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# REPORTS OF CASES

DECIDED BETWEEN

JANUARY 31, 1981 and MAY 15, 1981

IN THE

# Supreme Court of Nebraska

JANUARY TERM 1981

VOLUME CCVIII

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DONALD C. PATTON

OFFICIAL REPORTER

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PRIESMAN GRAPHICS

OMAHA, NEBRASKA

1981

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For the benefit of the State of Nebraska

## SUPREME COURT

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C. THOMAS WHITE, Associate Justice
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| | | Raymond J. Case | Plattsmouth |
| | | George H. Stanley | Papillion |
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| | | William D. Blue | Lincoln |
| | | Dale E. Fahrnbruch | Lincoln |
| | | Donald E. Endacott | Lincoln |
| | | Bernard J. McGinn | Lincoln |
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| | | James A. Buckley | Omaha |
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| | | Bryce Bartu | Seward |
| Sixth | Burt, Thurston, Dodge, and Washington | Mark J. Fuhrman | Fremont |
| | | Darvid D. Quist | Blair |
| Seventh | Fillmore, Saline, Thayer, and Nuckolls | Orville L. Coady | Hebron |

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

| | | | |
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| Tenth | Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster | Fredric R. Irons<br>Bernard Sprague | Hastings<br>Red Cloud |
| Eleventh | Hall and Howard | Joseph D. Martin<br>Richard L. DeBacker | Grand Island<br>Grand Island |
| Twelfth | Sherman and Buffalo | DeWayne Wolf | Kearney |
| Thirteenth | McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas | Hugh Stuart<br>Keith Windrum | North Platte<br>North Platte |
| Fourteenth | Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy | Jack H. Hendrix | Trenton |
| Fifteenth | Brown, Keya Paha, Boyd, Rock, Holt, and Cherry | Henry F. Reimer | O'Neill |
| Sixteenth | Sheridan, Dawes, Box Butte, and Sioux | Robert R. Moran<br>Paul D. Empson | Alliance<br>Chadron |
| Seventeenth | Scotts Bluff, Morrill, and Garden | Alfred J. Kortum<br>Robert O. Hippe | Gering<br>Gering |
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| Twentieth | Blaine, Loup, Garfield, Greeley, Wheeler, Valley, and Custer | James R. Kelly | Broken Bow |
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# CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

## January 1981 Term

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No. 43181: **Venditte v. City of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

Nos. 43358, 43359: **Gross v. Gross.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43415: **Nelson v. Nelson.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43445: **Dillon v. Phillips Department Stores.** Dismissed for failure to file briefs.

No. 43462: **State v. Jackson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43476: **Ladehoff v. Wibbels.** Dismissed for failure to file briefs.

No. 43501: **Haase v. Haase.** Affirmed as modified by report and order of the court.

No. 43515: **State v. Winsley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43530: **McMahon v. Peter Kiewit & Sons, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43547: **State ex rel. NSBA v. Pettit.** Case dismissed.

No. 43550: **State v. Menser.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43576: **State v. Pettis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43612: **State v. Blackledge.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43630: **State v. Smith.** Affirmed as modified; appellant given 4 days credit for jail time.

No. 43631: **State v. Stenerson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43642: **First Nat. Bank & Trust Co. of Lincoln v. Olson.** Dismissed for failure to file briefs.

No. 43660: **State v. Levering.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43689: **State v. Minshall.** Motion of court-appointed

counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43698: **Zeller v. Cartee.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43703: **Clare v. Union Pacific Railroad Co.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43704: **Moerer v. D & M Feed & Produce, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 43710: **Carr v. Fisher.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43719: **State v. Barnes.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as premature at costs of appellant.

No. 43723: **State v. Von Busch.** Affirmed under Rule 20.

No. 43725: **State v. Kruse.** Affirmed; see Rule 20.

No. 43747: **Grosch Irrigation Co. v. Brush & Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43769: **State v. Burt.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43775: **State v. Palmer.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43777: **State v. Warrior.** Affirmed under Rule 20.

No. 43778: **State v. Dominguez.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43799: **State v. Kittelmann.** Affirmed under Rule 20.

No. 43801: **State v. Bedford.** Dismissed for failure to file briefs.

No. 43805: **State v. Herren.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43810: **State v. Schommer.** Affirmed under Rule 20.

Nos. 43816, 43817: **State v. Coleman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43825: **Todd v. Todd.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43826: **State v. Cavanaugh.** Affirmed under Rule 20.

No. 43833: **State v. Hill.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43835: **Chicago Lumber Company of Omaha v. Horner.** Motion of appellee for summary affirmance overruled.

No. 43841: **State v. Roberts.** Affirmed under Rule 20.

No. 43842: **State v. Gitchel.** Affirmed under Rule 20.

No. 43850: **State v. McCoy.** Affirmed under Rule 20.

No. 43851: **Brown v. Parratt.** Dismissed for failure to file briefs.

No. 43859: **Schumacher v. Michan.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43862: **State v. Guhde.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43865: **Stricker v. Hettinger.** Joint motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43866: **Boston v. Boston.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43895: **State v. Molden.** Stipulation allowed; case remanded to District Court for resentencing.

No. 43900: **Commercial Federal Savings & Loan Assn. v. Getzschman.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43902: **Horwart v. Horwart.** Dismissed for failure to file briefs.

No. 43903: **State v. Amerson.** Affirmed under Rule 20.

No. 43909: **State v. Manning.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43911: **Foxley v. Foxley.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43913: **Pollard v. Pollard.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43914: **Monarch Chemical Works, Inc. v. Thone.** Motion of appellants for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellants.

No. 43916: **State v. Jefferson.** Affirmed under Rule 20.

No. 43917: **State v. Washington.** Motion of court-appointed counsel for leave to withdraw appearance sustained;

judgment affirmed.

Nos. 43924, 43925: **State v. Barngrover.** Affirmed under Rule 20.

No. 43928: **Spethman v. State.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43929: **State v. Summers.** Motion of appellee for summary dismissal sustained; appeal dismissed.

No. 43930: **State v. Austin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43931: **State v. Flynn.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43934: **State v. Williams.** Dismissed for failure to file briefs.

No. 43937: **Oxner v. Oxner.** Affirmed as modified by report and order of the court.

No. 43947: **Scherer v. American Hail Management.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43952: **Anesthesia Associates v. Fleming.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43953: **State v. Eggert.** Dismissed for failure to file briefs.

No. 43959: **Meckel v. Meckel.** Affirmed as modified by report and order of the court.

No. 43964: **State v. Segobia.** Motion and stipulation allowed; appeal dismissed with prejudice at costs of appellant.

No. 43968: **State v. Brye.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

Nos. 43969, 43970: **State v. Elsinger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43971: **State v. Bradley.** Affirmed under Rule 20.

No. 43972: **State v. Kangas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43974: **State v. Carmody.** Dismissed for failure to file briefs.

No. 43975: **State v. Carmody.** Dismissed for failure to file briefs.

No. 43979: **Muhe v. South Platte Nat. Resources Dist.** Motion of appellee for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43991: **Loewenstein v. Loewenstein.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43995: **State v. Dahlke.** Dismissed for failure to file briefs.

No. 43996: **State v. Manning.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43998: **State v. Abram.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

Nos. 43999, 44000: **State v. Smith.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44014: **Seaton v. Construction Sciences, Inc.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44016: **State v. Benson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44017: **State v. Griffin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44031: **Morgan v. Barnes.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

**State v. Oliva.** Application for leave to docket error proceedings denied.

No. 44036: **Ekere v. The Omaha Savings & Loan Assn.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 44038: **State v. Gunter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44039: **State v. Elsinger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44052: **State v. Bernhardt.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(8).

No. 44072: **Stockstill v. Custodis Constr. Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44081: **Aizenberg v. Montclair Nursing Center.** Motion and stipulation for dismissal allowed; appeal dismissed at costs of appellant.

No. 44082: **Rugby Hydraulics Co. v. Baum Iron Co.** Motion sustained; appeal dismissed at costs of appellant pursuant to the agreement of the parties.

No. 44088: **Erickson v. Erickson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44089: **Keller v. Swanson.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44091: **First Cornhusker Corp. v. Spader.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44100: **Housing Authority of the City of Omaha v. Bryant.** Motion of appellant for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

Nos. 44103, 44104, 44105, 44106: **State v. Sanders.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44108: **Mayo's Electric Service, Inc. v. Phillips.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44118: **Stahmer v. Terry.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 44120: **McGowan v. McGowan.** By order of the court the decree of the District Court of February 19, 1981, is set aside and this appeal is dismissed as moot.

No. 44136: **State v. Jenkins.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44144: **State v. Roesch.** Motion sustained; appeal dismissed.

No. 44177: **CBS Records, Inc. v. Records Wholesale, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44204: **Siebrandt v. Siebrandt.** Motion sustained; appeal dismissed at costs of appellant.

**Richardson v. Clark.** Application for leave to commence original action denied.

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GARY M. PETERSEN, APPELLANT, V.
LINDA J. PETERSEN, APPELLEE.

301 N.W.2d 592

Filed February 6, 1981. No. 42995.

