so. The form of the testimony at the hearing on April 5, 1979, was no different or other than that which might have been included in the presentence report. As a matter of fact, by introducing the evidence from live witnesses appellants were afforded the opportunity to either object to the testimony or cross-examine the witnesses. Appellants sought to do neither, and did not object to the introduction of the testimony.

And finally, it is contended that the sentences were excessive. In the first instance, we have often said that a sentence within statutory limits will not be disturbed on appeal absence an abuse of discretion on the part of the trial court. See State v. Stephenson, 199 Neb. 362, 258 N. W. 2d 824. Moreover, while neither appellant had any previous criminal record, it is apparent from the evidence adduced that both appellants had been warned of the violations well in advance of the time they proceeded to carry out their scheme. Notwithstanding the fact that both their attorney and the Department of Banking had informed them of the violations and had afforded them an opportunity to correct the situation without criminal prosecution, the appellants chose to ignore those warnings and proceed as

they wished. Too often what is described as "white-collar crimes" go unpunished because of the argument that there was "no violence." While it may be true that there was no physical violence involved herein, it is likewise true that the taking of an individual's life savings may do more violence to their well-being than the physical abuse. The appellants, without care or concern for their investors who relied upon the appellants' ability to tell a good story, willingly accepted the investors' money in return for illegal securities. Individuals placed their confidence as well as their money in appellants, only to have the confidence destroyed and the money consumed. So-called "white-collar" criminals must understand that such behavior will not be tolerated and even first offenders may be required to serve time in prison. Punishment by incarceration in these cases was demanded. The sentences in these cases were not in any manner excessive and may have been said to be light. The judgment of the District Court is affirmed.

AFFIRMED.

RALPH DELP AND DOROTHY DELP, APPELLEES, V. GRETCHEN LAIER, APPELLANT.

288 N. W. 2d 265

Filed February 5, 1980. No. 42460.

1. **Waters: Drainage.** It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
2. _____: _____. It is fundamental that an owner may not by ditch, dam, or terrace divert surface waters in such a manner as to

cast them in volume upon the adjoining lands of another to his damage.

3. **Injunction: Damages.** Where the evidence establishes that the injury will be either continuous or repetitive, the granting of an injunction is an appropriate remedy.
4. **Trial: Evidence: Appeal and Error.** It is the duty of this court on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby to give weight thereto.
5. **Damages: Evidence.** Where it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty.
6. **Damages: Proof: Evidence: Witnesses.** In proving damages, the law requires not mathematical certainty but merely the best evidence obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury.

Appeal from the District Court for Gosper County: JACK HENDRIX, Judge. Affirmed.

Bernard B. Smith and David B. Smith of Smith & Smith, for appellant.

John Wightman and Michael L. Bacon of Wightman, Fallesen & Bacon, for appellees.

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

KRIVOSHA, C. J.

This is an appeal by the defendant, Gretchen Laier, from a judgment entered by the District Court for Gosper County, Nebraska, on August 9, 1978, awarding damages in favor of the plaintiffs, Ralph Delp and Dorothy Delp, husband and wife, in the amount of $1,203.85, and from the further order of the District Court permanently restraining and enjoining the defendant from discharging waters upon plaintiffs' land except at specific locations and from permitting any waters which may accumulate by reason of earthwork or other structures constructed by

the defendant on defendant's land to run over a road located on plaintiffs' land near its southern boundary. Our examination of the entire record leads us to the conclusion that the trial court was correct, and therefore we affirm the judgment in all respects.

The record discloses that the defendant is the owner of certain real estate located in Section 21, Township 8 North, Range 23 West of the 6th P.M., Gosper County, Nebraska. The plaintiffs own property located immediately north of defendant's property, legally described as the south half of Section 16, Township 8 North, Range 23 West of the 6th P.M., Gosper County, Nebraska. The defendant's northern boundary line is coincident to the plaintiffs' southern boundary line. The natural grade of the defendant's property is generally from the southern portion of her property toward plaintiffs' property, though the evidence discloses that the property likewise slopes from west to east. At the place where the properties touch, the south-to-north slope continues for several hundred feet and then generally levels off across plaintiffs' property, though it still has a slight west-to-east grade.

A canyon runs southwest to northeast upon plaintiffs' property at a point north and slightly east of where defendant constructed certain pits. Fingers of the canyon extend down into defendant's property near the site of the pits. The fingers were caused by erosion over the years. Water falling on defendant's land flowed in one of two directions. A small part of the defendant's land drained to the west and onto plaintiffs' land through a culvert located in the northwest corner of the defendant's land. Most of the remainder of defendant's land drained from south to north and from west to east into the fingers of the canyon located in the northeast portions of the property.

Sometime in 1976 defendant decided to develop her

land both for purposes of preventing further excessive erosion and to permit her land to be irrigated. A portion of the canyon fingers located upon defendant's land that had been created by excessive erosion were filled and two retaining pits constructed to collect and hold irrigation water and runoff water. The excess water escaped from the pits through an overflow pipe and into the canyons.

The evidence would establish that the defendant intended to cause all the water falling upon her land to be drained toward the north and east and into the retaining pits. This is substantiated by reason of the fact that during the course of the construction and leveling on defendant's land, the culvert located in the northwest portion of her land was blocked so that water which normally would have flowed through the northwest culvert was now also diverted to the north and east and into the pits.

The first pit was built in the northeast corner of the northwest quarter of the section, or almost exactly in the northeast corner of the irrigated portion of the defendant's land. The second pit is located southeast of the first pit. The inlet tube of the first pit located on its west rim was approximately 10 feet higher in elevation than the outlet tube on its east rim.

Beginning in April of 1977 the plaintiffs found mud in their pasture. On two occasions in May of 1977 heavy rains caused the east wall of the defendant's first pit to collapse and permit water and silt to flow onto the lands of the plaintiffs. A third rain, later in May, resulted in further silt being washed upon plaintiffs' pastureland. Finally, on Memorial Day morning there was an additional hard 2-inch rain. Much of the water was forced over the plaintiffs' roadway through the fields on the plaintiffs' farm by the dam forming the west edge of the north pit on defendant's farm. This water coming across the road deposited silt across the end rows of the plain-

tiffs' fields and in the waterway west and north of the plaintiffs' house. The waterway was covered with silt in some areas and in others scouring had occurred.

On August 25, 1977, a rain of 1½ inches again caused a breach of the east wall of the defendant's pit which had since been repaired, and again brought silt into the pastureland of the plaintiffs.

The evidence does disclose that at the time of the commencement of the trial the defendant had relocated the retention pit that had failed and it had been redesigned and reconstructed, to the end that it serves its purpose and does collect and retain irrigation runoff water with the excess being spilled into the canyon.

Plaintiffs filed suit against the defendant alleging the various facts as disclosed herein and seeking injunctive relief against defendant from continuing to cause the waters to flow onto plaintiffs' land. Defendant filed an answer and cross-petition. By her answer defendant generally denied the allegations of plaintiffs' claim, and further alleged that the slope of the land was such that in its natural state surface and floodwaters were assembled in natural drains and flowed from the lands of defendant onto the lands of the plaintiffs. Defendant then alleged that the plaintiffs constructed a dam upon their property in the form of a private roadway, which roadway dam prevented the waters from traveling in their natural drainageway, thereby causing the damage to plaintiffs' property. Defendant therefore alleged that any damage which may have been occasioned was caused by the plaintiffs' own action in damming the natural flow of the water. By way of cross-petition, defendant sought to have the plaintiffs remove the roadway dam and permit the waters to flow uninterrupted in their natural drainways.

The evidence with regard to the roadway discloses that a road of some type existed in the location of

the questioned road since before 1941. It was a private roadway wholly located upon the plaintiffs' land. The evidence further disclosed that in approximately 1961, after completing the leveling of their farm, plaintiffs hired a construction company which elevated the road by approximately 18 inches. The evidence discloses that the reason for the increase in elevation was to bring the road up to the elevation of the fence row to the south which had built up through silt deposits and which caused snow to drift across the roadway.

After taking evidence from both parties and personally viewing the premises, the trial court concluded that judgment should be entered for the plaintiffs and against the defendant, granting the requested injunction and awarding damages to the plaintiffs and against defendant. With regard to the amount of damages, the trial court specifically found that plaintiffs were entitled to damages in the amount of $164.85 for one-half the cost of cleaning the waterway, $37.50 for one-half the cost of reseeding the waterway, $121.50 for one-half of three-fourths of cleaning the reuse pit on plaintiffs' land, and owned by plaintiffs, and $880 for damage to a pond located upon plaintiffs' land. The trial court further found that as to the pasture, evidence of specific money damages had not been shown sufficiently to entitle the plaintiffs to recover.

The defendant assigns several specific errors. For our purposes, however, the questions can be simplified as follows: (1) Is there a natural drainageway on plaintiffs' property into which water from defendant's land should flow, and (2) did the trial court err in awarding damages to the plaintiffs and against the defendant? We turn then to the first question, whether there is evidence of a natural drainageway across plaintiffs' land in which waters from defendant's land should flow.

Much argument is made by defendant as to whether

this is collected water or diffused surface water and whether this court should now reconsider its stand as taken in the case of Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195. As we see the facts, however, none of that is necessary in order to properly dispose of the instant case.

Whether the waters, before they get to the defendant's pits, are diffused surface waters or waters in a natural drainageway is of no moment in this case. Whatever they may be initially, by the time they arrive in the defendant's pits they have been collected and gathered. Furthermore, the evidence in this case, including the aerial photos, clearly and unequivocally establishes the fact that there is not now, nor has there apparently ever been in the reasonable past, any natural drainageway flowing from the location of the defendant's reuse pits across the common boundary of the lands in question and onto and over plaintiffs' property. Nor is there any evidence of a drainageway leading from defendant's land into plaintiffs' land at any place where defendant's land abuts plaintiffs' roadway. There being no natural drainageways into which this water would be wont to flow, the rules in connection therewith are clear and unequivocal. In the case of Linch v. Nichelson, 178 Neb. 682, 134 N. W. 2d 793, we said, "It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature. Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195." As we have already indicated, the evidence conclusively establishes that there are no depressions, draws, swales, or other drainageways through

which such waters would be wont to flow in a state of nature from the location of the defendant's pits onto and across the plaintiffs' land.

This being the case, the defendant in this matter did not have the right to collect the waters and cause them to be thrown upon plaintiffs' land. As we said in Linch v. Nichelson, *supra,* "It is fundamental that an owner may not by ditch, dam, or terrace divert surface waters in such a manner as to cast them in volume upon the adjoining lands of another to his damage." The defendant in this case could not lawfully collect these waters and cast them upon the plaintiffs' lands. Likewise, because the waters cast upon the plaintiffs' land would not otherwise be inclined to flow in natural drainageways, running across the common boundary and over plaintiffs' land, the plaintiffs could take any reasonable action to resist the waters, including the construction of the roadway dam. See, Jorgenson v. Stephens, 143 Neb. 528, 10 N. W. 2d 337; Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732. The trial court was therefore totally correct in enjoining the defendant from continuing to cause the waters otherwise collected to flow upon the plaintiffs' property.

Where the evidence establishes that the injury will be either continuous or repetitive, the granting of an injunction is an appropriate remedy. See, Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889; Linch v. Nichelson, *supra*; Nichol v. Yocum, *supra.*

We turn next then to the matter of the damages. Defendant argues that the evidence is speculative and that therefore the trial court erred in awarding damages. We are not unmindful that this being an equity action it is considered by us de novo. Nevertheless, in a trial de novo this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. The Wickes Corporation v.

Frye, 202 Neb. 23, 273 N. W. 2d 663. We likewise must keep in mind that the trial court personally inspected the premises. We have said that it is the duty of this court on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby to give weight thereto. Webb v. Lambley, 181 Neb. 385, 148 N. W. 2d 835; Onstott v. Olsen, 180 Neb. 393, 142 N. W. 2d 919.

The record in this case clearly establishes that the successive collapsing of the walls of defendant's pit resulted in silt being carried into and upon plaintiffs' land, thereby causing damage. Plaintiffs produced a witness who testified as to his opinion concerning the cost of repairing the damage caused by the water flowing across plaintiffs' land. Defendant argues that because a certain amount of silting would have occurred even in the absence of defendant's acts, all damages are speculative. While it may be true that some silting would have occurred over a period of time, it is likewise clear that the defendant's acts caused immediate and increased damage to plaintiffs' land. Where it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. Omaha Paper Stock Co. v. California Union Ins. Co., 200 Neb. 31, 262 N. W. 2d 175; Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900. In all cases, the law requires not mathematical certainty but merely the best evidence obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. See Jensen v. Palatine Ins. Co., 81 Neb. 523, 116 N. W. 286. This being an equity case, the trial court in the first instance and this court on appeal serves as the trier of fact.

Our examination of the record leads us to the conclusion that the trial court did not err in its awarding of damages. The amount of damages was reasonably within the possible ranges which could be found based upon the evidence before the court.

Therefore, the judgment of the trial court is in all respects affirmed.

AFFIRMED.

BOSLAUGH and CLINTON, JJ., concur in result.

BERNADINE WELKE, APPELLANT, V. ARCHIE WELKE, APPELLEE.

288 N. W. 2d 41

Filed February 5, 1980. No. 42503.

Divorce: Parent and Child. A decision on child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless the court abused its discretion.

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

Raetz & Bergfield, for appellant.

Charles Plantz, for appellee.

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

ENDACOTT, District Judge.

This is an appeal by petitioner wife from a decree of modification in a dissolution of marriage proceeding.

The parties were married in 1973. In July 1975 the wife filed for dissolution of marriage. A son, Joseph was born December 11, 1975. On January 18, 1977, a decree dissolving the marriage was entered. The decree provided, in part, that the wife have custody of Joseph with $250 monthly child support for him, and the husband pay alimony in the sum of $4,800 in

monthly installments of $400, commencing February 1, 1977. The parties continued to live together until April 30, 1977. The wife then moved to Ohio, where she has resided ever since. The husband continues to reside in Chadron, Nebraska.

On September 17, 1977, another son, Nathaniel, was born to the parties. His conception was unknown until after the decree was entered. Unfortunately, Nathaniel was born with many serious medical problems.

In October 1977 the wife filed her first application for modification seeking, among other things, custody of Nathaniel and increased child support. On December 9, 1977, a decree was entered awarding custody of Nathaniel to the wife, and ordering the husband to pay child support of $200 per month per child.

In June 1978 the wife filed a second application for modification seeking reinstatement of alimony, additional child support, and other equitable relief.

A decree was entered by the trial court on October 23, 1978, denying the application to reinstate alimony; increasing child support for Nathaniel from $200 to $400 per month; refusing to compel the husband to follow particular procedures as to the processing of future medical insurance claims; and declining to impose liability upon the husband for $8,189.28 in unpaid medical bills for Nathaniel. The wife now appeals, alleging error in all aspects of the decree. We affirm.