**Equity: Motions for New Trial: Case Overruled.** An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Remanded with directions.

Steven T. Swihart for appellant.

Gregory P. Drew and Roy I. Anderson for appellee.

Heard before BOSLAUGH and WHITE, JJ., and COLWELL, RIST, and HOWARD, District Judges.

RIST, District Judge.

This is an action for dissolution of marriage in which petitioner, Gary M. Petersen, appeals from the decree of the trial court, assigning as error an abuse of discretion in the award of alimony and child support. Respondent, Linda J. Petersen, was awarded alimony in the gross amount of $100,000, payable in ten annual installments, and child support in the amount of $400 per month.

Before considering such assignments of error, we

first consider the fact that no motion for new trial was filed by petitioner in the trial court.

The rule in this jurisdiction is that actions for dissolution of marriage are considered as being in equity and on appeal are considered de novo in this court. Respondent argues, however, that such de novo review does not permit a review of the trial court's decision absent a motion for new trial and ruling thereon by the trial court. In support thereof, she cites *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977); *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977); and *Christensen v. Eastern Nebraska Equipment Co., Inc.*, 199 Neb. 741, 261 N.W.2d 367 (1978).

*Sempek* was a constructive contempt proceeding where a motion for new trial was not timely filed. Such actions are treated on appeal as actions at law where, absent such motion, the appellate court will only examine the record to determine if the pleadings are sufficient to confer jurisdiction on the trial court to make the order complained of. *Wright v. Wright*, 132 Neb. 619, 272 N.W. 568 (1937). Accordingly, it is not authority for respondent's position. *Christensen* involved an appeal in a law action originating in the county court and where no motion for new trial was filed in the District Court. Again, the rule as announced in *Sempek* is applicable and does not support respondent's position here.

*McClintock* was an appeal to the District Court from the Nebraska Appeal Tribunal where a motion for new trial was not timely filed in the District Court. The action was treated as being equitable in nature on appeal to this court. The majority opinion held that while the judgment could be affirmed upon other grounds, it cited the well-known rule that, in equity cases, in order to review errors of law occurring during the trial, a motion for new trial must be timely filed and ruled upon. It then proceeded to hold that the trial court's judgment construing the employment

contract there involved was such a question of law and, absent such motion, such matter was not before this court. It affirmed the trial court's judgment on that basis.

The dissent in *McClintock* dealt with a definition of "errors of law occurring during the trial," and submitted that such errors generally involved rulings on the admission of evidence, matters of pleadings, and similar questions, and do not include as an alleged error that the trial court decided the case erroneously.

We believe it necessary to examine this issue again.

There is no question that in appeals in equity actions a motion for new trial is required to review rulings of the trial court on the admission or exclusion of evidence and on the amendment of pleadings. It is a rule of long standing. *Oertle v. Oertle*, 146 Neb. 746, 21 N.W.2d 447 (1946); *Nemetz v. Nemetz*, 147 Neb. 187, 22 N.W.2d 619 (1946); *Rush v. Heinisch*, 157 Neb. 545, 60 N.W.2d 608 (1953); *Faught v. Platte Valley Public Power & Irrigation Dist.*, 155 Neb. 141, 51 N.W.2d 253 (1952).

In *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 284, 102 N.W.2d 599, 605 (1960), this court held: "It has been the consistent holding of this court that in an equity action a motion for a new trial is required to secure a review of rulings of the trial court on alleged errors occurring at the trial, such as rulings on the rejection or reception of evidence. *It is required for no other purpose.*" (Emphasis supplied.)

It has also been consistently held that even without a motion for new trial this court on appeal can try an equity case de novo on the record and upon its merits. *Douglas County v. Barker Co.*, 125 Neb. 253, 249 N.W. 607 (1933); *Rossbach v. Bilby*, 155 Neb. 575, 52 N.W.2d 747 (1952); *Molczyk v. Molczyk*, 154 Neb. 163, 47 N.W.2d 405 (1951); *Peek v. Ayres Auto Supply*, 155 Neb. 233, 51 N.W.2d 387 (1952).

Other jurisdictions have had occasion to define the phrase "errors in law occurring at the trial." In *Miller*

*v. National Benefit Ass'n.*, 68 S.D. 476, 4 N.W.2d 602 (1942), the Supreme Court of South Dakota held that errors in conclusions of law did not fall within the meaning of such phrase. In *Altmeyer v. Norris*, 124 Ind. App. 470, 119 N.E.2d 31 (1954), the appellate court of Indiana held that the finding of a trial court, if erroneous, is not an error occurring at the trial. The Supreme Court of Minnesota, in *Roelofs v. Baber*, 194 Minn. 166, 259 N.W. 808 (1935), held that errors occurring at the trial were those during the progress of the trial and before rendition of verdict or judgment.

Nowhere prior to *McClintock* has this court held that alleged errors in the trial court's findings or final judgment are errors of law occurring at or during the trial. We conclude from this examination that they are not such errors.

We further conclude from an examination of *McClintock* that it was not intended to change the rule with respect to the scope of review of equity cases where a motion for a new trial was not filed, but rather was intended as an application of the rule which had been in effect for many years. After careful consideration, we find that the majority opinion in that case improperly applied that rule; that alleged errors in the findings and judgment of the trial court are not errors occurring at or during trial; and that such findings and judgment in an equity action may be reviewed de novo on appeal without the filing of a motion for new trial. *McClintock* is therefore overruled to the extent that it conflicts with this determination. We therefore proceed to consider petitioner's assignments of error.

While such assignments relate only to the awards of alimony and child support, we note the decree divided the real estate of the parties, having an equity of approximately $83,000, in equal shares, each party to assume one-half of the mortgage indebtedness; divided the personal property of the parties, including automobiles, in substantially equal shares; and divided the unsecured debts of the parties in approximately

equal amounts. Petitioner was ordered to pay the secured indebtedness on the motor vehicles awarded to him; the motor vehicles awarded to respondent being free of such debt.

The parties were married in June 1958 and had three children, two of whom are emancipated. Petitioner is employed as a salesman with a net income at time of decree of $1,602 per month. Prior bonuses from his employer terminated in mid-1979, such bonuses having materially increased petitioner's earnings in prior years. There is no evidence indicating any resumption of a bonus plan or any substitute arrangement providing additional income to petitioner from his employment. Respondent at time of decree was engaged in new employment at a gross annual salary of $6,000, resulting in a net monthly income of from $400 to $460, depending upon tax exemptions. There is no evidence of any significant inheritance or gift to either party from others, nor any evidence of prior employment outside the home by respondent. Respondent was awarded custody of the minor child of the parties. Alimony and child support were awarded as set forth in the beginning of this opinion.

The allowance of alimony in the amount of $10,000 annually plus child support of $400 per month would require approximately 75 percent of petitioner's present net income. We find such allowances are beyond the reasonable reach and capacity of petitioner; and considering the division of property made by the trial court and the circumstances of the parties, such allowances are excessive to the point they represent an abuse of discretion.

We have considered the statutory criteria for allowances of alimony and child support (Neb. Rev. Stat. §§ 42-364 and 42-365 (Reissue 1978)) and prior decisions of this court relative to appropriate allowances. See *Brown v. Brown*, 199 Neb. 394, 259 N.W.2d 24 (1977). *Kosnopfl v. Kosnopfl*, 206 Neb. 524, 293 N.W.2d 854 (1980). Applying the same to the facts of this case, we find the decree herein should be modified

in the following respects: (1) Child support is fixed at $300 per month from the date of the mandate of this court herein, to continue until the minor child of the parties is emancipated or until the further order of the trial court; and (2) Respondent is awarded alimony in the amount of $4,800 per year for a period of 5 years, payable $4,800 April 1, 1981, and a like amount each April 1 thereafter, through and including April 1, 1985; said alimony to terminate upon the death of either party or remarriage of respondent. As to any unaccrued installments thereof, no installments shall bear interest to due date; but thereafter, if unpaid, such installment shall bear interest at 8 percent per annum from due date until paid.

This cause is remanded to the trial court for modification as herein provided. Respondent is awarded the sum of $300 for services of her attorney in this court.

REMANDED WITH DIRECTIONS.

PER CURIAM.

The entire court joins in the opinion rendered by the division overruling our previous holding in *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977).

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## SUSAN S. CHRISMAN, SURVIVING SPOUSE OF GERALD D. CHRISMAN, DECEASED, APPELLANT, V. GREYHOUND BUS LINES, INC., A CORPORATION, APPELLEE.

301 N.W.2d 595

Filed February 6, 1981. No. 43072.

1. **Workmen's Compensation: Words and Phrases.** The terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition.

2. **Workmen's Compensation.** If there is some personal causal contribution in the form of a previously weakened or diseased heart, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of nonemployment life.
3. **Workmen's Compensation: Appeal and Error.** In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same force and effect as a jury verdict in a civil case.

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

James R. Welsh and Robert V. Roach for appellant.

Theodore J. Stouffer and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and COLWELL and CANIGLIA, District Judges.

CANIGLIA, District Judge.