As to the wife's contention that the trial court erred in denying her additional alimony, reference is made to section 42-365, R. R. S. 1943, which provides, in pertinent part: "Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified * * *." In the original decree of dissolution in this case, the husband was ordered to pay alimony of $4,800 in monthly installments of $400, commencing

on February 1, 1977. Thus, on January 1, 1978, the $4,800 alimony had accrued in full. On June 21, 1978, the husband was served in regard to the wife's second application to modify. However, the entire amount of alimony had accrued prior to this service of process. Therefore, the original decree could not, under the statute, be subsequently modified to provide for additional amounts of alimony.

The wife also contends that the increase in monthly child support for Nathaniel from $200 to $400 was inadequate. We cannot agree. Nathaniel was born September 17, 1977. On December 9, 1977, the trial court modified the original decree, awarding the wife custody of Nathaniel, and ordering that the husband pay $200 per month child support for him. At that time it was known that Nathaniel was born with severe health problems. In fact, at that time, he was in intensive care at a weekly cost of $5,000. The total cost of this unfortunate child's medical expenses is staggering. The child's life has been and, in all likelihood, will continue to be a tragic one. But can we reasonably expect the father to do anything more? The answer is no. He is a conductor on a railroad. The record discloses his income and necessary expenses. With a total monthly child support obligation of $600 for the two boys, he will be hard pressed indeed financially. He has not remarried or undertaken new obligations. He lives simply. He does not waste or squander the wages he earns. He is aware of his responsibilities as a father, and does not seek to avoid them. A parent's support obligation is a great one, but it is not unlimited. Some consideration at least, in the light of other relevant factors, must be given to the parent's financial position. Hermance v. Hermance, 194 Neb. 720, 235 N. W. 2d 231 (1975). A decision on child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless the court abused its discretion. Sommers v. Sommers,

191 Neb. 361, 215 N. W. 2d 84 (1974). The trial court in the present case did not abuse its discretion when it increased the monthly child support for Nathaniel from $200 to $400. Incidentally, the trial court observed at the time that there was no doubt this increase would put a "severe strain" on the husband.

Finally, the wife contends the trial court erred in not imposing liability on the husband for particular past medical expenses of Nathaniel and in refusing to require the husband to follow certain procedures in the processing of future medical insurance claims. At the outset, it will be noted that neither the original decree of dissolution nor the first modification thereof imposed upon the husband any duty either to pay such medical expenses or to do anything in regard to medical insurance claims. He was ordered to pay child support. He has done that. The trial court was aware of Nathaniel's medical needs and anticipated expenses shortly after Nathaniel's birth. We cannot say the trial court abused its discretion to the extent of disregarding this available information in setting the amount of child support for Nathaniel. It is not necessary to decide whether the decree in its original form, or as modified, establishes any sort of limitation from a legal standpoint on the father's liability to provide for his children. The financial realities have already imposed such limitation.

Based on the record, we cannot accept the wife's contention that her husband has not cooperated sufficiently in the processing of Nathaniel's medical claims. While perhaps a bit inefficient by his very nature, there is nothing to indicate that the husband is acting in bad faith or even unreasonably. It will be noted that a substantial portion of Nathaniel's medical bills have been paid as a result of claims filed under a health insurance policy which the husband had by virtue of his employment with the railroad. He was not required by the court to provide

such health insurance. It will also be noted that as soon as the husband was informed that the company would pay benefits directly to the various health care providers, he gave the necessary written authorization for the company to do this. He also informed the insurer that his wife would be submitting future claims directly to the company. A court order regarding the processing of future medical claims is unnecessary.

An examination of the record on appeal does not reveal any abuse of discretion by the trial court. In addition, the trial court's decisions find ample support in the evidence.

AFFIRMED.

MFA INSURANCE COMPANIES, APPELLANT, V. JOHN L. MENDENHALL ET AL., APPELLEES.
288 N. W. 2d 270

Filed February 5, 1980. No. 42509.

1. **Declaratory Judgments: Statutes.** An action for declaratory judgment brought under section 25-21,149 et seq., R. R. S. 1943, which involves a question of fact, entitles the parties to a jury trial.
2. **Trial: Juries: Waiver.** Where the record indicates that a case was tried to the court without a jury and there is no indication of protest or objection on the part of either litigant, it will be presumed that a jury was waived.
3. **Declaratory Judgments: Verdicts: Appeal and Error.** A judgment on a fact issue tried to the court alone has the effect of a verdict of a jury and will not be set aside unless clearly wrong.
4. **Insurance: Motor Vehicles: Words and Phrases.** Permission as used in the standard automobile insurance policy is not limited to that expressly granted, but may arise and be implied from a course of conduct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of the owner.
5. _____: _____: _____. Express permission granted for limited specific purposes on isolated occasions does not imply general permission to use an automobile for purposes wholly unrelated in time, character, or circumstances.

6. ____: ____: ____. Implied permission to use an automobile arises from a course of conduct indicating mutual acquiescence or lack of objection under circumstances signifying assent.

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

Harold W. Kauffman and William J. Dunn of Gross, Welch, Vinardi, Kauffman, Day & Langdon, for appellant.

Harry R. Henatsch of Katskee & Henatsch, for appellee West American Ins. Co.

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

HASTINGS, J.

This is a suit for a declaratory judgment. The plaintiff, MFA Insurance Companies (MFA), seeks a determination as to whether or not its policy of automobile liability insurance issued to Janet T. Peery (Janet) on her 1974 Volkswagen extended to cover her sister, the defendant Sharon Peery (Sharon), as an additional insured while the latter was operating the automobile on February 24, 1978. At that time Sharon became involved in an accident in which Mendenhall, Joseph P. Menichetti, and West American Insurance Company, Mendenhall's collision carrier (defendants), sustained damages. The trial court found that MFA's policy did provide Sharon with liability insurance coverage as an insured under its omnibus clause. Plaintiff has appealed and we reverse.

Although a suit for declaratory judgment under section 25-21,149 et seq., R. R. S. 1943, is an action sui generis and may involve questions of both law and equity, the particular decision from which this appeal is taken involves at the outset a question of fact. As such, the parties were entitled to a jury trial. § 25-21,157, R. R. S. 1943. State Farm Mutual Automobile Ins. Co. v. Kersey, 171 Neb. 212, 106 N.

W. 2d 31 (1960). However, the record indicates that this case was tried to the court without a jury and where, as here, there is no indication of protest or objection on the part of either litigant, the court will presume that a jury was waived. State Farm Mutual Automobile Ins. Co. v. Kersey, *supra*. In such a case, the judgment of the trial court has the effect of a verdict of a jury and will not be set aside unless clearly wrong. State Farm Fire & Cas. Co. v. Muth, 190 Neb. 248, 207 N. W. 2d 364 (1973).

The evidence at trial consisted of the policy of insurance and the depositions of Janet and Sharon taken by the attorneys for the defendant, West American Insurance Company. The pertinent portion of the policy involved in this litigation is as follows: "With respect to the insurance afforded * * * the following are insureds: * * * any * * * person using such automobile with the permission of the named insured * * * provided his actual operation * * * is within the scope of such permission * * *."

Janet testified she is now single, has a small daughter, owns the automobile in question, and lives about 2 or 3 miles from her sister Sharon. Sharon is 26 years old, single, and the two are friendly and socialize with each other. Prior to February 24, 1978, Janet had let Sharon practice her driving with Janet's car as long as she also was in the car. She said Sharon did not practice driving with Janet's car when she was not along. Janet picked up Sharon on occasions to take her different places, including grocery and clothing shopping, and to see their other sisters. Sharon did not do any of the driving on those occasions that Janet could remember. Janet did not remember any occasion before the accident when she let Sharon take the car for her own use when she was not along. The day before the accident Janet had taken her daughter to Sharon's house to leave her because Janet was going out of town for the weekend. Janet had given Sharon her keys to

the house in case Sharon had to get the little girl some clothes or something from the house. All of her keys, including the car keys, were on the same ring. She had left her car parked in front of her house, and then left on her trip with friends.

Janet thought she and Sharon had discussed whether or not Sharon could use the car while Janet was gone. She didn't say what was said, but did testify that before this time she had specifically told Sharon when she had asked to use the car that she could not do so. She said that before February 24, 1978, she had never allowed Sharon to take the car by herself and drive it. When pressed for a reason why she wouldn't let Sharon drive, she said "I just didn't want her to drive it." Janet had let her other sister, Barbara, drive the car whenever Barbara asked, but to the best of her knowledge whenever Barbara had the car Sharon never drove it. Janet finally said that if they would have discussed Sharon's using the car while she was gone she would have told Sharon no, she couldn't use it. "It's, you know, with her, with her driving in the car with me before I just felt that I didn't want her to drive the car without me in it. That's all. It was a personal matter between me and her."

According to Sharon's deposition, she had driven Janet's car on several occasions before the accident, but only with Janet or her sister Barbara in the car. These would be short trips to the doctor's office or to the nearby shopping center. The greatest distance she had ever driven the car by herself was the night of the accident when she took the car to go to a show. In answer to a question, "Well, were there shorter drives by yourself when you were all alone?" she answered, "Maybe to the drugstore and back, but that's like in Baker's shopping center, but that was about it." She was then asked, "Did that pattern of driving that you told us about, did that continue from June of '77 until the date of this accident?"

to which she replied, "No. I didn't drive that much with the car, but I did just go, like we were just talking, like maybe to the store and drugstore, this and that." And a further question, "It was just the short trips?" and the answer "Yes. She wouldn't let me go anywhere, just if we were going to the store, the drugstore, that was about it. Most of the time I would drive or she or my sister Barbara, but no other trips." Finally, in this area, the following questions and answers were asked and given: "Q. Well, had you taken the Volkswagen alone, Sharon, to go get groceries at Baker's or Hinky Dinky prior to this accident? A. No. Janet would come and get me and we would go together. Q. The drugstore would be the only exception? A. Yes. Q. Where you would take it alone? A. Yes."

In describing the events leading up to the accident, Sharon told how Janet had brought her little girl Leslie over to her house. "* * * And she brought her Thursday evening over to my house, and she left her car at her house, but I had the keys to the house and the car, so I could go check on the house. So Friday evening I came home from work and I had a friend take me over to Janet's house and I picked up the car from there. Then I went to the show from there, and that was about four-thirty or five o'clock that evening."

When questioned about whether or not there was any discussion between her and Janet about using the car on this occasion, she said, "No. Only that not to use the car. * * * Q. Are you sure she talked to you about that? A. Well, usually — Q. But it's not 'usually' I'm asking about, I'm asking about this particular evening? A. Yes. * * * I don't remember if we discussed it, but she left her car at the house and she just told me to check on the house. * * * The car, we didn't discuss anything about the car, but I just took it as not to use the car because it was parked in front of her house." Then continuing,

"Q. Well, on those occasions when you would drive it alone to the drugstore, would it not be parked at her house then? A. No, she would come and bring the car to me. * * * Then I would drive from my house to her house and then I would go to the drugstore and bring the car back to her house and she would take me back home." Sharon went on to testify that this happened once a month or less when she would drive the car to the drugstore by herself to get her insulin. She could remember only one occasion when she drove to the doctor's office by herself.

On cross-examination by the attorney for the other defendants, Sharon testified for the first time that although this was the first time she had ever taken the car without permission, she assumed Janet would not care. Later on she said, "I still can't remember if we talked about it or not. But the car was parked at her house and that, from that understanding I got that I wasn't supposed to use the car, just to check on her house and that was about it." Sharon admitted to having told a representative of the plaintiff on March 1, 1978, that Janet did not give her permission to use the car on this particular occasion, and that she had never been permitted to use the car without Janet or Barbara being along.

The trial court cites the case of Arndt v. Davis, 183 Neb. 726, 163 N. W. 2d 886 (1969), for the proposition that Nebraska is committed to the "liberal or initial permission" doctrine, which it applied to this case. We think that reliance is misplaced. Arndt v. Davis, *supra,* and the cases it cites, refers to a situation where a person has been given unterminated permission to use a vehicle for a specific purpose or with defined limitations, but thereupon uses it for a purpose which is particularly forbidden or not especially authorized. The theory of that doctrine is at least twofold. In the first place, the use for which original consent was given continues, even though there is a temporary deviation from or abandonment

of that purpose. Secondly, and from a strictly public policy standpoint, the insurance company whose insured made it possible for the claimed unauthorized act by placing possession of the auto with that person should pay the damages. However, the cited case does not hold that once an insured automobile owner has given another permission to use the vehicle for a specific purpose on a particular occasion, every use thereafter, even without the owner's knowledge or permission, is authorized. This is not to say there cannot be implied permission so as to activate coverage under the omnibus clause.

State Farm Mutual Automobile Ins. Co. v. Kersey 171 Neb. 212, 106 N. W. 2d 31 (1960), was cited in Arndt v. Davis, *supra,* as supporting the strict rule doctrine. However, the analogy was inappropriate because, as has been pointed out earlier, the latter case involved a use for an unauthorized purpose during a permissible possession which had not been terminated. The former case, on the other hand, presented a true implied permission question, absent any initial permission, and with facts similar but much more favorable to defendants' position here, the court found no coverage. In that case, the insured's minor daughter was driving his automobile without specific permission, when she was involved in an accident on August 31, 1956. The findings of fact made by the trial court and in support of which there was substantial relevant evidence included the following: The daughter had driven the automobile alone on July 4, 1956, in Overton, Nebraska, with the permission of her father; she drove the automobile alone, with the permission of her father, in Smithfield, Missouri, during the summer of 1955; she drove the automobile a number of times on country roads and streets near and in Elm Creek, Nebraska, during the year preceding the accident, with her father in the car giving her driving lessons; she drove the automobile back and forth on the fam-

ily driveway, both with and without the express permission of her father, 12 to 15 times before the accident; her father had knowledge that she was driving on the family driveway and never objected; and the father did not notify his daughter she was not to drive the car at the time the accident happened. Nevertheless, the trial court found the evidence in the case neither expressly or impliedly granted the daughter permission to drive other than in the company of her father, and found there was no coverage afforded to the daughter under the omnibus clause of the insurance policy. In doing so, this court said: " 'Permission or consent may be implied. Thus permission is not limited to that expressly granted, but may arise and be implied from a course of conduct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of the owner, which must be regarded as a "permission" within the policy. But no implication arises from use on a specific occasion for a specific purpose by the insured or one of his household of permission to others to operate the automobile even for a use closely connected and related in purpose and time, and permission to use the automobile for a given purpose does not imply permission to use it for all other purposes.' " Recognizing the modifications imposed by the "liberal or initial permission" doctrine of Arndt v. Davis, 183 Neb. 726, 163 N. W. 2d 886 (1969), it might be more accurate to say that permission granted for limited specific purposes on isolated occasions does not imply general permission to use an automobile for purposes wholly unrelated in time, character, or circumstances.