This is an action brought by the plaintiff, Susan S. Chrisman, as surviving spouse of Gerald D. Chrisman, deceased, and as the mother and natural guardian of Duane L. Chrisman, Deborah Sue Chrisman, Dale Scott Chrisman, and Dorie Ann Chrisman, minor children of Gerald D. Chrisman, deceased, seeking benefits under the Nebraska Workmen's Compensation Act from the defendant, Greyhound Bus Lines, Inc., a corporation, on account of the death of Gerald D. Chrisman, an employee of Greyhound Bus Lines, Inc.

For convenience hereafter, Susan S. Chrisman will be referred to as the plaintiff, Gerald D. Chrisman as the decedent, and Greyhound Bus Lines, Inc., as the defendant.

The plaintiff alleges that Chrisman died on April 23, 1978, as the result of an accident arising out of and in the course of his employment. The defendant, in its answer, admits that decedent was an employee, and that the cause of death was attributed to severe coronary atherosclerosis. However, the defendant denies that the cause of death arose out of decedent's

employment or from any exertion of his occupation greater than the normal exertion of his nonemployment life.

The compensation court, in a single-judge hearing, dismissed the plaintiff's petition. Pursuant to Neb. Rev. Stat. § 48-179 (Reissue 1978), the plaintiff applied for and was granted a hearing before a three-judge panel. The three-judge panel dismissed the plaintiff's petition, affirmed the findings of the single compensation judge, and affirmed his order of dismissal.

The plaintiff has appealed that ruling to this court, assigning as error that the three-judge panel of the compensation court erred in finding (1) that the evidence failed to demonstrate that the exertion of decedent's employment was greater than his nonemployment life; and (2) that the evidence failed to demonstrate that decedent's employment exertion contributed in some material and substantial degree to his fatal attack.

The issue then, presented by this appeal, is whether the evidence shows that the exertion of decedent's employment was greater than that of his nonemployment life and whether the decedent's employment exertion contributed in some material and substantial degree to his fatal attack. This determination requires a review of the evidence presented to the single judge and subsequently to the three-judge panel.

The evidence discloses the following: On April 23, 1978, the plaintiff's decedent, Gerald D. Chrisman, died of a heart attack (cardiac arrhythmia) at the Greyhound Bus Lines terminal in Omaha, Nebraska. At some time immediately prior to the attack, decedent had been in the process of unloading baggage from the baggage compartment of one of the buses in connection with his employment by the defendant. Due to the fact that the baggage compartment on a Greyhound bus is located below the space occupied by passengers, it is necessary for the employees unloading the bus to bend over at the waist or to otherwise crouch down in order to gain access to the packages contained

within the compartment. The compartments are located on both sides of the bus; usual unloading procedures dictate that two employees simultaneously work compartments on opposite sides of the bus until all luggage has been removed.

A company employee was working the baggage compartments with the decedent on the morning of his death. At some point immediately prior to the attack, the company employee had assisted the decedent in his efforts to shift a triangular-shaped package which was estimated to weigh approximately 30 to 40 pounds. While the two employees were turning the package from opposite sides of the bus, the company employee overheard the decedent utter an expletive, but did not attach significance to the expletive at the time.

Following the incident with the triangular-shaped package, the company employee proceeded to unload the two adjacent baggage compartments. Consequently, it is not known how much time elapsed between the decedent's efforts in connection with his attempt to turn the package and the onslaught of the attack; estimates range from between 3 to 5 minutes. When the company employee finally came around the bus from the rear, he found the decedent clear of the compartment and lying on the ground. Decedent was eventually transported to Lutheran Medical Center in Omaha, where he was pronounced dead.

At the time of his death, the decedent was 37 years old, 71 inches tall, and weighed approximately 220 pounds. The decedent had experienced a nagging weight problem and had been placed on various diets since 1964. He had been taking medication to control the development of hypertension since March of 1964. He had shown reluctance in following the program of medication prescribed for him and frequently complained that the drugs gave him headaches; his personal physician suspected that he rarely took the medication. In 1977, the decedent was diagnosed a diabetic, and he had been taking diabenese, one daily, since that time.

The autopsy report revealed that the decedent had contracted atherosclerosis affecting all three of the major vessels to the heart. One of the arteries had undergone a 90 percent narrowing. The report also disclosed scattered areas of scar tissue within the heart of the decedent, suggesting the existence of past coronary problems.

The decedent's nonemployment life was characterized by the plaintiff as being "physically active." In addition to his employment with defendant, he also "moonlighted" as a schoolbus driver. During the winter months he operated his own snow removal service. Although he apparently utilized a snowplow in removing large drifts in connection with his snow removal business, the decedent did assist his sons in shoveling the family's own driveway by hand. For recreation, the decedent participated in camping and enjoyed amateur mechanics as a hobby.

Based upon this evidence, the Workmen's Compensation Court made the following findings: The decedent led a moderately active nonoccupational life. He engaged in camping, playing with his children, lawn work, and snow shoveling. He worked part time as a busdriver for the city school bus system, and in the winter used his truck to plow snow in the snow removal business. His health record shows that he had a long history of high blood pressure and the autopsy demonstrates that he brought to the job the personal risk of severe coronary atherosclerosis. On the day of the fatal attack, the decedent had been on the job approximately 2 hours and had participated in loading and unloading five buses when his death occurred. The decedent had been resting approximately 5 minutes before commencing the unloading of the bus which was the one being unloaded when the decedent collapsed. The decedent had been unloading the bus for, at most, a few minutes before he collapsed, and it could be concluded that the decedent removed no more than two parcels or bags from the bus when the fatal

attack occurred. The compensation court concluded that the evidence failed to demonstrate that the employment exertion was greater than the decedent's nonemployment exertion and that said exertion contributed in some material and substantial degree to the fatal attack.

In making these findings the Workmen's Compensation Court considered the medical testimony of several experts. Summarizing the medical testimony adduced at the trial, both of the plaintiff's experts initially opined that the exertion entailed by the employment of the decedent had precipitated the fatal attack. Ultimately, however, under cross-examination, both of these experts backed away from this position, one concluding that it was not possible to say with reasonable medical certainty that decedent's exertion was greater than the physical exertion in his nonwork life; the other expert conceding that the factors precipitating the attack lay within the realm of conjecture and speculation. Only the defendant's expert maintained the same position throughout the entire proceeding; that is, the employment activity added nothing significant to the dangers inherent in the decedent's preexisting condition, and that decedent's coronary disease could have caused the fatal attack at any time during employment or nonemployment activity.

In this connection, it should be noted that the plaintiff's burden of establishing the causative link between the employment of the decedent and the fatal attack is enhanced where, as in this case, the evidence established the existence of a preexisting condition.

This court expressly recognizes the causation problems inherent in fact situations involving preexisting conditions. Neb. Rev. Stat. § 48-151(4) (Reissue 1978) provides: "The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall include disablement resulting from occupational disease arising out of and

in the course of the employment in which the employee was engaged and which was contracted in said employment. The terms shall include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition."

The claimant must establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. "The terms 'injury' and 'personal injuries' do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition." *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 822, 272 N.W.2d 372, 375 (1978). The employment must contribute substantially to cause the injury. "'If there is some personal causal contribution *in the form of a previously weakened or diseased heart*, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with *this employee's* usual exertion *in his employment*, but rather with the exertions present in the normal *non-employment* life of this or any other person.' [Citation omitted.]" *Beck v. State*, 184 Neb. 477, 480, 168 N.W.2d 532, 533 (1969).

In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same force and effect as a jury verdict in a civil case. "A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judg-

ment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award." See, *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 514, 288 N.W.2d 477, 481 (1980); *Johnson v. Village of Winnebago*, 197 Neb. 845, 251 N.W.2d 176 (1977).

In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party; every controverted fact must be resolved in his or her favor; and he or she must receive the benefit of every inference reasonably deducible from it. See, *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Riley v. City of Lincoln*, 204 Neb. 386, 282 N.W.2d 586 (1979).

Applying these guidelines, we hold that the evidence in the record before us sustains the findings of the Workmen's Compensation Court. The order of the Workmen's Compensation Court is therefore affirmed.

AFFIRMED.

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## WILLIAM SIMET, PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL F. SIMET AND AS HEIR OF MICHAEL F. SIMET, DECEASED, APPELLANT, V. SHARON KLICH SAGE, APPELLEE.

301 N.W.2d 600

Filed February 6, 1981. No. 43272.

1. **Directed Verdict.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.

2. **Negligence: Pleadings: Jury Instructions.** Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury.

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

Frank Meares for appellant.

Richard J. Dinsmore of Dolan, Dinsmore & Davis for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

REIMER, District Judge.

The personal representative and heir of the victim of a pedestrian-automobile collision brings this action for general and special damages and damages for wrongful death in the District Court of Douglas County, Nebraska, alleging the defendant automobile operator to have been negligent (1) in failing to yield the right-of-way to plaintiff's decedent; (2) in failing to keep her vehicle under reasonable control; (3) in traveling at a rate of speed improper under the circumstances; and (4) in failing to keep a proper lookout. Defendant's answer admits the occurrence of the accident, denies negligence, and alleges contributory negligence more than slight (1) in failing to keep a proper lookout when attempting to cross a street at a point other than an intersection or crosswalk; and (2) in failing to yield the right-of-way to defendant's automobile. A trial to jury resulted in a verdict for defendant, and plaintiff appeals. We affirm.

The evidence shows that the plaintiff's decedent was a pedestrian crossing Craig Street in Omaha, Nebraska, at a point in the middle of the block west of the 28th Street intersection. Defendant was at this time proceeding west on Craig Street and had slowed to some 15 miles per hour to cross a railroad track located about half a block east of the scene of the accident. Defendant testified that as she crossed the

tracks she observed the decedent walking across the street from the south to north and gave the horn a "little toot," which the decedent did not seem to acknowledge. She further testified that as she approached the point where decedent was crossing, he had proceeded across the centerline three or four or five steps; that she turned her vehicle to the left into the left lane of the street at a speed of 5 to 10 miles per hour; and that the pedestrian stepped backward a step or two and turned into the front right-hand side of her vehicle. Officer Brock of the Omaha Police Department investigated the accident while the decedent remained in the street and before the defendant's vehicle had been moved, and he summarizes a statement made by the decedent at the scene as follows: "The pedestrian stated that he was crossing the street; he did not see the approaching auto but did hear a honk and, when he turned around to go back from where he started to cross from, he was struck by the auto." The decedent lived about a year as an invalid after the accident, and substantial damages are shown by the evidence.

On exceptions to the instructions duly raised, the plaintiff complains that the issue of defendant's negligence was submitted only on the allegation of failure to keep a proper lookout, and, further, that the issue of contributory negligence should have been directed against the defendant.

We will deal first with the question of whether the trial court erred in submitting the issue of contributory negligence to the jury. In so doing, these rules must be considered:

"[S]ince we are asked to overturn the jury verdict for defendants, we must consider this case in light of the rule that to justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake." *Merritt v. Reed,* 186 Neb.

561, 563-64, 185 N.W.2d 261, 263 (1971).

"'In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.'" *Koob v. Long*, 188 Neb. 640, 642, 198 N.W.2d 474, 476 (1972); *Hacker v. Perez*, 187 Neb. 485, 192 N.W.2d 166 (1971); *Napier v. Pedersen*, 175 Neb. 703, 123 N.W.2d 577 (1963).

In the instant case, as the parties neared the point of the collision, the defendant was in the position of having the right-of-way in the westbound lane of Craig Street and the plaintiff's decedent had placed upon himself a burden of considerable care in crossing Craig Street at a point other than a crosswalk. The duties of the defendant change from right-of-way as a matter of law to a duty to exercise care when she observes the position of the plaintiff's decedent from about a block away. In response to this, her testimony indicates that she slackened her speed, "tooted" the horn, and, seeing safety in doing so, pulled her automobile to the left of the centerline. A clear issue of fact remains, however, concerning the point in time at which the defendant "tooted" the horn. Defendant says it was from a block away and that the plaintiff's decedent did not respond. On the other hand, the statement of plaintiff's decedent, given to Officer Brock, indicates that he heard the horn and stepped back. Accepting, as we must for this purpose, the testimony of the defendant, she is entitled to the instruction given by the trial court on the two specific allegations of contributory negligence.

The plaintiff's second complaint of error is also covered by the foregoing analysis of the facts. "'Where . . . negligence is pleaded . . . and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues [involved] . . . .'" *Oberhelman v. Blount*, 196 Neb. 42, 45, 241 N.W.2d 355, 358 (1976). No evidence of the plaintiff controverts any other fact in the

testimony of defendant other than that of when the horn was "tooted."

The verdict of the jury and judgment of the District Court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DENNIS SHEA, APPELLANT.

301 N.W.2d 602

Filed February 6, 1981. No. 43496.

1. **Judicial Notice: Municipal Ordinances.** This court will not take judicial notice of a municipal ordinance which does not appear in the record.
2. **Presumptions: Municipal Ordinances.** The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.

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

Toney J. Redman for appellant.

Norman Langemach, Jr., City Prosecutor, for appellee.

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

BOSLAUGH, J.

The defendant, Dennis Shea, upon a plea of guilty, was convicted in municipal court of operating a motor vehicle while his Nebraska operator's license was suspended in violation of the municipal code of the city of Lincoln, Nebraska. He was sentenced to 30 days in jail and his driving privileges were suspended for 1 year. Upon appeal to the District Court, the judgment was affirmed.

The defendant has appealed and contends the sentence imposed was unconstitutionally excessive.

The section of the municipal code under which the defendant was sentenced, apparently § 10.52.040(c) according to the briefs, does not appear in the record. This court will not take judicial notice of an ordinance which does not appear in the record, and the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980).

We have examined the record and presentence report and find that the sentence imposed was not excessive.

The judgment is affirmed.

AFFIRMED.

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JOHN S. OLSON ET AL., APPELLEES, V. EDITH LUELLA SAMPSON, APPELLANT.

302 N.W.2d 32

Filed February 13, 1981. No. 43007.

1. **Wills: Intent.** The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention.
2. ____: ____. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made.
3. ____: ____. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
4. ____: ____. The intention of the testator must be found within the will, and that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.

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

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellant.

Bernard T. Schafersman of Yost, Schafersman, Yost, Lamme & Hillis for appellees.

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

MCCOWN, J.

This is an action to quiet title and partition certain real estate. The appellant, Edith Luella Sampson, alleged that she owned a life interest in one specific tract and prayed that partition be denied as to that tract. The District Court found that appellant had no life interest in the property and entered judgment quieting title and ordering partition. The sole issue on appeal is the nature and extent of the interest Edith Luella Sampson acquired in the tract under the will of John Sampson.

John Sampson died testate on December 7, 1925, leaving eight surviving children. A handwritten will, executed by the testator's mark, left an 80-acre tract of land in specific portions of approximately 26 acres each to his daughter, Alice Amanda; his son, Victor Emanuel; and his daughter, Edith Luella, the appellant here. The testator's will then devised the 120-acre tract directly involved in this appeal to the testator's daughters, Ingrid Sardina, Anna Matilda, Emma Josina, and Esther Johanna, and his son, Nels Hjalmar, equally, share and share alike, and stated: "Provided, however, that the 120 acres herein devised cannot be sold by the owners thereof so long as any of the five children named in this paragraph are living. If any of said five children should die without issue the share of the one so dying shall descend to all of the lawful heirs of said child. Provided also, that my daughter Edith Luella shall, before her marriage, have the right to make her home with my said five children on the premises described in this paragraph."

The family residence was located on the 120-acre tract, and following the death of John Sampson it continued to be the family home. The five children, to whom the 120-acre tract was devised, and the appellant, who was and is unmarried, continued to live in the house. Esther Johanna married and left the home for some period of time but returned later and lived in the residence again with her three children until her death intestate in 1939. The other three devisee daughters never married and lived in the house until their deaths, and all died intestate. Nels Hjalmar, the last survivor of the five devisees of the 120-acre tract, died intestate in 1968. At that time the appellant was 76 years old and remained unmarried.

After the death of John Sampson, the appellant assumed the duty of directing and managing the family farm and business. Before the death of Nels Hjalmar, income from the 80-acre tract and the 120-acre tract was kept in a bank account under the names of both the appellant and Nels Hjalmar. Funds in the account, in addition to business expenses, were used to pay living expenses of family members living in the residence and, at least on occasion, for expenses of those not living there. The agricultural land on both tracts was leased. Following the death of Nels Hjalmar, the appellant continued to live in the residence and continued to lease the land, and has reported all income from both tracts on her personal income tax returns. She was living on the premises at the commencement of this action.

On October 17, 1978, the plaintiffs, who are two sons of Esther Johanna Sampson Olson, filed this action to quiet title and partition the 120-acre tract and that portion of the 80-acre tract that had been devised to Victor Emanuel Sampson, who died intestate in 1941. On August 3, 1979, the District Court found that the appellant did not have a life interest in the 120-acre tract, confirmed and quieted title in the respective owners in the percentages set out,

and ordered partition of the real estate. On this appeal no issue is raised with respect to any portion of the 80-acre tract of land, nor is there any issue as to the ownership of the fee interests in the 120-acre tract. The only issue on appeal is the nature and extent of the interest the appellant acquired in the 120-acre tract under the will of John Sampson.

The appellant originally alleged that the language of the will created a conditional life estate in the appellant, but now asserts only that the language created a conditional license or privilege to occupy and use the premises for the term of her life. She also contends that the license and privilege is not limited to the use of the residence on the land but extends to the entire 120 acres, conditioned only upon her remaining unmarried.

The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator. See, *Rasmussen v. Wedge*, 190 Neb. 818, 212 N.W.2d 637 (1973); *Slocum v. Hevelone*, 196 Neb. 482, 243 N.W.2d 773 (1976).