Although finding against the insurance company on disputed facts, Bourne v. Manley, 435 S. W. 2d 420 (Mo. App., 1968), laid down the following rules: "We recognize that one relying upon implied permission must prove it, that no implied permission

arises merely because someone obtains possession of a vehicle and uses it without the knowledge of the named insured, and that the permission contemplated by the omnibus clause is something more than mere sufferance or tolerance without taking steps to prevent, that term being used rather in the sense of leave, license or authority with the power to prevent. * * * It may and usually does arise from a course of conduct of the parties over a period of time prior to the use in question." To the same effect is Cooper v. Firemen's Fund Ins. Co., 252 So. Car. 629, 167 S. E. 2d 745 (1969): "Implied consent involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent. * * * However, permission requires something more than mere sufferance or tolerance without taking steps to prevent the use of the automobile and permission cannot be implied from possession and use of the automobile without the knowledge of the named insured." See, also, National Farmers Union Prop. & Cas. Co. v. Ronholm, 153 N. W. 2d 322 (No. Dak., 1967); Whelchel v. Sommer, 413 F. 2d 521 (8th Cir., 1969); Gremillion v. Goleman, 316 So. 2d 810 (La. App., 1975); Pettis v. State Farm Mutual Automobile Ins. Co., 286 Ala. 344, 239 So. 2d 772 (1970); Tomasetti v. Maryland Casualty Co., 117 Conn. 505, 169 A. 54 (1933).

Thus, the common thread that runs through the fabric of implied permission under Nebraska law and that of other jurisdictions is a course of conduct indicating mutual acquiescence or lack of objection under circumstances signifying assent. With one minor exception, the evidence here indicated that Sharon had never been allowed to drive the automobile alone, that she was not granted permission on this particular occasion, and that she understood she was not to use the car. The exception, and the view of the evidence most favorable to the prevail-

ing party, consisted of a statement by Sharon that she had driven the car to a drugstore with permission of Janet less than once a month, always on occasions when Janet would pick her up, take her to Janet's house, and then let her drive to the drugstore and back. This is countered by contrary statements of Sharon and unequivocal statements by Janet that she had never allowed Sharon to drive the car alone. However, even assuming the truth of the one statement, isolated instances of permission for a specific purpose under recurring special circumstances do not amount to a "course of conduct indicating mutual acquiescence or lack of objection under circumstances signifying assent" to a use for a purpose "wholly unrelated in time, character, or circumstances." As a matter of fact, the evidence conclusively establishes the contrary, i.e., there was no permission, express or implied, for Sharon to use the automobile on this occasion. Therefore, we are compelled to reach the conclusion that the findings of the trial court were clearly wrong.

Accordingly, we find that at the time of the use of the Volkswagen automobile by Sharon, she did not have permission to use the same; she was not an additional insured under the omnibus clause; and the policy issued by MFA does not afford Sharon coverage for the accident in question. The judgment of the trial court is reversed and judgment is entered accordingly for the plaintiff.

REVERSED.

McCOWN, J., dissenting.

The opinion of the court acknowledges that the judgment of the trial court finding that there was permission to drive within the terms of the policy had the effect of the verdict of a jury and could not be set aside unless clearly wrong as a matter of law. The opinion then proceeds to weigh and resolve conflicts in the evidence and to determine the weight to be given to the testimony, which obviously includes

a determination of the credibility of each witness, and concludes that the trial court's determination of the facts was clearly wrong. I disagree with that conclusion. The evidence was sufficient to support the findings and judgment of the District Court.

We have consistently held that in a case such as this it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Merten v. Pedersen, 199 Neb. 34, 255 N. W. 2d 869.

It has also consistently been 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, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Fabricators, Inc. v. Farmers Elevator, Inc., 203 Neb. 150, 277 N. W. 2d 676.

In the present case there were only two witnesses; Janet, the owner of the automobile, and her 26-year-old sister, Sharon, the driver. Their testimony was conflicting and there were inconsistencies in the testimony of each. The owner testified that she had never given the driver permission to drive the automobile by herself. The driver testified that she had driven the car by herself, with the permission of the owner, on short trips to the drugstore about once a month over a period of some 2 to 3 years, and that approximately a month before the accident involved here the driver, with the permission of the owner, drove by herself to the doctor's office and thereafter drove into downtown Omaha to pick up the owner at her place of employment. This testimony was uncontroverted by the owner. It is also undisputed that the owner had frequently given permission to the driver to drive the automobile over the period of 2 or 3 years before the incident on occasions when either the owner or another sister were present in

the car. There was no testimony by either witness that the owner had ever refused permission to the driver to drive on any occasion except one time approximately 1 year before the incident here occurred, and there is no explanation as to the reason for that refusal. There was no discussion about driving the automobile at the time the owner delivered the keys to the driver along with her house keys. The driver testified that she assumed her sister wouldn't mind her taking the car.

It seems clear that the evidence in this case as to implied permission was conflicting and contradictory, and it is undisputed that there was no express permission. The trial court, as the fact finder, resolved the evidence in favor of the driver. This court has now held, as a matter of law, that where only express permission has been granted during the prior course of conduct of the parties, implied permission is thereafter insufficient and only express permission can constitute permission under the terms of an automobile liability policy.

In this case the trial court was the fact finder. The posture of the case in this court is the same as though the case had been submitted to a jury under complete and proper instructions as to the law, and a jury had returned the same verdict the trial court did here. The judgment of the trial court was not clearly wrong as a matter of law and should have been affirmed as a matter of fact.

DOUGLAS JOE SIKES, APPELLEE, V. JOEL DARLENE SIKES, APPELLANT.

288 N. W. 2d 43

Filed February 5, 1980. No. 42514.

1. **Divorce: Parent and Child.** In determining the question of child custody, the paramount consideration must be the best interests and welfare of the child.

2. **Divorce: Parent and Child: Judgments.** A judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case.
3. **Trial: Appeal and Error: Evidence.** Although this appeal is triable de novo in this court, we must give weight to the fact that the trial court saw and observed the witnesses and the attitude of the parties at trial and, likewise, had the opportunity to hear the witnesses and weigh their testimony.
4. **Trial: Evidence.** Where there are irreconcilable conflicts in the evidence, weight will be given to the fact that the trial court accepted one version of the facts rather than the other.
5. **Divorce: Parent and Child: Appeal and Error.** Although the discretion of the trial court on the granting of child custody is subject to review, its determination will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Mitchell & Demerath, for appellant.

Randall Alexander, for appellee.

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

ENDACOTT, District Judge.

This is a dissolution of marriage proceeding. The petitioner husband was awarded custody of the parties' only child, a 3-year-old boy. The respondent wife appeals from this decision. We affirm.

The issues on appeal are whether the court abused its discretion and whether its decision was contrary to either the evidence or the law.

The couple was married in 1972. Their son was born November 9, 1975. The marriage was a stormy one. In November 1977 the husband filed the present action. A decree of dissolution was entered on March 29, 1978. However, ruling was reserved on the custody issue. Each party was to be afforded a period of temporary physical custody while under observation by the

Buffalo County Department of Social Services.

On November 17, 1978, trial was held on the custody issue. In its supplemental decree, the court awarded custody to the husband. It is from this decision that the wife appeals.

It would serve little useful purpose to set forth in any detail the story of the couple's unhappy marriage, or to dwell upon the weaknesses and frailties, real or imagined, which each spouse sees in the other. Suffice it to say that the record is replete with irreconcilable conflicts in the evidence. When such conflicts exist, weight will be given to the fact that the trial court accepted one version of the facts rather than the other. Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466 (1978). And, in considering this appeal de novo, weight will also be given to the fact that the trial court observed the witnesses and their manner of testifying. Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617 (1974). As was noted in Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111 (1974), the judgment concerning child custody is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The Christensen decision then lists some of these many factors for the court to consider. Of course, above all else, the paramount consideration must be the best interests and welfare of the child. § 42-364, R. R. S. 1943. A review of the record in the present case makes it abundantly clear that the trial judge, who heard and observed the witnesses, gave careful consideration to the many appropriate factors in the particular circumstances of this case. In its supplemental decree, the trial court specifically found that the father was living in a trailer which would be physically suitable to house the minor child; that the father was regularly employed and appeared to have stability in job employment and work goals; and that the mother continued to reside with her mother, ap-

peared to have emotional problems, and, while recognizing the need for job training, appeared to be somewhat undecided and wavering as to her employment future. The court also found that, although it may be medically and emotionally helpful to the mother to have custody of her son, such custody may adversely affect the emotional and mental health of the boy and may not be in his best interests. The court then found that it would be in the best interests of the child that custody be granted to the father subject to visitation by the mother.

The discretion of the trial court on the granting of custody of minor children is, of course, subject to review. However, the determination of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853 (1977). Upon a review of the record, we find no abuse of discretion by the trial court. There is more than sufficient evidence to support its decision awarding custody of the son to his father.

AFFIRMED.

EARL MCCANN, APPELLANT, V. HOLY SEPULCHRE CEMETERY ASSOCIATION AND THE STATE OF NEBRASKA, SECOND INJURY FUND, APPELLEES.

288 N. W. 2d 45

Filed February 5, 1980. No. 42545.

1. **Workmen's Compensation: Proximate Cause: Proof.** Under the Nebraska Workmen's Compensation Law, the claimant seeking compensation has the burden of proof to establish by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought.
2. **Workmen's Compensation: Evidence: Proof.** The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means.
3. **Workmen's Compensation: Evidence: Verdicts: Appeal and**

Error. Findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict and will not be set aside on appeal unless clearly wrong.

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

Thomas R. Wolff, for appellant.

Gaines, Otis, Mullen & Carta, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and RIST and BARTU, District Judges.

RIST, District Judge.

This is an appeal by plaintiff, Earl McCann, from an order on rehearing by the Nebraska Workmen's Compensation Court dismissing his claims for benefits against his employer, Holy Sepulchre Cemetery Association and the State of Nebraska, Second Injury Fund, arising from injuries which he claims arose out of and in the course of his employment by the cemetery association.

The record reflects that plaintiff, since early childhood, has had little vision in his right eye, secondary to amblyopia, and was for all practical purposes a one-eyed person. In 1973 plaintiff was struck on the head by a tree branch and thereafter suffered a considerable loss of vision in his left eye, which was diagnosed as a detached retina. Surgery was performed on the left eye on July 26, 1973, following which the vision in that eye showed immediate improvement, but over subsequent months deteriorated. Testing revealed the eyesight in the left eye on July 8, 1976, was limited to counting fingers at 10 feet, and on June 30, 1977, it had a visual acuity of 20/400 which, in the Snellen Table for Visual Loss used by the compensation court, reflects a 96.7 percent loss of vision.

On November 2, 1977, while operating a power mower for his employer, plaintiff bumped into a tombstone which fell and struck him on the back of

the head. Defendant testified he was dazed and checked into the University Medical Center for treatment. He further testified that he suffered a loss of vision in his left eye immediately after the accident.

Testing of plaintiff's left eye following the accident revealed the following: On November 2, 1977, immediately following the accident, he could see hand motion at 1 foot; on November 4, 1977, he could see hand motion at 6 feet; on March 30, 1978, he could count fingers at 6 feet; and on July 10, 1978, he had a visual acuity of 20/400.

The only medical evidence was that of Dr. Raymond Records, an opthalmologist and chairman of the Department of Opthalmology at the University of Nebraska College of Medicine. Dr. Records had examined the plaintiff both before and after the accident of November 2, 1977.

Dr. Records testified that there was a measurable difference in the sight of the left eye before and after the accident as revealed by the tests previously noted. When asked if he could say with a reasonable degree of probability whether the blow to the head on November 2, 1977, caused a loss of vision, he testified: "The relationship is there in time, but, again, there is no structural or anatomic abnormalities that would account for this loss of vision." He further testified: "Before the accident his vision was here and after the accident is here (indicating). There is a difference. Something has happened. I could find no particular reason for this in examining the man's eye or his visual pathways back to his brain, or whatever." He further testified it was possible that the deteriorated eyesight existed prior to the 1977 accident and that the plaintiff's vision would vary from time to time because of his prior retinal problem.

With reference to the examination of plaintiff on July 10, 1978, Dr. Records reported that he could find "no progressive condition which would suggest that

his vision will deteriorate in future years" and further, that "I am unable to document exactly the reason for the decrease in vision, but there is no evidence to date to suggest that there will be a permanent improvement."

On rehearing, the compensation court, in denying plaintiff's petition, found that although Dr. Records had found a decrease in vision as measured before and after the accident of November 2, 1977, he did not state the difference was caused by the accident but rather that he could not say what caused it and that the condition possibly existed before the accident. The court also noted the visual acuity of the left eye was measured at 20/400 both before and after the accident, and found plaintiff had not sustained his burden of proof showing a causal connection between the accident of November 2, 1977, and any loss of vision.

Plaintiff asserts that expert testimony is not required with respect to causation, claiming the injury was objective in nature and with the time line and loss of vision confirmed by the doctor, the plaintiff's testimony as to the accident and subsequent impairment of vision is sufficient to support an order and judgment for plaintiff. We do not agree. The decisions cited by plaintiff in support of his position are those in which the injury was obvious both as to its nature and effect or in which an expert had indicated the probability of causation between the injury and the resulting disability. Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15; Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808. Here the connection between a blow to the back of the head and loss of vision is neither objective nor obvious. All the more so considering plaintiff's medical history involving his eyes.

The general rule set forth in 31 Am. Jur. 2d, Expert and Opinion Evidence, § 99, p. 620, at pp. 621, 622, is applicable: "* * * where the subject matter

is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of the * * * physical condition. * * * the pathological cause of an ailment is a scientific question upon which it is necessary to obtain scientific knowledge, and only the opinions of experts are of value." This court has held that unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Yount v. Seager, 181 Neb. 665, 150 N. W. 2d 245. This is such a case requiring expert medical testimony to show the requisite causal connection between the injury and the claimed disability. There is no such testimony or evidence in the record.

Plaintiff has the burden of proof to establish his claim by a preponderance of the evidence. Parrish v. Karl Kehm & Sons Contractors, 186 Neb. 252, 182 N. W. 2d 422; Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92.

An award of workmen's compensation benefits cannot be based on possibilities or conjecture. Camarillo v. Iowa Beef Processors, Inc., 201 Neb. 238, 266 N. W. 2d 917; Welke v. City of Ainsworth, *supra*.

The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case, and such order may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can be drawn therefrom. Riley v. The

City of Lincoln, 204 Neb. 386, 282 N. W. 2d 586; Hyatt v. Kay Windsor, Inc., *supra*. Such findings on rehearing will not be set aside on appeal unless clearly wrong. Hyatt v. Kay Windsor, Inc., *supra*.

On the record in this case the compensation court was justified in finding that plaintiff failed to meet his burden by a preponderance of the evidence and failed to prove the injury sustained on November 2, 1977, was the cause of any loss of sight. No compensable loss having been proved, the order of the Workmen's Compensation Court on rehearing is affirmed.

AFFIRMED.

IN RE CONSERVATORSHIP OF ESTHER HATCHER, ALSO KNOWN AS MARY ESTHER HATCHER. DOROTHY HORNUNG AND BETTY MARTIN, DAUGHTERS, AND RICHARD HORNUNG, CONSERVATOR, OBJECTORS-APPELLANTS, V. ESTHER HATCHER, ALSO KNOWN AS MARY ESTHER HATCHER, ET AL., APPELLEES.

288 N. W. 2d 276

Filed February 5, 1980. No. 42552.

1. **Eminent Domain: Appeal and Error: Pleadings: Courts.** Except for appeals involving eminent domain proceedings, neither party is required to file a petition on appeal in the District Court when appealing from a judgment or decree entered by a county court or municipal court.
2. **Eminent Domain: Appeal and Error: Pleadings: Time.** In appeals involving eminent domain proceedings, the first party appealing must file a petition on appeal within 50 days from the rendition of the award or judgment of the county court, although the filing of the petition is not jurisdictional. See, Estate of Tetherow v. State, 193 Neb. 150, 226 N. W. 2d 116; City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537.
3. **Appeal and Error.** A trial de novo in a reviewing court is a trial held as if no action whatever had been instituted in the court below.
4. **Appeal and Error: Probate and Administration: Courts.** A de novo trial in the District Court on appeal in probate matters is

likewise held as if no action whatever had been instituted in the county court.

5. **Trial: Evidence: Appeal and Error.** The action of the trial court in excluding testimony of a witness may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show.

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

Roy A. Sheaff and William L. Walker and Earl Ludlam, for appellants.

Michael O. Johanns and Peterson, Bowman, Swanson & Johanns, for appellees.

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

KRIVOSHA, C. J.

This is an appeal from an order of the District Court for Lancaster County, Nebraska, which decreed that the conservatorship created for the benefit of Esther Hatcher be terminated and that the properties of Mrs. Hatcher in the hands of the conservator be returned to her. Two of Mrs. Hatcher's children, Dorothy Hornung and Betty Martin, and the conservator (Objectors) have filed an appeal in this matter, contending that the order of the trial court terminating the conservatorship was in error. We have reviewed the record in this case and find the objections to be without merit. The judgment of the trial court in terminating the conservatorship is therefore affirmed.

The record discloses that in 1973 Mrs. Hatcher and her husband jointly petitioned the county court of Lancaster County, Nebraska, for the appointment of a conservator to manage their assets. In August of 1974 Mrs. Hatcher's husband passed away, and in January of 1977 she filed an application in the county court to terminate the conservatorship. Objections to the termination were filed by Mrs. Hornung and

Mrs. Martin. On March 18, 1977, hearing was had in the county court of Lancaster County, Nebraska, after which hearing the county court determined that no reason existed to continue the conservatorship and ordered it terminated. Thereafter, the Objectors, within 10 days, gave notice of their intention to appeal and duly filed their bond with the clerk of the District Court for Lancaster County, Nebraska. The transcript was also filed in the office of the clerk of the District Court for Lancaster County, Nebraska.

No further action was taken in the matter for a time. On September 12, 1977, Mrs. Hatcher filed a motion to dismiss, maintaining that the Objectors had failed to file a petition on appeal within the time required by law, apparently relying upon the provisions of former section 27-1306, R. R. S. 1943. Section 27-1306, R. R. S. 1943, was repealed in 1972 with the adoption of the court reform act contained in L.B. 1032, Laws 1972. Section 27-1306, R. R. S. 1943, provided that in all cases of appeal from the county court or a justice of the peace court, the plaintiff in the court below must, within 50 days from and after the date of the rendition of the judgment in the court below, file a petition in the District Court. Mrs. Hatcher maintained that the Objectors, being the parties that had appealed, were the plaintiffs in the District Court and had failed to file their petition on appeal within the requisite 50 days.

Hearing before the Honorable Dale Fahrnbruch was had in the District Court for Lancaster County, Nebraska, on the motion to dismiss, and on January 5, 1978, Judge Fahrnbruch found that the adoption of L.B. 1032, Laws 1972, did not specifically repeal section 27-1306, R. R. S. 1943, insofar as it was incorporated into section 30-1606, R. R. S. 1943. Sections 30-1601 to 30-1610, R. R. S. 1943, provide for the procedure to follow in appealing matters arising under the Nebraska Probate Code, which includes conservatorships.

The court further found that under the provisions of former section 27-1306 as incorporated into section 30-1606, a petition on appeal must be filed within 50 days of the county court judgment, relying upon our earlier decision in the case of Estate of Tetherow v. State, 193 Neb. 150, 226 N. W. 2d 116. The trial court then found that notwithstanding our statement in Tetherow to the effect that the party appealing has the burden of filing the petition, the specific provisions of former section 27-1306 require the plaintiff in the court below to file the petition in the District Court.

The trial court therefore concluded that it was Mrs. Hatcher who was the plaintiff in the county court and required to file the petition on appeal in the District Court. Judge Fahrnbruch overruled the motion to dismiss.

Thereafter, Mrs. Hatcher filed a petition on appeal. The Objectors then filed special appearances, maintaining that Mrs. Hatcher's petition on appeal, being filed more than 50 days after judgment in the county court, was now out of time. Judge Fahrnbruch again reviewed the matter and concluded that Mrs. Hatcher should be afforded an opportunity to file the petition on appeal. He therefore ordered that unless Mrs. Hatcher refiled her petition on appeal within 7 days from the date of the order, the appeal would be dismissed. Mrs. Hatcher did, on February 22, 1978, and within the 7 days, refile her petition on appeal.

On August 30, 1978, trial was had on the merits. All the parties appeared before the Honorable William C. Hastings, then one of the judges of the District Court for Lancaster County, Nebraska, and stipulated that the matter might be submitted to the court on the transcript and record of proceedings in the Lancaster County court, notwithstanding the fact that the case was one which is tried to the court de novo. §§ 30-1606 and 25-1105, R. R. S. 1943. Neither party sought to introduce any evidence in the District

Court other than to stipulate that the transcript and record in the county court be considered as the evidence in the District Court. On November 13, 1978, the District Court for Lancaster County, Nebraska, entered an order terminating the conservatorship.

Objectors, after having their motions for new trial overruled, perfected their appeal to this court. Objectors have assigned a number of errors but argue only two in their brief. First, they maintain that the trial court erred in permitting Mrs. Hatcher to file her petition on appeal out of time, and second, they maintain that the District Court erred in sustaining the county court's ruling on certain evidence.

The facts concerning the matter of the evidence are as follows: During the hearing in the county court, Objectors sought to introduce evidence as to Mrs. Hatcher's condition following the creation of the conservatorship. The county court ruled that the relevant issue was her condition at the time the termination was being sought and not at the time the conservatorship was created, and did not permit such evidence to be introduced. Objectors made no offer of proof in the county court, nor did they offer any evidence in the District Court concerning Mrs. Hatcher's previous condition.

We turn first then to Objectors' assignment that the District Court erred in permitting Mrs. Hatcher to file a petition out of time. Section 24-541, R. R. S. 1943, now provides in part as follows: "*In all cases not otherwise specifically provided for,* either party may appeal from the final judgment of the county or municipal court to the district court of the county where the judgment was rendered. * * *." (Emphasis supplied.) Sections 24-542 to 24-550, R. R. S. 1943, then set forth the procedure to follow in perfecting the appeal.

However, appeals involving the Nebraska Probate Code are "otherwise specifically provided for" under the provisions of sections 30-1601 to 30-1610, R. R.

S. 1943, and controlling in cases involving the termination of a conservator such as the case at bar.

Under the provisions of section 30-1602, R. R. S. 1943, "[A]ll appeals shall be taken within thirty days after the decision complained of is made." Likewise, section 30-1603, R. R. S. 1943, provides that a bond shall be filed within 30 days from the rendition of the decision. Section 30-1604, R. R. S. 1943, further provides: "After such bond has been filed, the appeal shall be granted, * * *."

The final jurisdictional requirement is found in section 30-1605, R. R. S. 1943, which provides in effect that the transcript must be filed within 10 days after perfecting such appeal. We have heretofore held that the time for filing such transcript is 40 days from the rendition of the decision. See Caha v. Nelson, 195 Neb. 333, 237 N. W. 2d 870. No other jurisdictional steps are necessary to cause an appeal to be properly filed in the District Court.

We are not unmindful of the fact that we have, on previous occasions, said that a petition on appeal in a probate matter must be filed in the District Court within 50 days following the rendition of the judgment. See, Mitchell v. Tucker, 183 Neb. 155, 158 N. W. 2d 614; In re Estate of Lindekugel, 148 Neb. 271, 27 N. W. 2d 169. Regardless of the reasoning behind those earlier decisions, we are now of the opinion that the filing of a petition on appeal within 50 days is not required.

In 1972 the Legislature adopted L.B. 1032 which repealed all of Chapter 27. In addition, the Legislature, first in 1972 and again in 1974, specifically amended those sections concerning appeals from county court to District Court. See, L.B. 1032, Laws 1972, § 41; L.B. 733, Laws 1974, § 1. There is presently no requirement, express or implied, in either sections 30-1601 to 30-1610 or sections 24-541 to 24-550, R. R. S. 1943, which requires the filing of a petition on appeal by any party. To the extent that the

Mitchell case or the Lindekugel case, or cases of similar import, provided to the contrary, they are overruled. Should additional pleadings be required, the District Court, under its discretionary authority, can always permit amendments to the pleadings in an appropriate case. § 25-852, R. R. S. 1943.

In so overruling our former decisions to the contrary, we do not overrule those cases involving appeals in eminent domain cases and which do require the filing of a petition on appeal within 50 days. See Estate of Tetherow v. State, 193 Neb. 150, 226 N. W. 2d 116. The Tetherow case and others like it were limited to eminent domain cases and were occasioned by reason of the fact that Chapter 76, article 7, of the Nebraska statutes was not covered by L.B. 1032, Laws 1972, and for the further reason that no other specific statutory appeal procedure exists. We do not disturb the procedure prescribed for appeals in eminent domain cases, and suggest seeing Estate of Tetherow v. State, *supra*, and City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537, for the procedure to be followed in such proceedings.

In this case neither party, therefore, was required to file a petition on appeal within 50 days from the rendition of the judgment. No error was committed by the trial court in permitting Mrs. Hatcher to file a petition on appeal which was not required. The Objectors' assignment of error in that regard is without merit.

We now turn to Objectors' second claim, that the District Court erred in sustaining the county court's rulings limiting Objectors' evidence in the county court.

In the first place, Objectors fail to recognize the effect of a de novo trial in the District Court. A trial de novo in a reviewing court is a trial held as if no action whatever had been instituted in the court below. See, Bookstaver v. Town of Westminster, 131 Vt. 133, 300 A. 2d 891 (1973); Rudolph v. State, 286

Ala. 189, 238 So. 2d 542 (1970); In re Hayes, 261 N. C. 616, 135 S. E. 2d 645 (1964). A de novo trial in the District Court on appeal in probate matters is likewise held as if no action whatever had been instituted in the county court. The rulings by the county court ceased to exist with the filing of the appeal in the District Court to the same extent as the judgment itself. Whatever the county court did was not before the District Court for review and is not before us for review. The only matters to be reviewed by this court on appeal are the actions of the District Court in hearing the case as if it had been originally filed in the District Court.

Even if we assume that the objections made by the Objectors in the county court were before the District Court by reason of the parties stipulating to the entire record, including the objections, and the District Court should have permitted the evidence (an issue which we do not decide), the Objectors' assignment of error is without merit. The Objectors failed to make any offer of proof in the District Court. We have frequently stated that the action of the trial court in excluding testimony of a witness may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. See Wisnieski v. Coufal, 191 Neb. 598, 216 N. W. 2d 736; Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537. A reading of the record fails to disclose to us what the evidence would have shown, and therefore we have no way to determine whether the trial court's refusal to accept said evidence constituted prejudicial error. The Objectors' second assignment of error is therefore likewise without merit.

The evidence clearly supports the trial court's finding that Mrs. Hatcher did not require a conservator and could adequately handle her own property.

For the foregoing reasons the decision of the trial court is therefore affirmed.

AFFIRMED.

WHITE, J., concurs in result.

HASTINGS, J., not participating in the decision of this case.

STATE OF NEBRASKA EX REL. KARYN M. STANSBERY ET AL., APPELLANTS, V. PAUL SCHWASINGER ET AL., COUNTY COMMISSIONERS OF KEITH COUNTY, NEBRASKA, APPELLEES.

289 N. W. 2d 506

Filed February 5, 1980. No. 42559.

1. **Mandamus: Statutes.** A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion. § 25-2156, R. R. S. 1943.
2. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act: (1) The duty must be imposed by law; (2) the duty must still exist at the time the writ is applied for; and (3) the duty to act must be clear.
3. **Highways: Counties: Statutes: Mandamus.** The ultimate decision whether to acquire or accept right-of-way and to establish and/or improve a new road under the provisions of sections 39-1638 to 39-1655, R. R. S. 1943, is vested in the sound discretion of the county commissioners and the exercise of their authority in this respect may not be compelled by mandamus.
4. **Highways: Governmental Subdivisions: Special Assessments.** A governmental subdivision has no authority to improve roads and levy special assessments except for public roads to which it has title.
5. **Highways: Counties: Statutes: Right-of-Way.** The authority of the county commissioners to establish new roads or to extend existing roads under the Rural Road Improvement District Act, sections 39-1638 to 39-1655, R. R. S. 1943, depends not only upon compliance with the procedures outlined in the act, but also upon the acquisition by the county in some manner of the necessary right-of-way. § 39-1644, R. R. S. 1943.

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

Firmin Q. Feltz, for appellants.

Patrick B. Hays, for appellees.

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

CLINTON, J.

This is an action by the relators, rural property owners, for a peremptory writ of mandamus to compel the respondents, county commissioners of Keith County, Nebraska, to pass a resolution creating a road improvement district under the provisions of the Rural Road Improvement District Act, sections 39-1638 to 39-1655, R. R. S. 1943, Laws 1963, c. 213, p. 679. The District Court denied the writ, finding that the creation of the district involved a discretionary function of the county commissioners. The relators have appealed to this court, contending that the statutory function of the county commissioners under the act is purely ministerial and that the writ should be issued. We affirm.

The act defines improvement as meaning, "the completed road and all work incidental thereto." § 39-1638 (3), R. R. S. 1943. Section 39-1639, R. R. S. 1943, authorizes the county to establish and construct new roads or extend existing roads, and to improve such roads in various ways which the statutes describe.

Two methods of initiating a road improvement district are provided for in the act. The board may initiate the matter by a proposed resolution, or it may be initiated by petition of 25 percent of the property owners in the proposed district. §§ 39-1639, 39-1640, R. R. S. 1943.

The proposed resolution must contain certain information. In the case of existing roads, the road must be designated. In case of establishing a new road, the location must be given. In addition, the proposed resolution must contain: (1) The general

description of the improvement and the kind of material, if it is to be surfaced; (2) a rough estimate of the total cost; (3) the proposed method of financing; and (4) the outer boundaries of the district in which it is proposed to levy special assessments. § 39-1639, R. R. S. 1943. If initiated by property owner petition, the petition must state the improvements desired and the property to be included. When the requisite petition is filed, the commissioners "shall prepare and propose the resolution as provided in section 39-1639." § 39-1640, R. R. S. 1943. The board must set a hearing date, set the matter for public hearing, and give notice thereof. § 39-1641, R. R. S. 1943.