The overall plan of the testator divided his property approximately equally between all of his children and was also apparently intended to provide a home for some of his children. The real property the testator owned consisted of two tracts and the residence was

on the larger 120-acre tract. The smaller 80-acre tract was devised to one of his sons, one married daughter, and the unmarried appellant, who was also designated as executrix of his will. The larger 120-acre tract involved here, upon which the residence was located, was devised to the remaining five children, share and share alike, with the limitation that the land could not be sold by the owners so long as any of the five children were living. The will also provided that if any of the five children died without issue, his or her share would descend to his or her heirs. The testator then added the provision which is critical here: "Provided also, that my daughter Edith Luella shall, before her marriage, have the right to make her home with my said five children on the premises described in this paragraph."

In determining the question of what character or quantum of estate or interest is created by a will which, by mere direction, purports to establish premises as a home for one or more designated persons, the terms of the particular instruments vary so greatly that no pattern or rule of decision can be determined. See Annot., 45 A.L.R.2d 699 (1956). The language used by the testator in the present case, that appellant should "have the right to make her home" with the five devisees of the land, would indicate that the testator intended to give the appellant only the privilege of using the home as a residence before her marriage but did not intend to create any right or interest in the land or in the income from the land.

The testator devised the entire fee title to the 120-acre tract to the five named children, with specific limitations. The first was that the land could not be sold by any of the owners so long as any of the five named children were living. He also provided that if any of the five children died without issue, his or her share would descend to all of his or her lawful heirs. The proviso for the appellant to make her home on the premises followed. All restrictions on sale or disposi-

tion of the property ended with the death of the last devisee. The appellant's privilege to occupy the residence on the premises "with" the five devisees ended at the same time. It may well be that the testator did not contemplate that the appellant would remain unmarried and would survive all the named devisees. The intention of the testator is the one expressed by the language of the will and not an entertained but unexpressed intention. See *Slocum v. Hevelone, supra.*

The finding and judgment of the District Court that the appellant did not own any life interest in the 120-acre tract was correct, and the judgment of the District Court confirming and quieting title in the respective owners and ordering partition is affirmed.

AFFIRMED.

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LAURA COX, ALSO KNOWN AS LAURA HENDRICKS, APPELLEE, V.
ROBERT K. HENDRICKS, APPELLANT.

302 N.W.2d 35

Filed February 13, 1981. No. 43083.

1. **Paternity: Child Custody: Visitation.** In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied.
2. **Paternity: Visitation: Jurisdiction.** The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the father in an appropriate case.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed in part, and in part vacated and remanded.

Richard J. Schicker of Cullan, Cullan & Morrison for appellant.

Thomas F. Dowd, P.C., for appellee.

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

MCCOWN, J.

This action was commenced by the mother of a child born out of wedlock to establish paternity and obtain support for the child. The father admitted paternity and sought custody of the child. The District Court found that the petitioner mother was a fit and proper person to have custody and control of such minor child, granted custody and control to her, and ordered the father to pay $140 per month for support of the child. The father has appealed.

In April 1968 the parties to this action began living together as husband and wife. At that time the woman was 18 years old and the man was 47 years old. They never married. On December 11, 1974, a daughter was born to the parties. The parties continued to live together and both shared in providing care and financial support for their daughter. In August of 1977 the mother was hospitalized under the care of a psychiatrist and remained in the hospital for approximately 3 months. Upon her release from the hospital in 1977, the mother refused to return to the family home, took custody of her daughter, and moved into an apartment. The parties have not lived together since that time.

There is evidence in the record that following the mother's departure from the family home the father harassed her at her apartment when he was intoxicated and that she called the police on several occasions. There was also evidence that the father babysat with the child on occasion with the mother's permission. In July 1978 the mother was again hospitalized. The

mother agreed to let the father take care of the daughter while the mother was in the hospital. The father took the child in July 1978 and continued to take care of her until the date of trial in October 1979. Upon the mother's release from the hospital in October 1978, she asked the father to return the child and he refused. While proceedings were pending in this case the father continued to keep the daughter at his mobile home and the mother visited the child at the father's mobile home each weekend and occasionally during the week at the home of a babysitter employed by the father.

The case was tried in the District Court on October 1, 1979. Paternity was admitted and was not at issue. The evidence at trial established that the mother had married on May 14, 1979, and that she and her husband, who was an engineering student, lived in a four-bedroom duplex. The mother was regularly employed and had a monthly gross income of $1,086. She was also a part-time student at the University of Nebraska at Omaha. The mother testified that she had secured a babysitter for the child and that she could properly provide the necessary care and attention for her daughter.

There was also evidence at the trial that the father was an alcoholic, but that he had not had a drink since April 1978, and regularly attended meetings of Alcoholics Anonymous. He was employed by Nebraska Truck Sales and Service and his gross monthly salary was approximately $900 per month. He lived in the two-bedroom mobile home in which the parties had previously resided and left the child at the home of a babysitter during his hours of employment. At the time of trial the child was not quite 5 years old.

Neither the mother nor the father had any complaint about the care which the other had given the child at any time. Both parties love their daughter and want to have physical custody of her and the child loves both parents.

On October 23, 1979, the District Court entered its decree finding that the mother was a fit and proper person to have custody and control of the minor child, granted custody and control to her, and ordered the father to pay the sum of $140 per month for support of the child. The court also found that it had no jurisdiction to award visitation rights and therefore directed that the father may visit the child at such times as the mother may determine. The case now before us is one of first impression in this jurisdiction in determining what standards are to be used in a custody dispute between the natural parents of a child born in familial circumstances but out of wedlock, whose parents have never been married to each other.

The father contends that the District Court applied the rule that the mother of a child born out of wedlock has a legal right to its custody, care, and control superior to the right of the father or any other person, and that such action was erroneous. That rule has been applied in the past in paternity cases generally, and various reasons have been assigned as the basis for the rule. See Annot., 98 A.L.R.2d 417 (1964). In the present case the decree of the District Court does not show what rule the court followed in awarding custody of the child to the mother. The decree does find that the mother is a fit and proper person to have custody and control of the child and makes no finding as to the fitness of the father.

The case at bar is not the usual paternity case in which the mother seeks to establish the paternity of her child against a putative father who has denied paternity. In this case the parties lived together as husband and wife for almost 10 years, and the father has not denied paternity but acknowledged it and accepted his paternal responsibilities. During the lifetime of the child the father continuously fulfilled the role of a father and maintained a parental and familial relationship with his child. The relationship continued even after the parties were separated, and

the father had physical custody of the child for more than a year prior to trial.

U.S. Supreme Court cases reflect the expanding concepts of the nature and extent of the rights of putative fathers. See, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).

Modern cases tend to hold that where an unwed father has demonstrated a familial relationship with his child the courts do not grant a superior right of custody to the mother but decide custody issues on the basis of the best interests of the child. Kern, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 Wash. U.L.Q. 1029; Note, *The Putative Father's Paternal Rights: A Focus on "Family,"* 58 Neb. L. Rev. 610 (1979).

The clear trend in recent cases is to disregard the fact that a child was born out of wedlock in deciding custody disputes between natural parents. The case of *Pruitt v. Jones*, 62 Ohio St. 2d 237, 405 N.E.2d 276 (1980), reflects that view. In that case the natural mother of a child born out of wedlock brought a habeas corpus action against the natural father for custody of the child. The parties stipulated that they were the natural parents of the child and that they had never been married to each other. The Ohio Court of Appeals found the mother had a valid and immediate right to custody. The Ohio Supreme Court, on appeal, held that the lower court had erred in taking into account the fact that the child was born out of wedlock, and said: "We are unable to discern any difference between the present case, dealing with an illegitimate child, and a case dealing with a legitimate child. In both types of cases, when the controversy is between the child's natural parents, our main concern remains with the best interests of the child. The necessary corollary to this concern is the need for determining the suit-

ability of the parents. [Citations omitted.]" *Id.* at 238, 405 N.E.2d at 276-77. See, also, *Alberto B. v. Rosa O.*, 102 Misc. 2d 147, 423 N.Y.S.2d 111 (1979).

In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied.

In the case at bar, while the court made no affirmative finding that the award of custody to the mother was in the best interests of the child, there is sufficient evidence to support such a finding and to justify the award of custody to the mother, regardless of the rule which may have been applied in reaching that result.

The District Court, however, misapplied the case of *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960), in determining that the court had no jurisdiction to award visitation rights in the present case. *Paltani* was decided on a demurrer on the issue of lack of jurisdiction in a statutory paternity case brought by the father. Although *Paltani* invalidated a decree which in part awarded visitation rights to a natural father, the issue of visitation rights was not directly considered nor ruled upon.

The case at bar is also a case of first impression as to the issue of visitation privileges of unwed fathers, at least in the modern era. In 1972, at the time the U.S. Supreme Court decided *Stanley v. Illinois*, *supra*, only six states granted an unwed father visitation privileges over the opposition of the mother. Today, however, virtually all states which have considered the issue have granted the father a right to reasonable visitation if it is in the best interests of the child. See,

for example, *State ex rel. Wingard v. Sill*, 223 Kan. 661, 576 P.2d 620 (1978); *Gardner v. Rothman*, 370 Mass. 79, 345 N.E.2d 370 (1976). As the Supreme Court of Kansas said in the *Wingard* case: "The day is gone when the putative father has no parental rights under the law." *Id.* at 665, 576 P.2d at 624.

In an action to establish paternity, issues of custody and visitation rights are incidental to the primary cause of action and fall within the general equity jurisdiction of the District Court. The District Court has jurisdiction to award reasonable visitation rights to the father in an appropriate case. In the case at bar the District Court did not determine visitation rights, citing lack of jurisdiction.

For the reasons stated, the decree of the District Court is affirmed in all respects except the provision that the "respondent may visit such child at such times as petitioner may determine." That portion of the decree is vacated and the cause remanded for further proceedings as to visitation rights.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED.

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VIRGINIA L. KOPERSKI, APPELLANT, V. HUSKER DODGE, INC., A CORPORATION, ET AL., APPELLEES.

302 N.W.2d 655

Filed February 13, 1981. No. 43093.

1. **Uniform Commercial Code: Words and Phrases.** The Nebraska Uniform Commercial Code does not use the term "rescission," but refers to that remedy under its statutory provisions as "revocation of acceptance."
2. **Statutes: Jurisdiction.** Where a statute provides an adequate remedy at law, equity will not entertain jursidiction, and the statutory remedy must be exhausted before equity may be resorted to.
3. **Trial: Judgments: Appeal and Error.** In a trial to the court in a law action, the findings and judgment of the trial court on the facts

have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong.

4. **Uniform Commercial Code: Revocation: Time.** Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it.
5. _____: _____: _____. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts.
6. **Uniform Commercial Code: Words and Phrases.** Under Neb. U.C.C. § 1-201(10) (Reissue 1971), the term "conspicuous" is defined to mean a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it.
7. **Uniform Commercial Code: Sales: Warranty.** Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.
8. **Sales: Warranty.** Where an action is based upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant to recover under breach of express warranty. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation.
9. **Uniform Commercial Code: Sales: Warranty.** Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.
10. **Sales: Warranty.** Language of a warranty limiting the buyer's remedies to repair and replacement of defective parts is not, on its face, unconscionable.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

James A. Hogan for appellant.

Harold L. Hadland of Cassem, Tierney, Adams, Gotch & Douglas for appellee Chrysler Corp.

Hansen & Engles for appellee U.S. Nat. Bank.

James R. Sacoman of Seminara, Caniglia, Turco, McCarthy & Sacoman for appellee Husker Dodge.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

BRODKEY, J.

Virginia L. Koperski (Virginia), plaintiff below, appeals to this court from a decree entered by the District Court of Douglas County on October 3, 1979, dismissing her petition in an action filed by her against the defendants, Husker Dodge, Inc., Chrysler Corporation, and United States National Bank, seeking revocation of a contract entered into between her and the defendant Husker Dodge, Inc., and also for a judgment against the defendants and each of them for both direct and consequential damages suffered by her as a result of alleged defects in the automobile purchased by her. We affirm.

In her second amended petition, filed on August 7, 1979, plaintiff sets out five causes of action against the defendants Husker Dodge and Chrysler, setting forth her claims against those defendants arising out of the sale to her of a 1978 Dodge Diplomat automobile, and based on allegations of breach of warranty, rescission of contract and revocation of acceptance of the automobile, and a violation of the Consumer Product Warranties Act (Magnuson-Moss Act), 15 U.S.C. §§ 2301 et seq. The defendants each filed separate answers to the second amended petition. In its separate answer, Husker Dodge, Inc., alleged as a defense that the contract for the sale of the automobile referred to provided that it was sold "as is" by said defendant and that the contract excluded any implied warranty of merchantability, any implied warranty of fitness, and, further, denied that it had breached any warranty in connection with the sale of the vehicle. It also alleged that the plaintiff had not sustained damages as prayed

and, further, denied that plaintiff's petition stated a cause of action against them under the terms of the Magnuson-Moss Act. In its separate answer, defendant Chrysler Corporation alleged that the 1978 Dodge Diplomat automobile purchased by plaintiff was accompanied by an express limited warranty from Chrysler Corporation, under the terms of which limited warranty the exclusive obligation of Chrysler Corporation was to repair or replace any part or parts of the vehicle which proved defective in normal use, and that it had seasonably fulfilled all obligations in connection with such warranty. It also denied that the plaintiff had sustained direct and consequential damages as a result of any act or omission on the part of that defendant. Defendant U.S. National Bank was made a party to the action by virtue of a loan made by it to the plaintiff to finance the balance of the purchase price of the automobile. In its answer, the bank generally denied each of the allegations against it contained in plaintiff's second amended petition.

The case was tried in the District Court of Douglas County on August 20, 1979, and the court entered its decree in said case on October 3, 1979. In its decree the trial court found generally in favor of the defendants and against the plaintiff, and specifically found with regard to plaintiff's first cause of action based upon revocation of acceptance that the plaintiff had failed to prove by the evidence that there was a substantial impairment of value of the motor vehicle in question, and further failed to show that repairs were not seasonably performed by the defendants, but, on the contrary, that repairs were made within a reasonable length of time after notice to the defendants. The court specifically found with reference to plaintiff's second cause of action based upon an alleged breach of an express warranty by the defendant Husker Dodge that said defendant had expressly excluded all express and implied warranties under the provisions of Neb. U.C.C. § 2-316 (Reissue 1971), and that defendant

Chrysler Corporation had expressly limited its warranty to repairs and/or replacement of defective parts, and determined that under the evidence adduced the defendant had fully complied with the obligations of its limited warranty. In its decree the court specifically found with regard to plaintiff's third cause of action based upon a violation of the Magnuson-Moss Act that Husker Dodge had offered no warranty in its contract; that the manufacturer, Chrysler Corporation, had complied with the requirements of the Magnuson-Moss Act and had conspicuously designated its warranty as a limited warranty; and that therefore the Magnuson-Moss Act was not in question in the lawsuit. The court also specifically found with regard to plaintiff's fourth and fifth causes of action that the plaintiff had failed to prove any breach of warranty. The court therefore decreed that plaintiff's petition should be dismissed at plaintiff's cost. Following the overruling of a motion for a new trial, plaintiff perfected her appeal to this court.

In her brief on appeal, the plaintiff assigns as error: (1) That contrary to the finding of the court, the evidence was sufficient to establish a substantial impairment of value of the motor vehicle; (2) That the court erred in finding that the repairs were properly performed; (3) That the court erred in finding that the disclaimer of warranty on the part of Husker Dodge, Inc., was "conspicuous" and constituted an effective disclaimer of warranty; (4) That the court erred in finding that the defendants Husker Dodge, Inc., and Chrysler Corporation had not breached certain express warranties running in favor of plaintiff; (5) That the court erred in finding that defendant Chrysler Corporation had not breached its express warranties by failing to make proper repairs and/or replacement of defective parts on the automobile purchased by plaintiff; and (6) That the court erred in failing to grant plaintiff the remedy of revocation of acceptance.

The evidence in this case reveals that Virginia was a recent college graduate, and was 25 years of age at the time of the transaction in question. On June 12, 1978, Virginia entered into a purchase contract for a 1978 Dodge Diplomat with Husker Dodge, Inc., a Chrysler dealership in Omaha, Nebraska. The vehicle buyer's order recited a purchase price of $6,000. On that date, she also requested permission to take the car for a test drive, but the salesman informed her that she could only drive a demonstrator vehicle, and not the car she purchased. On June 15, 1978, she took delivery of the vehicle; and on that date various other documents were signed by the plaintiff, including a new car buyer's information sheet which listed numerous notices concerning the vehicle and applicable warranties, the car invoice, an odometer mileage statement, and the car delivery acknowledgment. Virginia made the $1,000 downpayment and arranged to finance the remaining balance through defendant U.S. National Bank.

Upon delivery of the car, Virginia noticed grease marks on the vehicle's headlining, front seat, and floorboard, and was told by the salesman that she could make an appointment to have the car cleaned. Within a few days following delivery of her automobile, Virginia began to experience difficulties with it. Testimony revealed that the car would vibrate at speeds of 35 to 40 miles per hour; that the motor killed when the air-conditioner was turned on; and that the engine would die when placed into reverse. On or about June 20, 1978, she returned the car to Husker Dodge to be cleaned and repaired.