The stipulation of the parties shows that notice was given and the public hearing was held; and that the county commissioners viewed the premises, determined the district was not in the public interest, and refused to enact the proposed resolution. No objections were made to the proposed resolution by any of the three property owners. The record shows the two relators and one other person own all the land in the proposed district.

Section 39-1642, R. R. S. 1943, provides that all interested persons shall be given an opportunity to be heard on any matter affecting the formation of the district. That statute also provides: "At or following said hearing the board may pass the resolution as proposed, or amend the resolution and pass the amended resolution. The amendments may, among other things, exclude any tracts included in the proposed resolution, or include additional property in the district, or otherwise change the boundaries of the proposed district." Section 39-1644, R. R. S. 1943, provides in part: "The county may obtain any property necessary for the improvement by gift, purchase or by eminent domain. The county may accept gifts or contributions to assist in the costs of the improvement. . . ."

Section 39-1647, R. R. S. 1943, provides that after acceptance of the improvement, costs are to be assessed against property owners especially benefited.

The record shows that, in this case, the landowner petitioners had caused a plat and map to be made and recorded. On the plat are designated a number of tracts of land of approximately 20 acres each. Meandering through the plat is a designated right-of-way. The surveyor's certificate on the plat refers to "an easement for access, 66 feet wide, through said land," and recites, "in accordance with Article 3, Section 2, revised, of the Keith County Zoning Regulations, this does not represent a subdivision to be governed by said regulations." There is nothing in the record to establish what the pertinent zoning regulations are. That plat, received in evidence, contains no dedication of right-of-way to the public and is not signed by the landowners. Neither does it bear any record of filing marks.

The owner of the greater part of the land within the proposed boundaries was the only witness to testify on behalf of the relators. She referred to the tracts on the plat as "twenty acre farms," and said: "Some of these roads are currently nearing completion but all of the roads that are proposed are laid out on the plat." She further stated the roads were constructed at the request of the witness and that there is more work to be done on the roads, saying: ". . . we are at several stages depending on which area of the roads you are talking about. There is about a mile and an eighth, approximately, that is graded and culverted and just waiting for little detail ditching and gravel. There is another one of approximately a mile that has been surveyed and staked and it will probably not be cut through until sometime later this fall. And then there is about a half of a mile, I guess, that is roughed-in and it is passable but it needs widening and ditching and a fjord built; all major things all of which have been

contracted for at this point. None of the burden of this work I am describing will fall on the county."

The owner stated it was her purpose to open the roads to the public. She described her purpose in filing the petition as follows: "Q Is it your purpose to make arrangements for the widening and reditching of the major roads and the redistricting [sic] thereof? A I prefer not to be perpetually burdened with the maintenance and snow clearance and that sort of thing. As far as bringing the roads up to county specifications, I have indicated that I intend to do that before the county is made responsible for the roads. Q Now then, has the fact there are no arrangements for the maintenance of the roads impeded the sale of the farms there? A Yes, it makes it very difficult for people to know what their property value is going to be; so yes, it does."

The resolution proposed by the landowner petitioners provided: "(4) The proposed method of financing is with private funds," and that the cost would be about $14,000. The petition described the boundaries of the district but made no mention of special assessments.

The proposed resolution of the county commissioners on which the public hearing was held differed in the following respects from that attached to the petition. It said: "(4) That the proposed method of financing the same is personal finances," and it described the boundaries of the district in which "it is proposed to levy special assessments."

One of the 20-acre tracts has been sold to a person not a party to this litigation. At the time of trial, that person was building a home on that tract which was nearing completion. One of the relators owns one tract. The relator witness owns the balance of the land. The proposed road serves only the several 20-acre tracts and no other land.

One of the county commissioners testified as follows: "Well, we tried to look at four different areas

as far as this Road Improvement District was concerned. First, we looked at the petition itself and there was no mention of the amount of improvements wanted. Next, we looked at the valuation of the area involved and in relation to any money that could be raised for such improvements. Then, we looked also at the area that it did involve as far as in relation to the other roads or how it would connect with any existing county roads. Q Did you go out and personally inspect the property? A Yes, we did."

The underlying rule governing the use of the writ of mandamus is: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion." § 25-2156, R. R. S. 1943.

We have recently said: "To warrant the issue of a peremptory writ of mandamus to compel the performance of a legal duty to act: (1) The duty must be imposed by law; (2) the duty must still exist at the time the writ is applied for; and (3) the duty to act must be clear." State ex rel. Blome v. Bridgeport Irr. Dist., *ante* p. 97, 286 N. W. 2d 426.

The Rural Road Improvement District Act clearly contemplates the construction of new public roads and extensions thereof, or the improvement of existing public roads by means of special assessment of the properties specially benefited. The powers, rights, and duties of counties pertaining to public roads are set forth in many different sections of the statutes. Section 39-1401 (2), R. R. S. 1943, states: "Public roads shall mean all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by

the county board of any county and traveled for more than ten years. . . ." There are various methods prescribed for laying out public roads, as well as statutes prescribing the duties of a county with reference to the maintenance and regulation of public roads. Sections 23-114.04 (1), 39-1402, 39-1403, 39-1405, 39-1410, 39-1649, 39-1710, 39-2003, and 31-727, R. R. S. 1943, among others.

Section 39-1501, R. R. S. 1943, provides in part: "The county board, in commissioner type counties having a county highway superintendent . . . shall: . . . (5) Maintain roads in unincorporated areas if such roads are dedicated to the public and are first improved to minimum standards as established by the county board. In a zoning area of a municipality such standards shall be the higher of those established either by the county or the municipality. Future improvements may be undertaken pursuant to the provisions of Chapter 39, article 16."

Chapter 39, article 16, R. R. S. 1943, provides three separate methods for improving public roads through improvement districts. Two of these methods contemplate special assessments, one of the latter being the method at issue in this case.

The testimony of the relator who appeared as a witness clearly shows that the relators' purpose is not to create an improvement district, but to require the county to maintain roads which are not yet public. The plat referred to in the evidence contains no dedication of the roads to the public use and, as earlier mentioned, was not executed by the owners of the land. The owners have not delivered or even tendered to the county a deed to the proposed right-of-way, nor has there been an implied dedication and acceptance. The act authorizes, but does not require, the county to acquire the right-of-way by eminent domain. § 39-1644, R. R. S. 1943.

A governmental subdivision has no authority to improve roads and levy special assessments except

for public roads to which it has title. Metropolitan Life Ins. Co. v. SID No. 222, 204 Neb. 350, 281 N. W. 2d 922; City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396. See, also, Village of Maxwell v. Booth, 161 Neb. 300, 73 N. W. 2d 177.

It is apparent that when the act refers to roads it means public roads. § 39-1639, R. R. S. 1943. It contemplates that the county shall acquire title to the right-of-way in some manner. § 39-1644, R. R. S. 1943. It provides that when the road improvements "have been completed and accepted," they shall constitute a part of the county road system and be maintained by the county. § 39-1649, R. R. S. 1943. The procedures under the act are not in and of themselves a means by which the county acquires title, nor by which the road becomes public.

The application for the writ must fail for three reasons: (1) The relators' proof does not bring them within the provisions of the act. (2) Their proof indicates they want road maintenance rather than road improvements, but there is no public road which qualifies for public maintenance. (3) The provisions of the act and related statutes, as we read them, do not impose upon the board of county commissioners a mandatory ministerial duty to establish and construct new roads even upon petition. The provision for acquisition of right-of-way contains no mandatory language. The fact that a public hearing is required and that estimated costs of improvements are to be considered are also indications that the county commissioners are to exercise discretion and judgment. The Legislature would seem to have left it to the judgment of the county commissioners to determine whether the costs would be disproportionate to special benefits.

The term "improvement," as defined in section 39-1638, R. R. S. 1943, when read together with section 39-1645, R. R. S. 1943, which makes provision for paying "cost of the improvement as the work prog-

gresses," does not appear to include right-of-way. It further does not appear that the cost of the acquisition of right-of-way is part of the cost to be paid by special assessments. The expenditure of funds for right-of-way is clearly discretionary and obviously the board would have to consider availability of funds in determining whether to establish new roads. The entire tenor of the act fits the existing statutory pattern which, unless specifically otherwise provided, leaves the decision as to the opening and improvement of roads to the county commissioners. See, Cummins v. Sheridan County, 95 Neb. 459, 145 N. W. 975; State ex rel. Goossen v. Board of Supervisors, 198 Neb. 9, 251 N. W. 2d 655; State ex rel. Weinberger v. Gormley, 155 Neb. 242, 51 N. W. 2d 343; Kunz v. Bornemeier, 170 Neb. 463, 102 N. W. 2d 842; 55 C. J. S., Mandamus, § 177, pp. 335, 336. We hold that the ultimate decision whether to acquire or accept right-of-way and to establish and/or improve a new road under the provisions of sections 39-1638 to 39-1655, R. R. S. 1943, is vested in the sound discretion of the county commissioners and the exercise of their authority in this respect may not be compelled by mandamus.

The county commissioners did perform the duty which was mandatory under the act, i.e., they proposed a resolution and held a public hearing thereon.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. GERALD JOSEPH FALLIS, APPELLANT.

288 N. W. 2d 281

Filed February 5, 1980. No. 42749.

1. **Criminal Law: Venue: Trial: Appeal and Error.** A motion for a change of venue in a criminal action is addressed to the sound

discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion is shown.

2. **Criminal Law: Venue.** Among the relevant factors considered in determining whether a change of venue should be granted due to pretrial publicity are the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn.
3. **Criminal Law: Juries: Discrimination.** Nebraska's method of jury selection from voter registration lists is racially neutral.
4. **Criminal Law: Right to Counsel.** The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not in itself sufficient to warrant the appointment of substitute counsel.
5. **Criminal Law: Lesser-Included Offenses.** The test to be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense.
6. **Criminal Law: Evidence: Courts: Judgments.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
7. **Criminal Law: Evidence: Verdicts.** A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.

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

Tim Sindelar of Sindelar & Gooch, 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.

BRODKEY, J.

The defendant, Gerald Joseph Fallis, was charged

in a multicount information of committing the offenses of (1) first degree sexual assault under section 28-408.03, R. R. S. 1943; (2) burglary under section 28-532, R. R. S. 1943; and (3) being a habitual criminal under section 29-2221, R. R. S. 1943. He was convicted of the first two offenses after a trial to the jury, and was sentenced to serve a term of 8 to 25 years on the first degree sexual assault conviction, and to a term of 1 to 10 years on the burglary conviction, the sentences to run concurrently. He has appealed those convictions to this court. We affirm.

The victim, an 83-year-old retired school teacher, was sexually assaulted in her home in Valentine, Nebraska, during the evening hours of September 16, 1978. Due to her physical condition and the nature of the attack, she was unable to identify her assailant. Defendant, an American Indian, enrolled in the Rosebud Sioux Tribe and residing in Mission, South Dakota, was arrested later that evening upon information obtained by the police following an investigation of the incident. Counsel was appointed by the court to represent the defendant; and upon his arraignment on counts I and II of the information, the defendant entered pleas of not guilty to those charges. The charge of being a habitual criminal was later dismissed by the court and will not again be referred to in this opinion.

Trial was originally set by the court for January 8, 1979; however, because of various motions filed by the defendant, and two continuances granted by the court on its own motion, the trial was reset for February 12, 1979. Following the second continuance, and prior to trial, both the defendant and his court-appointed counsel filed separate motions to disqualify defendant's attorney from representing the defendant in the action. The basis for the motion of defendant's attorney was that his client had failed to cooperate with him in the preparation of the case

and had not confided in him or given him the names of prospective witnesses, and had indicated that he preferred to have an attorney more closely associated with the American Indian movement. In support of his separate motion, the defendant alleged that he was unable to confide in his court-appointed attorney and felt that there was a conspiracy between the prosecuting attorney and his court-appointed attorney, and that he would be unable to obtain fair representation in the trial. Both motions were overruled by the court, and the trial commenced the same day.

There was little, if any, conflict in the evidence adduced at the trial, with the exception of the evidence in support of the defendant's alibi defense, his claim being that he was in Kilgore, Nebraska, during the entire evening on which the alleged assault had been committed. The State presented evidence which, if believed by the jury, placed the defendant at the scene of the crime in Valentine, Nebraska, at the time the crime was committed. There was also evidence indicating that the defendant was the assailant of the victim at that time.

Based on the evidence presented at that trial, the jury returned a verdict of guilty on both counts, and the defendant was sentenced as above indicated.

In his appeal to this court, the defendant assigns four errors which he claims constitute reversible error. Defendant's first and principal contention is that the trial court erred in denying his motion for a change of venue. In his motion, defendant contended that a change of venue was necessary in order to receive a fair trial for the reason that there was extensive pretrial publicity, and more importantly, that the jury panel included no American Indians. In support of his motion, defendant presented three affidavits, almost identical in form, and containing conclusional statements without supporting facts, to the effect that an American Indian was

unable to receive a fair trial in Cherry County, Nebraska. He also produced evidence with regard to the alleged absence of American Indians on the jury panel. The rule is well established that a motion for a change of venue in a criminal action is addressed to the sound discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595 (1974); State v. Goham, 187 Neb. 34, 187 N. W. 2d 305 (1971); Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689 (1951); State v. Ell, 196 Neb. 800, 246 N. W. 2d 594 (1976). In connection with the issue of extensive pretrial publicity as justifying a change of venue, this court stated in State v. Ell, *supra*: "A survey of cases throughout the United States shows that among the relevant factors considered in determining whether a change of venue should be granted due to pretrial publicity are the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn." We note, however, that the defendant did not introduce any evidence whatsoever as to what the purported extensive pretrial publicity consisted of. In the absence of such evidence, we are reluctant to express an opinion on the prejudicial nature of this publicity, if any.

However, the proceedings of the voir dire of the jury at the trial are available and revealing on this issue. It is interesting to note that of the 38 talesmen in the venire, only 11 were dismissed for cause. None of the persons dismissed for cause were dis-

missed because of exposure to pretrial publicity. In reviewing the record, we are unable to find anything which would indicate that the purported pretrial publicity was so extensive or of such a nature as to make it impossible for the defendant to secure a fair trial in Cherry County, Nebraska.

Defendant also contested the manner used in the selection of the jury panel in his motion for change of venue. Specifically, he contended that the jury panel contained no American Indians and was therefore not a jury of defendant's "peers." We comment, in passing, that in this country the word "peers" is generally held to mean "citizens," and nothing more. 70 C. J. S., Peers, p. 385; Black's Law Dictionary (5th Ed., 1969), p. 1019. However, we believe defendant is in effect contesting the method of the selection and composition of his jury. In State v. Martinez, 198 Neb. 347, 252 N. W. 2d 630 (1977), this court stated: "A prima facie case of discrimination in jury selection can be established upon demonstration that a significant disparity exists between the percentage of a particular minority chosen for jury duty and the percentage of that minority available in the population from which the jurors are drawn. See Gibson v. Blair, 467 F. 2d 842 (5th Cir., 1972). For example, in Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935), proof that a substantial segment of the population was of negroid descent, coupled with proof that no black American, although several were qualified, was ever called for jury service over an extended period of time, was held to constitute a prima facie case of systematic exclusion of a distinct minority from jury service."

As previously stated, defendant's evidence with reference to discrimination in jury selection consisted of the affidavits of three persons alleging, in conclusional form, that it was impossible for an American Indian to receive a fair and impartial jury

in Cherry County, Nebraska. The defendant testified at the hearing on the motion for change of venue and stated that upon examining the jury panel list, he did not know of any member of the American Indian race that was included in that list. The clerk of the District Court for Cherry County also testified at the hearing that he did not know of any jurors, personally, who were members of the American Indian race; but indicated that some on the list might have been American Indians as he did not personally know all the persons on the list, and that it was not possible to determine that fact from the names alone. This is obviously true, as even the defendant's name, Fallis, does not indicate American Indian heritage. The record reveals that in overruling defendant's motion for a change of venue, the court stated as follows: "Of course, our juries are, by the state law, drawn from the poll list, and that is where this jury was drawn from. This Court selected the key number and certified the key number from the poll list, and this jury was drawn by the clerk in due fashion, and be there persons of Indian nationality that voted, they would have, possibly, been drawn if the key number for their registration had been drawn by this Court by lot, and I can see that there is no — if there be persons of Indian nationality, our laws do not discriminate against their being called for jury duty, the same as anyone else. Your general evidence for a change of venue, even to another county, must be deemed by this Court to be insufficient for a change of venue. I realize that you draw on the additional argument that there are probably no Indian persons or persons of Indian Nationality on the jury list. * * * there is no guarantee that your own nationality will be on that jury, even under the United States Constitution. As long as your general statutory provisions for the selection of that jury does not, by some means, prohibit their general selection, then the selection of the jury is

deemed to meet the statutory — I mean the constitutional requirements, so the motion for change of venue is overruled and denied." We agree. In State v. Martinez, *supra*, we stated: "This court has previously approved of the statutory method of jury selection from voter registration lists. See State v. Gutierrez, 187 Neb. 383, 191 N. W. 2d 164 (1971). As shown by that opinion, Nebraska's jury selection process is racially neutral. Because members of minorities are not identified, Nebraska's jury selection process does not encounter the problems as did the jury selection process in Avery v. Georgia, 345 U. S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953), where Negroes were identified by colored cards; or in Whitus v. Georgia, 385 U. S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967), where the letter '(c)' was placed after the names of Negroes. While some Indians may be easily identifiable by their surnames, many have names which are not obviously Indian. That fact fails to separate Indians from other ethnic groups."

The most that can be said of defendant's evidence is that neither the defendant nor the clerk of the District Court personally knew of the existence of American Indians on the jury panel. The fact is that on voir dire examination of the jury it was determined that one of the jurors was of American Indian heritage. We think it is clear the defendant failed to establish discrimination in the jury selection and the ruling of the trial court was not a clear abuse of discretion. There is no merit in defendant's assignment.

Defendant's second assignment of error relates to the trial court's failure to disqualify defendant's court-appointed counsel. The law of this state is well settled that the right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing and that *mere distrust of,* or dissatisfaction with, appointed counsel

is not enough to secure the appointment of substitute counsel. See, State v. Blunt, 197 Neb. 82, 246 N. W. 2d 727 (1976); State v. Bratton, 187 Neb. 460, 191 N. W. 2d 612 (1971). The record discloses that defendant, through a letter written on February 6, 1979, a date subsequent to the originally scheduled date of the trial, made a request for the dismissal of his court-appointed counsel. At the hearing on this request, the defendant stated: "[U]p to date, I have not really confide [sic] in [my defense attorney], and to tell him the whole defense yet. I don't have that much confidence in him, and I feel like that he just couldn't truly, adequately give me a decent defense in this trial coming up." The court-appointed counsel amplified this feeling in testifying on his own motion to withdraw, when he stated: "[S]ince the date of [defendant's] arrest, he has indicated a desire to be represented by somebody who has been identified with the Indian Movement. He has indicated that he was suspicious of my ability to represent him." Clearly a lack of trust by defendant in his court-appointed counsel was present. However, a defendant cannot base a claim of inadequate representation of counsel upon his refusal to cooperate with appointed counsel. See, Shaw v. United States, 403 F. 2d 528 (8th Cir., 1968); United States ex rel. Curtis v. People of St. of Illinois, 521 F. 2d 717 (7th Cir., 1975), cert. denied, 423 U. S. 1023, 96 S. Ct. 465, 46 L. Ed. 2d 397 (1975). A review of the entire record convinces us defense counsel ably represented defendant throughout these proceedings. Failure to inform the court of his distrust in counsel until only a week before trial, when defendant had at least 6 weeks to do so, leads inescapably to the conclusion that defendant only demonstrated he did not have complete confidence in his court-appointed counsel. Such lack of confidence does not, of itself, establish grounds for securing new counsel. Further, defendant's failure to confide in his court-appointed coun-

sel does not set forth a claim of inadequate representation of counsel. It is interesting to note that trial in this matter had been rescheduled on two separate occasions. Defendant was fully aware that any counsel whom he retained would be required to adjust to the trial court's schedule. While defendant might have made attempts to retain other counsel, he made no showing that any counsel he had contacted was able to conform to the court's schedule. Such absence of proof that other counsel was available does not aid defendant in this regard either. While the actions of counsel in informing the trial court of his position were commendable, the trial court was correct, we believe, in denying the motions. We therefore reject this claim of defendant.

The third assignment of error relates to the refusal of the trial court to instruct the jury on the lesser-included offenses of second degree sexual assault and battery. " 'The test which must be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense.' " State v. Tamburano, 201 Neb. 703, 271 N. W. 2d 472 (1978). Defendant contends there was evidence which would provide a rational basis for finding that defendant did not commit a first degree sexual assault or battery. Specifically, defendant contends the element of "penetration" was placed in dispute. We do not agree with this analysis. The only evidence with reference to this element came from the examining doctor. He testified that while it was impossible to determine the depth of the penetration, it was possible for the victim to sustain the injury only through natural penetration. We do not believe the evidence can be viewed as not establishing penetration. In fact, defendant claims that the absence of the victim's blood on defendant's body places the element of penetra-

tion *by defendant* in issue. Again defendant's position is without merit. The statute involved provides: "(1) A person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration * * *." § 28-408.03, R. R. S. 1943. Sexual penetration is defined among other things as "any intrusion, *however slight,* of any part of the actor's body *or any object manipulated* by the actor into the genital or anal openings of the victim's body." (Emphasis supplied.) § 28-408.02 (5), R. R. S. 1943.

The evidence presented does not establish a rational basis for one to conclude that the defendant did not sexually assault or penetrate the victim. The record reveals that defendant was observed asking for and receiving directions to the victim's residence. A person of defendant's build, wearing clothes similar to those worn by the defendant when arrested, having a distinctive cough similar to defendant's, and driving a vehicle of the same make, color, and license plate number of the vehicle defendant was driving at the time of his arrest, was seen leaving the scene of the crime. The physician who examined the victim following the assault testified that the injuries sustained by her could only result from a natural penetration. Finally, blood was found on the clothing worn by the defendant at the time of his arrest, which was of a type and grouping corresponding to that of the victim, and different from that of the defendant. From the foregoing, it cannot be said that the defendant's requested instruction regarding lesser-included offenses was required; and we likewise reject this contention of the defendant.

Finally, defendant contends that the evidence presented was insufficient to support the verdict of the jury. In State v. Allen, 198 Neb. 755, 255 N. W. 2d 278 (1977), we stated: "In determining the sufficiency of the evidence to sustain a conviction, it is not the

province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. * * *

"In a criminal action, this court will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt. * * * A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it."

In this case the only evidence which could create an inference that defendant was innocent was the testimony of defendant's three alibi witnesses. The jury, as the finder of fact, obviously did not believe the testimony of these witnesses as to defendant's whereabouts on the evening in question. Even the testimony of these witnesses as to defendant's whereabouts on that evening was conflicting. Taking the evidence in the light most favorable to the State, we conclude that such evidence was sufficient to support the verdict, and therefore also reject defendant's claim in this regard.

We therefore conclude that the judgment and verdict of the lower court was correct and must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY DICKSON, APPELLANT.
288 N. W. 2d 48

Filed February 5, 1980. No. 42780.

1. **Criminal Law: Escape: Statutes.** Legal custody is an essential element of the crime of escape from the legal custody of a law enforcement officer under section 28-736, R. R. S. 1943.
2. **Criminal Law: Escape: Statutes: Time.** An accused who was arrested for violation of a temporary order which had been issued

under section 42-357, R. R. S. 1943, and which was not in effect at the time of the arrest, was not in legal custody.

Appeal from the District Court for Hall County: L. W. KELLY, JR., Judge. Reversed and remanded with directions to dismiss.

Cronin, Shamberg & Wolf, 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.

BOSLAUGH, J.

The defendant was convicted of escape and sentenced to 2 years probation, including 90 days imprisonment in the county jail. He has appealed and contends his conviction was not sustained by the evidence and was contrary to law.

The record shows the defendant was arrested outside of the Brick Bar in Grand Island, Nebraska, on November 14, 1978, by a Grand Island police officer. The defendant's former wife was in the bar and, apparently, had made a complaint to the police about the defendant. The defendant was placed in a police vehicle, and while he was being taken to the county jail he opened the left rear door of the vehicle and escaped. The defendant was recaptured within a short time and taken to the jail.

The record further shows that when the defendant was arrested, he was advised he was under arrest for "violation of a restraining order." On June 29, 1978, a temporary order had been entered in the proceeding for the dissolution of the marriage between the defendant and his wife, enjoining and restraining the defendant from molesting or disturbing the peace of the petitioner. The temporary order was not in effect on November 14, 1978, because a final judgment had been entered in the dissolution proceeding on September 6, 1978. See § 42-357, R. R. S. 1943.

There is no evidence in this case that the defendant was arrested for any reason other than the police officer believed the defendant was violating the restraining order. The defendant offered to prove he had not committed a criminal offense prior to his arrest and that the arresting officer had no probable cause to believe the defendant had committed any criminal offense at the time he was arrested. Objections to the offers to prove were sustained on the ground of relevancy.

The information alleged that the defendant, "while in the legal custody of a law enforcement officer," had escaped from such custody. An essential element of the offense, which the State was required to prove, was that the defendant was in legal custody at the time he escaped. See § 28-736, R. R. S. 1943. See, also, Akins v. State, 253 Ark. 273, 485 S. W. 2d 535; People v. Tedesche, 3 App. Div. 2d 220, 159 N. Y. Supp. 2d 486; Warren v. State, 371 So. 2d 219 (Fla. App., 1979); Annotation, 70 A. L. R. 2d 1430; 27 Am. Jur. 2d, Escape, Prison Breaking, and Rescue, § 7, p. 854; 30A C. J. S., Escape, § 5 (2), p. 882.

The State relies upon State v. Reeves, 199 Neb. 725, 261 N. W. 2d 110, in which a conviction for escape was affirmed. In the Reeves case the defendant was arrested for possession of marijuana after marijuana had been found in his motel room during a search pursuant to warrant. Later, a motion to suppress was sustained. We held this did not prevent the defendant from being in legal custody because there had been probable cause for the arrest, and guilt or innocence of the charge for which an arrest is made is immaterial to a charge of escape.

The distinction between the Reeves case and this case is that the defendant here was not suspected of any criminal offense and there was no probable cause for the arrest. Ordinarily, violation of an injunction by itself is not a crime. Smolczyk v. Gaston, 147 Neb. 681, 24 N. W. 2d 862.

It is unnecessary to consider what authority a police officer may have to arrest for the violation of a restraining order where there has been no contempt proceedings because the record in this case shows the restraining order was not in effect at the time the arrest was made.

Since the record fails to show the defendant was in "legal custody" at the time of the arrest, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. MARCEL ROUNDTREE, APPELLANT.

288 N. W. 2d 50

Filed February 5, 1980. No. 42807.

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

Clarence E. Danley, 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 Roundtree was found guilty by a jury of a charge of having knowingly uttered and published a forged instrument with intent to defraud, and was sentenced to a term of 24 to 30 months in the Nebraska Penal and Correctional Complex. He has appealed and assigns and argues the following alleged errors claimed to have been made in the trial court: (1) The conviction rested on the uncorroborated testimony of an accomplice and was therefore insufficient to sustain the convic-

tion. (2) The evidence was insufficient to sustain the conviction. (3) The fact of the forgery was not proved until the trial and the proof showed that the forgery was committed by someone other than the defendant. We affirm.

This appeal is wholly frivolous. A great deal of proof was available — circumstantial evidence and eyewitness and expert testimony, as well as the testimony of an accomplice. It was all presented. The evidence clearly established that the defendant knowingly passed a check on which the endorsement had been forged, he knew it had been forged, and he did so with intent to defraud. No useful precedential purpose would be served by detailing the evidence or reciting the elementary principles of law here involved. The claims that in a charge of uttering and publishing a forged instrument there must be proof that the utterer committed the forgery and that the forgery must be proved before trial can only be sham assertions.

AFFIRMED.

ROBERT NASH, APPELLANT, V. CITY OF NORTH PLATTE, A POLITICAL SUBDIVISION, APPELLEE.

288 N. W. 2d 51

Filed February 5, 1980. No. 42810.

Police Officers and Sheriffs: Bailments. An officer is required to exercise reasonable care and diligence for the safekeeping of property within his custody. The care required is that which men of average prudence would exercise in the conduct of their own affairs and must be commensurate with the dangers involved, having regard for the nature and situation of the property. The officer is responsible for reasonably foreseeable happenings or contingencies which could have been prevented by the exercise of reasonable care.

Appeal from the District Court for Lincoln County:

HUGH STUART, Judge. Reversed and remanded with directions.

Schneider & Nisley, P.C., for appellant.

Baskins & Rowlands, for appellee.

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

BOSLAUGH, J.

The plaintiff appeals from a judgment of the District Court affirming a judgment of the county court in favor of the defendant, City of North Platte, Nebraska.

The action was brought to recover the value of a motorcycle stolen from the city pound after it had been seized by the police and was being held in police custody while an investigation was made concerning the engine on the motorcycle which was believed to have been stolen. The facts are more fully stated in Nash v. City of North Platte, 198 Neb. 623, 255 N. W. 2d 52.

At the first trial the lower court held the plaintiff's action was barred by section 23-2409 (3), R. R. S. 1943, of the Political Subdivisions Tort Claims Act. Although the county court had received evidence concerning the degree of care exercised by the city, there had been no determination in either court upon that issue. We reversed the judgment and remanded the cause for a determination on the issue of whether the City of North Platte had exercised the appropriate degree of care in the detention of the plaintiff's motorcycle.