A warranty repair order, dated June 20, 1978, indicates that the plaintiff's car was worked upon by the mechanics of defendant Husker Dodge, and that foreign material was removed from the carburetor. However, Virginia's difficulties with the Dodge did not end after this repair, and the testimony shows that she returned the car to Husker Dodge on June 22,

1978, because the engine would still die when the car was placed in reverse. At this time the plaintiff informed a service representative that she wanted the car repaired by June 30, 1978, the date of a planned family vacation to Wisconsin. Plaintiff left the vehicle to be repaired and the second warranty repair order admitted at trial indicates that the automobile's entire transmission was replaced by Husker Dodge on June 30, 1978, without charge to plaintiff. When Virginia returned for the car, she insisted on test driving it before taking it home. She testified that during the test drive the car made a high-pitched noise which emanated from the rear end, and she was told by a service mechanic that the rear end would be "going out" within 6 months. Virginia stated that when the vehicle was put into reverse gear, it again died. The record further reveals that plaintiff took the car with her on the trip to Wisconsin, having made arrangements to have the car repaired upon her return. Virginia and her parents testified that during the trip to Wisconsin the car's transmission difficulties continued, and that family members even had to push the car out of parking spaces when it failed to go into reverse. On July 5, 1978, Virginia returned from Wisconsin and took the car back to Husker Dodge for repair. The third warranty repair order admitted in evidence indicates that on that occasion the automobile's radiator was removed and a transmission cooler was replaced. Virginia returned for the car on July 8, 1978, and upon test driving the vehicle found that, while it would now go into reverse, a rubbing metallic sound was produced when the car was driven. Upon reporting these facts to the mechanic, she was instructed by him to take the car home and drive it for a week. She testified that during that period the car did not automatically shift gears when she pressed on the accelerator, but would either stop or jerk forward suddenly. Virginia's mother testified that she had occasion to drive the car during this

period, and related an incident which occurred when she crossed an intersection in Omaha. Mrs. Koperski stated that the automobile stalled in the middle of the intersection and would not move forward when she stepped on the accelerator or when she shifted gears. Finally, on restarting the car's engine, she was able to drive the car, but it would jerk forward suddenly. Mrs. Koperski expressed the opinion that the car was unsafe to drive.

It appears that during this same period Virginia secured a position in California. On July 25, 1978, she was scheduled to fly to California, and her father drove her to the airport in the Dodge. Mr. Koperski, a truck mechanic by profession, testified that on the way back from the airport he attempted to pull out onto Abbott Drive, but the car would not move. He stated that when he pressed on the accelerator nothing happened. He further stated that when he again pressed on the accelerator the car "shot" across Abbott Drive. He also stated that as he drove the vehicle it made a great deal of noise and he feared that the transmission might explode. At trial, he also expressed the opinion that the automobile was dangerous to drive.

Mr. Koperski returned the vehicle to Husker Dodge on that date and informed the service manager that his daughter wanted a replacement car. It appears that the Koperskis had previously notified their attorney as to their difficulties with the car, and on July 25, 1978, he sent a letter to defendants Husker Dodge and Chrysler Corporation requesting a replacement vehicle or, in the alternative, plaintiff would rescind the contract. He requested a return of the purchase price, as well as damages. On August 4, 1978, without the knowledge of the plaintiff, a second replacement transmission was installed in the vehicle. However, there is no question that even after installation of the second transmission, the Koperskis still did not pick up the car. Thereafter, Koperski received notice that the

car had been repossessed by the defendant bank and would be sold unless redeemed. Virginia did not redeem the automobile, and it was thereafter sold at a private sale for $5,100.

It will be helpful at the outset to determine the scope of review in this court of the action filed by the plaintiff herein, and the judgment of the trial court now here on appeal. It would appear from the record that the parties considered this action to be an action at law tried to the court without a jury, and tried the case on that theory. Neither the plaintiff nor the defendants contend to the contrary in this appeal, nor does the plaintiff on appeal contend that the action was one in equity and not one at law. Plaintiff's action was clearly brought under the statutory provisions of the Nebraska Uniform Commercial Code. While it is true that in her petition, in addition to her prayer for damages arising out of the sale of the automobile in question, plaintiff also prays for both a revocation of her acceptance of the vehicle and rescission of the contract, we conclude that the use of the term "rescission" in the petition does not automatically transform the action into an equity action. Although rescission was originally an equitable remedy, it is now clear that there are two types of rescission, one being applied to a law action and the other designated as equitable rescission. *Aron v. Mid-Continent Co.*, 141 Neb. 806, 4 N.W.2d 884 (1942); 12A C.J.S. *Cancellation of Inst.* § 4 (1980). The Uniform Commercial Code, however, does not use the term "rescission" with reference to Neb. U.C.C. § 2-608 (Reissue 1971), but refers to that remedy under its statutory provisions as "revocation of acceptance." In White & Summers, Uniform Commercial Code (2d ed. 1980), these authorities discuss the relationship between "rescission" and "revocation of acceptance" in § 8-1 at 295, as follows: "A word should be devoted to that ambiguous action called 'rescission.' Some use the word rescission to encompass what the Code defines as a rejection or

revocation of acceptance; others use it to mean simply the buyer's act in returning the goods; still others use it to cover the buyer's cancellation of the executory terms of the contract; and finally some might call it the buyer's cause of action for fraud, (including presumably the return of the goods, cancellation of the executory portion of the contract and the return of money paid). It is the apparent intention of the drafters to restrict the word rescission to a rather limited number of cases, those involving a mistake or in which the seller has committed fraud, duress, or the like. Comment 1 to § 2-608 makes the point as follows: 'The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract.' *If the seller has not committed mistake, fraud, or the like, we believe that the Code preempts the field and that the buyer's only rights to return the goods are those stated in Article Two.*" (Emphasis supplied.) More important, however, it appears to be the general rule that where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. So, when jurisdiction has become concurrent through statutory enlargement of the legal remedy, a court of equity, although recognizing the existence of its jurisdiction, will generally decline to exercise it where the remedy at law is complete and adequate, and no special circumstances exist demanding the interference of equity. See 30 C.J.S. *Equity* § 23(2) (1965). Nebraska, in a long line of cases, has adopted and follows the aforesaid rule. In *Bend v. Marsh*, 145 Neb. 780, 784, 18 N.W.2d 106, 109-10 (1945), this court, citing *Brandeen v. Beale*, 117 Neb. 291, 220 N.W. 298 (1928), stated: "'"The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by

statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. [Citations omitted.]"'"

Our conclusion is, therefore, that plaintiff's action, being based upon the Nebraska Uniform Commercial Code, and tried upon that theory, was an action at law tried to the court without a jury.

We therefore examine the scope of review by this court in a case tried to the court without a jury. In *Countryside Mobile Homes of Lincoln, Inc. v. Schade*, 204 Neb. 209, 281 N.W.2d 756 (1979), we stated the rule to be that in a trial to the court the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it, citing *Burhoop v. Pegram*, 194 Neb. 606, 234 N.W.2d 828 (1975). Also, in *Brandt v. Mayer*, 196 Neb. 751, 757, 246 N.W.2d 203, 206 (1976), we stated: "The case below was tried to the court. Our rule is well-established. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong." See, also, *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974). In *Brandt v. Mayer, supra* at 755, 246 N.W.2d at 205, we also stated: "It is the function of this court to independently determine if sufficient evidence was presented to sustain the trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict."

In the instant case, the matter was tried to the court without a jury, and findings and conclusions of the trial court have already been discussed. We are governed in this case by the rules previously announced.

It is clear that the instant transaction constitutes a

sale of goods governed by article 2 of the Uniform Commercial Code.

In her first cause of action, the plaintiff seeks to revoke her acceptance of the Dodge automobile under the provisions of § 2-608, which states:

"(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it.

"(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

"(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

"(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

"(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them."

In *Countryside Mobile Homes of Lincoln v. Schade*, *supra*, a case which involved the sale of a mobile home, this court held that under § 2-608 a buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. In that case, however, this court held that there was sufficient evidence in the record to support the finding of the trial court that after acceptance the appellee found defects that substantially impaired the value of the mobile home, and stated: "Although neither conclusive nor the only evidence supporting diminution of value is the fact that the mobile home at public sale on January 16th brought

$7,000. This was less than one-half its value when sold to the appellee." *Id.* at 215, 281 N.W.2d at 759.

In the instant case, the court found that the plaintiff failed to prove that there was a substantial impairment of the value of the motor vehicle; and evidence in the record indicates that, upon repossession by the bank, the vehicle was sold for $5,100, or approximately 85 percent of plaintiff's original purchase price. We are not prepared to say that the trial court erred in its holding in the instant case that there was no proof of a substantial impairment of value in the motor vehicle. It appears to be the general rule that the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact subject to the jury's determination. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976). See, also, *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977). Likewise, in *Peckham v. Larsen Chevrolet-Buick-Oldsmobile*, 99 Idaho 675, 679, 587 P.2d 816, 820 (1978), the court stated:

"A further factual issue appears to remain regarding the conformity of the goods. Here there appears to be a dispute as to whether the goods were accepted by Peckham in a defective nonconforming condition or whether he accepted the goods upon assurance by the seller that the defects would be remedied. As stated by I.C. § 28-2-608, comment 2:

"'[r]evocation of acceptance is possible only where the nonconformity substantially impairs the value of the goods to the buyer. For this purpose, the test is not what the seller had reason to know at the time of contracting; the question is whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.'

"An exhaustive discussion of what constitutes substantial impairment to a buyer is unnecessary since it

is held each case must be examined on its own merits to determine what is a substantial impairment of value to the particular buyer."

Our conclusion is that the finding of the trial court on this issue was not clearly wrong and hence will not be disturbed on appeal. *Brandt v. Mayer*, 196 Neb. 751, 246 N.W.2d 203 (1976).