Upon retrial the county court found that the defendant city was a gratuitous bailee required to exercise only slight care in the custody of the motorcycle, and that the evidence showed the defendant had adequately fulfilled that duty. Upon appeal to the District Court the judgment of the county court was affirmed.

We believe the liability of the city is governed by section 29-818, R. R. S. 1943, which provides that property seized and held as evidence "shall be safely kept" by the officer seizing it unless otherwise directed by the court. An officer is required to exercise reasonable care and diligence for the safekeeping of property within his custody. The care required is that which men of average prudence would exercise in the conduct of their own affairs and must be commensurate with the dangers involved, having regard for the nature and situation of the property. The officer is responsible for reasonably foreseeable happenings or contingencies which could have been prevented by the exercise of reasonable care. See, 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 33, p. 155; 80 C. J. S., Sheriffs and Constables, § 78, p. 274.

The determination in this case that the city was a gratuitous bailee required to exercise only slight care was erroneous. While the city was not an insurer, it was required to exercise a degree of care which was commensurate with its duty under the circumstances in view of the nature of the property seized.

The evidence shows that the motorcycle was unique in that the plaintiff had spent more than $200 on plating and painting the motor and frame of the motorcycle. The city had stored the motorcycle within a fenced area which had a gate secured by a chain and padlock. The motorcycle itself was not chained or otherwise secured, and could be seen by anyone looking into the pound area. The motorcycle was not only attractive to thieves but was relatively portable and could be easily removed from the pound once entry had been gained into the fenced area.

Under the circumstances in this case, we believe the evidence shows as a matter of law that the city failed to exercise the degree of care required by the

statute and the city is liable to the plaintiff for failing to "safely keep" the motorcycle which its officers had seized.

The parties stipulated that the motorcycle, including the engine, had a value of $2,400. Although there was evidence that the engine had been stolen, it was stipulated that the plaintiff was an innocent purchaser for value, having purchased the engine from a dealer in North Platte. Under these circumstances the plaintiff's title and right to possession was good as against all except the rightful owner if in fact the engine had been stolen. See 63 Am. Jur. 2d, Property, § 46, p. 329.

The judgment of the District Court is reversed with directions to enter judgment for the plaintiff in the amount of $2,400 with interest and costs.

REVERSED AND REMANDED WITH DIRECTIONS.

VERNON L. CARLSON, APPELLANT, V. RAY E. NELSON, DOING BUSINESS AS RAY'S FARM SERVICE, APPELLEE.

288 N. W. 2d 489

Filed February 12, 1980. No. 42440.

SUPPLEMENTAL OPINION

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

Robert M. Harris and Randall L. Lippstreu, for appellant.

Padley, Dudden, Schroeder & Schoon, P.C., for appellee.

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

PER CURIAM.

Upon motion for rehearing, the opinion in the

above case, appearing at 204 Neb. 765, 285 N. W. 2d 505, is modified as follows. The sentence on pages 770 and 771 of the opinion reading as follows: "In April 1974, before return of the downpayment was tendered, defendant, under the contingent contract, asked plaintiff if he intended to take the combine and was told he did not want the machine," is corrected to read: "In April 1974, before return of the downpayment was tendered, the purchaser under the contingent contract asked plaintiff if he intended to take the combine and was told he did not want the machine."

The following is added as the final paragraph: "On retrial, the District Court is limited to determining from the record whether or not defendant has established his defense of mutual rescission by a preponderance of the evidence. If he has, judgment should be entered for the plaintiff in an amount equal to that paid by him initially, $500. If the court finds that such defense has not been proven, then it shall consider and determine from the record the amount of plaintiff's damages under section 2-713, U. C. C., i.e., the excess of market value over contract price at the time plaintiff learned of the breach."

The motion for rehearing is overruled.

OMAHA PUBLIC POWER DISTRICT, A NEBRASKA PUBLIC CORPORATION, APPELLEE AND CROSS-APPELLANT, V. DARIN & ARMSTRONG, INC., APPELLANT AND CROSS-APPELLEE.

288 N. W. 2d 467

Filed February 12, 1980. No. 42532.

1. **Contracts: Damages: Costs.** The total cost method of calculating damages for an equitable adjustment under a construction contract is not preferred, but is permissible when no other method is feasible and the supporting evidence is substantial.
2. _____: _____: _____. The acceptability of the total cost

method hinges on proof that: (1) The nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the bid or estimate was realistic; (3) the actual costs were reasonable; and (4) the contractor was not responsible for the added expenses.

3. **Breach of Contract: Damages: Proximate Cause.** In a damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages.
4. _____: _____: _____. Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract.
5. **Trial: Evidence: Equity.** In an action in equity where the evidence is conflicting and cannot be reconciled, the Supreme Court will consider the fact that the trial court saw and heard the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.
6. **Judgments: Equity: Appeal and Error.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition, and the rule applies in equity cases as well as in actions at law.
7. **Contracts: Equity: Damages: Evidence: Words and Phrases.** In an equitable adjustment case involving a construction contract a "jury verdict" may be allowed if there is clear proof that the contractor was injured, and there was no more reliable method for computing damages, but only where the evidence adduced was sufficient to enable a court or jury to make a fair and reasonable approximation of the damages.
8. **Contracts: Equity.** Profits may be included as one of the elements of an equitable adjustment pursuant to the contract terms.
9. _____: _____. In an equitable adjustment case involving a construction contract the allowance of profit is not mandatory but is discretionary.
10. **Contracts: Damages: Proof: Contractors.** Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the work as provided in the contract. The contractor has the burden of proving the amount of damages with reasonable certainty.

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

Gerald P. Laughlin, Michael G. Lessmann, Kirk S. Blecha & Sharon R. Kresha of Baird, Holm,

McEachen, Pedersen, Hamann & Haggart and Robert J. Huck of Delehant, Croker & Huck, for appellant.

Hird Stryker of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

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

MCCOWN, J.

This action arose out of a dispute which occurred during the performance of a construction contract. The contract covered piling, concrete foundation, and steel erection work involved in the construction of a coal-fired electric power plant located near Nebraska City, Nebraska. The proceeding began as an equity action filed by the owner, Omaha Public Power District (district), against the contractor, Darin & Armstrong, Inc. (D & A), for an injunction requiring the contractor to proceed with the construction work after a work stoppage. After granting the injunction, the District Court retained jurisdiction to determine the amount of increased compensation due to the contractor because of a substitution of compacted clay fill for granular fill at the site of the construction project. The District Court entered judgment in favor of the contractor and against the owner in the sum of $1,563,307.75. The contractor has appealed and the owner has cross-appealed.

Prior to 1975, the Omaha Public Power District completed plans and preparations for the construction of a coal-fired electric power generating plant to be built on a site adjacent to the Missouri River in Otoe County, Nebraska. Total contracts for construction exceeded $90 million, and, in addition, contracts for equipment to be incorporated into the plant were in excess of $100 million.

The contract involved here, described as contract

1038, covered work which D & A divided into three separate portions. (1) Drive approximately 2,100 steel pipe piles through approximately 24 feet of fill material and into the soil beneath to a total depth of about 85 feet. The piles were in clusters and were to be filled with concrete after they were driven. This part of the contract also included excavation and backfill work for other portions of the contract. (2) Furnish and pour concrete caps over and tie beams between the various clusters of piles, lay a large concrete circulating water pipe from the river to the plant, and pour a massive concrete thrust block and turbine pedestal. (3) Erect the structural steel for the plant on the pile caps.

The defendant, D & A, was the contractor for all the work under contract 1038, but subcontracted the pile driving and excavation and backfill work described as (1) above to C. J. Rogers Construction Company, and the steel erection work described as (3) above to Midwest Steel Erection, Inc.

Before work under the contract involved here was to begin, the general plans and specifications called for the excavation and removal of the top 24 feet of existing material from the immediate area of the building site and its replacement with a like volume of compacted new material. The advertisement for bids for this site preparation contract requested that bids quote a base price for using cohesive clay material to be taken from the bluffs to the west of the construction site as the fill material, and an alternate price for using granular or sand material dredged from the Missouri River as the fill. Although either type of fill would have provided a suitable foundation, the engineer for the district and the soils engineer preferred and recommended the granular material. Due to the inability of the district to obtain the necessary dredging permits by the required date, the site preparation contract let by the district provided for the use of the cohesive clay fill

rather than the granular fill. That contract was awarded to Eby Construction Company on March 27, 1975, and on April 20, 1975, Eby began work on an around-the-clock schedule, and completed the work on August 15, 1975.

The plans and specifications for the contract involved here were issued on May 6, 1975. Although drafted to cover work on either cohesive or granular fill, the plans and specifications contained no information as to the type of fill that was actually being used by Eby. However, several portions of the test boring log data available to prospective bidders, and prepared by the district's soils consultant, indicated compacted granular fill. The district has conceded that the contractor could have reasonably believed that the top 24 feet of the area in which the pilings were to be driven, and on which the contract work was to be done, would be compacted granular fill rather than compacted cohesive fill.

The engineer's estimate of the cost for contract 1038 was $12,019,000. There were four bidders. D & A was the low bidder with a bid of $8,969,000. The next low bid was more than $1.5 million higher, and the high bid was more than $3 million above the D & A bid. D & A was based in Detroit, Michigan, had not previously bid in the Omaha building trades area, and had not previously had a power plant contract.

Because of the low amount of the bid, the engineering supervisor for the district gave a copy of the engineer's detailed price breakdown to the bid estimator for D & A, and requested him to compare it with their bid to be sure something had not been left out. On July 17, 1975, contract 1038 was awarded to D & A by the district.

Contract specifications for the pile driving were silent on the subject of predrilling. On July 25, 1975, the engineer for the district advised that predrilling for piling would be allowed to a maximum depth of

24 feet, but that the diameter of the holes should be restricted to 10 inches. The piles were 12¾ inches in diameter, although the bottom closure plate of the piles was 13½ inches.

Rogers commenced the pile driving on August 22, 1975. Initial attempts to drive piling without predrilling were unsuccessful and driving piling in 10-inch holes was very difficult, and the clay became "like concrete" when wet. In mid-September 1975, the engineer authorized an increase in diameter of the predrilled holes from 10 inches to 13 inches for 1,800 of the 2,100 piles involved. By late October 1975, Rogers had driven some 900 piles.

The pile driving specifications required that each pile support a design load of 150 tons, and specified 50 blows to the inch under a 30,000 foot-pound hammer as a final driving resistance. There was a reference to a safety factor of 2.5 in some of the provisions dealing with vibratory pile drivers, which were not used on the project. Contract 1038 contains pile load test procedures and requires the contractor to furnish the necessary equipment for testing, keep all records of load and movement of test piles, and bear the cost of pile testing.

In early September 1975, Rogers employed a consulting engineer about the problems that were being encountered in connection with pile driving on contract 1038. The consultant, in a report transmitted to all parties by Rogers, recommended predrilling of the piling holes to any reasonable depth beyond 24 feet, filling the pilings with concrete when partially driven, and completing driving thereafter. His opinion was that under the contract design, many of the piles would not carry the load required under the specifications, and that the final driving resistance specified was well beyond industrial custom and could not be defended.

Rogers and D & A conducted piling compression tests on three test piles, each of which they asserted

failed to show a 150-ton load capacity with a safety factor of 2.5, although the tests showed load capacities of 275, 285, and 288 tons. On October 15, 1975, the engineers for the district were notified by the contractor that the piles could not meet the load criteria in the specifications, and requested that the contractor be given a full waiver of responsibility for being unable to obtain the design loads. On October 23, 1975, the contractor was notified that the district and its engineers had determined that the piles that had been installed were acceptable, with the exception of 12 piles, and would support a design load of 150 tons. The district assumed responsibility for load limits, and ordered the contractor to resume driving piles.

There was extensive discussion and communication between the parties as to pile driving specifications and difficulties. The contractor insisted that specifications for the pile driving be changed, and the district assume all responsibility and liability for load limits relating to the piling, and grant the contractor additional compensation because of the pile driving difficulties encountered. The district responded that the assurances as to load limits requested had already been given, and referred to the contract requirement that the contractor proceed diligently with the performance of the work in accordance with the engineer's orders in such a dispute.

On October 31, 1975, the district was advised that Rogers was ceasing all pile driving operations pending issuance of change orders as to the method of pile driving and test load requirements of the specifications. Rogers discontinued all piling work about November 4, 1975.

On November 19, 1975, the district filed the original petition in this action, seeking an injunction requiring the contractor to resume the pile driving work. A temporary restraining order was issued ordering

D & A to resume work and continue performance of the contract pending subsequent hearing. D & A and Rogers refused to comply with the temporary restraining order, and on December 8, 1975, the district filed a motion to find D & A guilty of contempt, which was later withdrawn.

During the course of the injunction proceedings, the district conceded that the contractor was entitled to anticipate that the top 24 feet of the area in which the piling was to be driven would be compacted granular material rather than compacted cohesive material, and that that change may have had an adverse effect on the contractor's pile driving costs and the time required for the performance of the work. The district assured the court that it had no intention to deprive the contractor of any additional compensation to which it might be entitled under the contract for the performance of the piling work. The district agreed that to the extent the substitution of cohesive for granular material in the fill area increased the contractor's costs of driving the piling to refusal, the district would reimburse the contractor for those costs, together with a reasonable markup to cover overhead and profit.

On December 22, 1975, the District Court entered its order finding that the district had made a substantial change in the contract by substituting compacted clay fill for an approximate depth of 24 feet in lieu of the granular fill originally specified in the agreement, and that a permanent injunction should be granted restraining the contractor from neglecting and refusing to diligently perform the work. The injunction was conditioned on the district's acceptance of a specified condition that the contractor be permitted to preauger a 13-inch diameter hole through the cohesive clay fill. Under the terms of the order the injunction was to be effective upon filing of written acceptance of the condition by the district.

The parties then entered into an agreement that changed the pile driving specifications, set out new preaugering and driving criteria, deleted all testing criteria, and reserved all rights, claims, and remedies each party otherwise had under the contract. The parties then entered into and filed a stipulation with the court which incorporated the agreement, accepted the condition of the injunction, and specifically stipulated: "2. Should the parties be unable to agree on any matters not resolved in said agreement, including, but not limited to, any claims by defendant for alleged extra costs or extra time, it is stipulated that such dispute shall be submitted to this Court for determination after following the procedures set forth in Contract 1038."

Article VI of contract 1038 provided: "DISPUTES-All questions of fact, and any and all disputes with reference thereto arising during the performance of this Contract, and all questions as to the rights and obligations of the Contractor and the District thereunder, and all claims for extra costs or damages incurred in connection therewith, shall first be submitted to the Engineer for decision. That decision, when made in writing, shall be final and conclusive upon the parties hereto, unless thereafter determined by a Nebraska State or Nebraska Federal Court of competent jurisdiction, to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as to necessarily imply bad faith, or not supported by substantial evidence. Pending final determination of any dispute hereunder, the Contractor shall proceed diligently with the performance of the Work in accordance with the Engineer's decision."

In late December 1975, Rogers resumed pile driving operations and completed driving the approximately 1,200 remaining piles by mid-February 1976. Thereafter the project engineer determined that the sum of $369,578.74 was due under the contract for extra work and extra costs involved in the piling work

done by Rogers, and $247,658.63 was due as extra costs incurred by D & A and Midwest Steel in connection with their portions of the contract occasioned as a consequence of pile driving delays. Contract supplements were issued in those amounts and paid.

On September 16, 1976, D & A filed its claim for not less than $2.6 million for the extra work and extra costs involved in the piling and excavation work done by Rogers due to the change in fill material. The claim was based on total costs, less amounts received.

On July 11, 1977, D & A filed its combined claim, which incorporated the Rogers claim and also included claims for extra costs and work allegedly incurred by D & A and Midwest Steel. The claim involved total costs incurred for all segments of contract 1038, plus overhead and profit, less amounts paid by the district. The actual costs claimed were: Rogers $2,905,073; Midwest Steel $4,998,033; and D & A $6,156,891. Overhead and profit were added to those costs to make up the total claim.

The district generally denied the allegations of D & A; alleged that the change in soil conditions did not have a compensable impact on any part of the contract other than the driving of pipe piling; alleged that the costs claimed by D & A were not segregated and were not due to the change in soil conditions; and that no additional amount was due to the contractor beyond amounts already paid.

Trial to the court commenced August 1, 1977. There were 26 days of evidentiary hearings, concluding on January 5, 1978. D & A's evidence was that the change of fill from granular to cohesive clay affected all segments of the work under contract 1038 and greatly increased the costs on the entire project; and that the losses flowing from the change in fill could not be segregated with reasonable certainty. The evidence for D & A developed through

its auditors showed the total expenditures made in the performance of the contract. The costs were separated only as to the work done respectively by Rogers, Midwest Steel, and D & A. They were not separated nor classified otherwise, and there was no attempt to establish that any particular portion or portions of the costs were directly attributable to the change in fill. The contractor's evidence was that the clay peeled off the sides of predrilled holes, matted under the end of the piles, and was like concrete when it was wet; and that the failure of the district to make immediate change orders as to the pile driving delayed the pile driving work which, in turn, delayed all the other work. The evidence was that the work area design for granular fill was in a bowl shape and the substitution of clay for granular fill created a bad drainage situation and created additional work problems for equipment and storage of materials, and reduced labor efficiency. There was evidence that the substitution of clay for granular fill on the piling and backfill operations created a ripple effect which adversely affected Midwest Steel's and D & A's operations, disrupted the performance of those portions of the contract, and adversely affected the efficiency of the working force, as well as creating extensive delay. There was evidence that D & A and its subcontractors were good, efficient contractors, with work forces of average or above average competency. There was also evidence that the customary markup for overhead costs was 10 percent and for profit 10 percent, and an additional 10 percent for the contractor on work done by a subcontractor.

The evidence for the district was that the increased costs were not due to the change in fill, but were due to the contractor's inefficiency and lack of experience, underestimation of the reasonable cost of the work, underbidding the contract, and overestimating the qualifications of its supervisory and

labor forces. The district's evidence was that from a construction cost standpoint the difference in costs between granular and cohesive fill should be minimal for the construction involved here. There was also evidence that the pile driving rigs should have been working on mats, and that if they had been, the type of fill is of no consequence. There was evidence that unit costs and time of performance was excessive and unreasonable, and that costs were increased by delay occasioned by the fault of the contractor. There was evidence that the productivity and efficiency of the contractor's labor force was below average or normal, and that the ability, experience, and efficiency of its supervisory force was inadequate.

Upon completion of the trial, the court took the case under advisement, and briefs were filed. On August 18, 1978, the District Court filed its memorandum opinion and entered judgment. The District Court found that the substitution of cohesive clay for cohesive granular fill material in the construction area was a substantial change in conditions which materially altered the nature and cost of the pile driving and foundational work performed by the subcontractor, C. J. Rogers. The court also found that there was no breakdown of the items of cost, and although a total cost method of calculating damages was not preferred, it was permissible when no other method was feasible and the supporting evidence was substantial. The court then found that the total cost theory should be applied to the work to be performed under the subcontract of C. J. Rogers, but should not be applied to any other portion of the work. The court found that the total costs for the Rogers portion of the contract, as shown by the audit reports, was $2,804,821, from which the court deducted various items of cost of $95,357.56, and found the total allowable costs to be $2,709,463.44. To that figure the court added a markup of 10 percent over-

head and an additional markup of 10 percent profit, making a total amount of $3,278,450.75. From that amount the court subtracted the total payments of $1,843,143 made by the district for the Rogers work, leaving a balance of $1,435,307.75 additional compensation due for the Rogers portion of the work under contract 1038.

The court also found that the district wrongfully deleted $128,000 from the Midwest Steel subcontract portion of contract 1038, and that D & A should recover the total amount deleted. Judgment was therefore entered against the Omaha Public Power District, and in favor of the contractor, Darin & Armstrong, Inc., in the total sum of $1,563,307.75. The contractor has appealed and the district has cross-appealed.

The contractor appellant contends that it should be entitled to recover the total costs expended on all portions of contract 1038, together with overhead and profit, instead of being limited to the Rogers portion of the contract. In essence, the position is that if the change in fill material was a substantial change in conditions which directly and materially affected the nature and cost of the Rogers pile driving work under contract 1038 and justified an equitable adjustment in costs for that work, the change of fill also affected all other portions of contract 1038 and justified an equitable adjustment under the total cost theory for the entire contract.

The total cost method of calculating damages for an equitable adjustment under a construction contract is not preferred, but is permissible when no other method is feasible and the supporting evidence is substantial. The acceptability of the total cost method hinges on proof that: (1) The nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the bid or estimate was realistic; (3) the actual costs were reasonable; and

(4) the contractor was not responsible for the added expenses. See Moorhead Const. Co., Inc. v. City of Grand Forks, 508 F. 2d 1008 (8th Cir., 1975).

It should be noted here that the District Court's memorandum opinion noted that the court struggled with elements (3) and (4) before resolving them in favor of the contractor with respect to the Rogers portion of the contract, and that the court also specifically concluded that a large part of the damages claimed by the contractor with respect to the other portions of the contract were speculative and conjectural as to proximate cause, and that the total cost theory could not be applied to them.

It is a basic concept that in any damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages. In a breach of contract case there must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment. Western Land Roller Co. v. Schumacher, 151 Neb. 166, 36 N. W. 2d 777.

In a case involving a contract dispute as to whether an equitable adjustment should have been awarded for damages allegedly stemming from an acceleration order by the owner, this court held: "Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract." Siefford v. Housing Authority, 192 Neb. 643, 223 N. W. 2d 816.

Court of Claims cases cited by both parties deal with different theories of damages in construction contract cases, and almost universally hold that recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach. Boyajian v. United States, 191 Ct. of

Claims, 233, 423 F. 2d 1231, and cases there cited.

The evidence as to the causal connection between the additional costs incurred by Rogers, Midwest Steel, and D & A, and the substitution of clay for granular fill is in direct conflict. While the proceedings involve an equitable adjustment of amounts due on a contract, the issues of proximate cause and causal connection; the reasonableness or unreasonableness of costs incurred; and the presence or absence of fault of either party are all factual issues. In an action in equity where the evidence is conflicting and cannot be reconciled, the Supreme Court will consider the fact that the trial court saw and heard the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. See Stuthman v. Lippert, *ante* p. 302, 287 N. W. 2d 80. In the case now before us the evidence supports the trial court's conclusion that the change of fill was the direct and proximate cause of the increased costs of Rogers, but was not the proximate cause of the additional costs or damages incurred by D & A and Midwest Steel.

Insofar as D & A and Midwest Steel portions of the work are concerned, the evidence is speculative and conjectural and rests on the assumption that because the change in fill affected the Rogers work directly and materially, it caused a "ripple" effect on all subsequent portions of the contract and was, therefore, a material breach of the entire contract authorizing total cost recovery without further proof of causal connection or allocation of fault. We disagree.

In making the equitable adjustment in favor of the Rogers portion of the contract here the District Court based its award upon the application of the total cost theory of damages. This court has followed the rule that a proper judgment will not be reversed because the trial court gave an erroneous

reason for its rendition. See Strauss v. Square D Co., 201 Neb. 571, 270 N. W. 2d 917. That rule has been applied in equity cases as well as in actions at law. See Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245.

Although the trial court in this case announced that it was following the total cost theory with respect to the Rogers work, it nonetheless examined the evidence and deleted virtually $100,000 in costs which the court determined were not causally connected nor supported by the evidence. Even in situations where courts have rejected the total cost method of proving damages, where the record contains reasonably satisfactory evidence of what the damages are, computed on an acceptable basis, the court has adopted such other evidence, at least where the evidence is sufficient upon which to predicate a "jury verdict" award. The Court of Claims has said: "In the past we have allowed so-called 'jury verdicts' if there was clear proof that the contractor was injured and there was no more reliable method for computing damages — but only where 'the evidence adduced [was] sufficient to enable a court or jury to make a fair and reasonable approximation.'" See WRB Corporation, 183 Ct. of Claims 409, and cases there cited. "In estimating damages, the Court of Claims occupies the position of a jury under like circumstances; and all that the litigants have any right to expect is the exercise of the court's best judgment upon the basis of the evidence provided by the parties." Specialty Assembling Co., 174 Ct. of Claims 153, 355 F. 2d 554.

The District Court indicated its concern with the validity and accuracy of the audited costs in this case because of the fact that the auditors were dependent upon the contractor for supporting material. The court obviously weighed the evidence and eliminated ten separate items of cost totaling more than $95,000 from the Rogers total cost figures. The Dis-

trict Court was entitled to use either the total cost method or a "jury verdict" method in making the equitable adjustment here, and the fact that the method used may have been inaccurately identified is immaterial where the record supports the award. The court's determination of the amount of additional compensation due under the Rogers portion of contract 1038 is supported by the evidence.

It is apparent that the District Court also made a determination of fact, not only that the total cost theory of damages should not be applied to any portion of the work other than the Rogers subcontract, but also determined that a substantial part of the total cost of that work was not due to the change in fill, but was due to the fault of the contractor and his labor force, and that the work stoppages by the contractor were not authorized under the contract and could not be used as a basis upon which to claim damages for increased costs. The determination of the District Court as to D & A and Midwest Steel, although denying any total cost theory of recovery, implicitly approved the additional compensation award of the engineers to D & A and Midwest Steel of $247,658.63, which had already been paid. Those determinations are also supported by the evidence.

The contractor also contends that the District Court erred in failing to award an additional 10 percent allowance for the contractor's profit in addition to the 10 percent profit figure allowed on the Rogers subcontract. The argument is that since the district agreed to pay a reasonable profit on additional costs for the Rogers subcontract, therefore evidence that an additional 10 percent profit for a contractor on a subcontractor's work was usual and customary was sufficient to require the District Court to add such an amount to the 10 percent profit amount allowed in the judgment.

Profits may be included as one of the elements of an equitable adjustment pursuant to the contract

terms. See United States v. Callahan Walker Co., 317 U. S. 56, 63 S. Ct. 113, 87 L. Ed. 49. Reasonable profits may also be allowed as part of an award of damages in a breach of contract action where the damages are granted as part of the original contract price, but those calculated on the excess damage award are ordinarily barred. See J. D. Hedin Construction Co., Inc., 171 Ct. of Claims 70, 347 F. 2d 235.

In an equitable adjustment case such as the one now before us, the allowance of profit is not mandatory but is discretionary, and in an appropriate case profit may be denied altogether, even profit computed on the original contract basis. See Moorhead Const. Co., Inc. v. City of Grand Forks, 508 F. 2d 1008 (8th Cir., 1975).

The usual construction contract equitable adjustment case focuses on actual increased costs stemming from changes in conditions without considering additional profit for the additional work. The allowance which the District Court made here, in addition to the Rogers total adjusted costs, included a 10 percent allowance for overhead in the sum of $270,946.34, and a 10 percent profit allowance on the combined costs and overhead figure in the sum of $298,040.97. In this case the profit award was reasonable and the evidence supports the trial court's determination.

The cross-appeal of the district asserts that the District Court erroneously found that the district wrongfully deleted $128,000 of gallery steel work from the Midwest Steel portion of the contract, and that the entry of judgment for $128,000 as damages for such deletion was erroneous.

During the course of erection of the structural steel by Midwest Steel, the engineer for the district determined that certain gallery steel work, including gratings and handrails in the boiler area which were included in the contract work to be performed by Midwest Steel, should be deferred to facilitate the

installation of a boiler. Negotiations between Midwest Steel and the engineer as to price adjustments were unsuccessful, and the engineer for the district then deleted that steel work from the Midwest Steel portion of the contract, reduced the contract price $127,406.30, and added the work to the boiler company's contract at a price of $140,808. The district's engineer testified that the difference in price reflected the additional costs which the engineer estimated the boiler contractor would incur in performing the work on a second shift, which required night lighting, and in order not to interfere with other contractors on the project, which Midwest Steel had been unwilling to do.

The contract deletion is not covered by the pleadings, nor was there evidence that Midwest Steel did any work or incurred any expenses in connection with the work deleted. Neither was there any evidence as to the amount of any profit which might have been realized from the performance of the deleted work. The court, on its own initiative, determined that the district wrongfully deleted $128,000 from the contract price when Midwest Steel was contractually bound and prepared to erect the deleted steel, but was not allowed to do so. The court also determined that the contractor had suffered damages because of the breach of contract and entered judgment for $128,000 against the district.

Assuming the deletion made was not within the scope of the engineer's authority to make changes under the contract, it is nevertheless clear that the $128,000 judgment relates to a cause of action that was neither pleaded nor argued in the trial of the case. It is elementary that a judgment must be supported by the pleadings. See Swartz v. Peterson, 199 Neb. 171, 256 N. W. 2d 681. Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if

he had been allowed to complete the job as provided in the contract. See Kroeger v. Franchise Equities Inc., 190 Neb. 731, 212 N. W. 2d 348. That case likewise holds that the contractor has the burden of proving the amount of damages with reasonable certainty.

In the case now before us the contractor failed to introduce any evidence that profit in any amount would have been realized if Midwest Steel had been permitted to perform the deleted work. Neither was there any evidence that Midwest Steel had performed any work or incurred any costs attributable to the deleted portion of the work. Even if there had been evidence of some damages, there was certainly no evidence which would permit the recovery of the full contractually computed price for work which was never performed. The contractor's own evidence established that there was a loss on all portions of the Midwest Steel contract rather than a profit. There is certainly no evidence that the deleted portion of the work would have been any different.

That portion of the judgment awarding Darin & Armstrong, Inc., the sum of $128,000 for deletion of the gallery steel work from the Midwest Steel portion of contract 1038 is not supported by the pleadings or by the evidence and cannot be sustained.

The judgment of the District Court is reduced in the amount of $128,000 to the sum of $1,435,307.75, and as thus modified the judgment is affirmed.

AFFIRMED AS MODIFIED.