We now turn to a discussion of what warranties, if any, were made by Husker Dodge, the seller of the automobile, and/or Chrysler Corporation, the manufacturer of the vehicle. With respect to Husker Dodge, it is clear from the record that it gave no separate warranty, express or implied, to the plaintiff, and in fact the evidence revealed that Husker Dodge expressly excluded all express and implied warranties on the sale of the automobile, under the provisions of § 2-316, and the court so found in its decree. There appears on the face of the vehicle buyer's order given by Husker Dodge the following disclaimer:

"AS IS

Customer note that the vehicle is being sold 'AS IS' by the Selling Dealer. Should the Manufacturer's Warranty apply to this vehicle, it is directly offered by the Manufacturer to the Customer. . . ."

In addition, the document referred to contains a disclaimer by the dealer of express or implied warranties as to merchantability or fitness of purpose. There is no question that Husker Dodge's disclaimer of warranties contained on their vehicle buyer's order was "conspicuous" as required by § 2-316(2). That term is defined in Neb. U.C.C. § 1-201(10) (Reissue 1971) as follows: "'Conspicuous': A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as, NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type *or color*. . . ." (Emphasis supplied.) In the instant case the disclaimer of warranties of mer-

chantability and fitness for purpose was printed in contrasting red print. The comment to the above section defining "conspicuous" states: "This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it." There is no question that in the instant case Husker's disclaimer of warranties, printed on its document in the manner above indicated, was sufficient to call attention to such disclaimer. In addition, we note that § 2-316(3) provides in part:

"(3) Notwithstanding subsection (2)

"(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . ." In this connection, see, also, *Gilliam v. Indiana Nat. Bank*, 337 So.2d 352 (Ala. Civ. App. 1976).

The evidence in the record of this case clearly indicates that the only warranty in existence was the express limited warranty furnished by the defendant Chrysler Corporation, which was included among the various documents given to plaintiff at the time of the purchase of the automobile in question.

We set forth hereafter in full the complete text of Chrysler's limited warranty:

"BASIC COVERAGE — For the first 12 months or 12,000 miles (20 000 km), whichever occurs first, any part of this vehicle supplied by Chrysler, except tires, which proves defective in normal use will be repaired or replaced by the Selling Dealer using new or remanufactured parts.

"ADJUSTMENTS — During the first 3 months of the warranty period, the Selling Dealer will also perform any adjustment service required as a result of a manufacturing deficiency. Thereafter, adjustments will be considered owner maintenance responsibility unless

required as a direct result of repair or replacement of a defective part under this warranty.

"WARRANTY START DATE — This warranty starts on the date of original retail delivery or original use, whichever occurs first.

"OBTAINING WARRANTY SERVICE — To obtain warranty or adjustment service, the owner must return this vehicle to the Selling Dealer's place of business where such service will be performed without charge for parts or labor. In the event the owner is travelling or has moved to a different locality and cannot return to the Selling Dealer, warranty and adjustment service may be obtained from any authorized Chrysler Corporation dealer who sells the same make vehicle.

"WHAT IS NOT COVERED — This warranty will not apply to:

- A vehicle on which the odometer reading is altered;
- Maintenance services as specified in the Operating Instructions & Product Information Booklet supplied with this vehicle and the parts used in connection with such services;
- Repairs required as a result of failure to properly care for or maintain this vehicle, fire, accident, abuse or negligence;
- Loss of use of the vehicle, loss of time, inconvenience, expense for gasoline, telephone, travel or lodging, loss or damage to personal property, commercial loss, loss of revenue, or other matters not specifically included are not covered.

* * * * * * * * *

"This warranty gives the owner specific legal rights and the owner may also have other rights which vary from state to state.

"THIS WARRANTY IS THE ONLY EXPRESS WARRANTY MADE BY CHRYSLER APPLICABLE TO THIS VEHICLE. ANY IMPLIED WARRANTY APPLICABLE TO THIS VEHICLE IS LIMITED IN DURATION TO THE DURATION OF THIS WRITTEN WARRANTY.

"Some states do not allow the exclusion or limitation of incidental or consequential damages or limitations on how long an implied warranty lasts, so the above limitations or exclusions may not apply to you.
"This warranty applies to the 50 United States and Canada. It applies to all owners of this vehicle during the time and mileage (kilometres) limitations expressed herein."

It is clear that under the terms of Chrysler's limited warranty, as set out above, its liability under such warranty is limited to repair or replacement of defective parts for the first 12 months or 12,000 miles, whichever occurs first. This is the only warranty involved in this litigation, as Husker Dodge had sold the vehicle to the buyer under an "as is" restriction and properly disclaimed all other warranties.

Chrysler Corporation contends, however, in its brief and argument that it is not liable under its limited warranty to the plaintiff herein because of failure of privity of contract between it and the buyer of the vehicle, pointing out that it was not the "seller" of the vehicle, but, on the contrary, that the sale of the vehicle was a transaction between Husker Dodge and the plaintiff. We point out, however, that Chrysler Corporation's warranty, although limited in scope, was a direct representation and warranty made by Chrysler to the purchaser. Chrysler's contention is effectively answered by White & Summers, Uniform Commercial Code, § 11-7 at 410-11 (2d ed. 1980), where those authorities state: "When the non-privity plaintiff's suit is not based upon 402A or implied warranty, but rather upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant. Usually courts characterize such cases as express warranty cases, though in some jurisdictions they are classed as misrepresentation cases. The misrepresentation may come through the defendant's advertising, through

labels attached to the product, or through brochures and literature about the product. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation. Of course, any such plaintiff must also state the other elements of his cause of action.

"It is possible that lack of privity as a defense to a cause of action will be only a historic relic in the year 2000. It is a doctrine in hasty retreat; its current vitality is largely in cases in which plaintiffs seek recompense for economic loss." We point out again, however, that in this case the limited express warranty of Chrysler Corporation is not based upon merely a warranty allegedly arising in advertising materials, but is a direct written or printed warranty to the purchaser of the automobile, included with the other documents of the seller in the consummation of the sale of the vehicle. In this connection, see *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973).

There is no question that under the law Chrysler Corporation could legally limit its liability under its express warranty, as it did in this case. It is clear from the record that, contrary to the contentions of the plaintiff, Chrysler Corporation fully complied with the requirements of the Consumer Product Warranties Act (Magnuson-Moss Act), 15 U.S.C. §§ 2301 to 2312, inclusive. The trial court in its decree found that it had done so, and that the applicability of the Magnuson-Moss Act was not a question in this lawsuit.

"Repair and replacement" clauses, in the nature of those contained in Chrysler's limited warranty, have become the basic mechanism by which manufacturers limit or avoid liability in actions for breach of warranty. The clause provides both a remedy to the buyer, whereby he may obtain goods conforming to the contract, and a limitation of the liability of the manufacturer. See *Beal v. General Motors Corporation*, 354 F. Supp. 423 (D. Del. 1973). The authority to limit a

buyer's remedies under a warranty is found in Neb. U.C.C. § 2-719 (Reissue 1971), which provides in pertinent part as follows:

"(1) Subject to the provisions of subsections (2) and (3) of this section . . .

"(a) *the agreement may provide for remedies in addition to or in substitution for those provided in this article* and may limit or alter the measure of damages recoverable under this article, *as by limiting the buyer's remedies* to return of the goods and repayment of the price or *to repair and replacement of nonconforming goods or parts;*

. . . .

"(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

"(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." (Emphasis supplied.)

The general rule appears to be that language of a warranty limiting the buyer's remedies to repair or replacement of defective parts is not, on its face, unconscionable. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480 (Ky. 1978); *Cox Motor Car Company v. Castle*, 402 S.W.2d 429 (Ky. 1966); *Potomac Electric Pow. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.C. 1974).

While it is clear that Husker Dodge, as the dealer selling the automobile in question, was not the agent of Chrysler Corporation for the sale of the automobile, it was such agent with respect to the warranty repairs under Chrysler Corporation's limited warranty. It is clear from the record that all of the repair work done by Husker Dodge on plaintiff's vehicle was authorized and paid for by Chrysler Corporation. Each dealer, by specific written agreement with the manufacturer, was authorized to perform warranty work at the expense of Chrysler Corporation. Through this agree-

ment, the manufacturer held out every dealer as its representative and agent to perform warranty work. Husker Dodge in no way adopted the manufacturer's warranty, and, in fact, sold the automobile on an "as is" basis, disclaiming any warranties whatsoever. However, with respect to the warranty work performed for Chrysler, it was clearly Chrysler's agent. It is a fundamental rule that an agent who contracts on behalf of a disclosed principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party. The contract is that of the principal alone and the agent cannot be held liable thereon. See, *Bury v. Action Enterprises, Inc.*, 197 Neb. 38, 246 N.W.2d 724 (1976); *V.P.O., Inc. v. Money*, 201 Neb. 30, 266 N.W.2d 79 (1978); *Fisher v. Beebe & Runyan Furniture Co.*, 200 Neb. 349, 263 N.W.2d 826 (1978); 3 Am. Jur. 2d *Agency* § 261 (1962). In the present case, the warranty furnished by Chrysler Corporation to the buyer specifically instructed her to return the vehicle to her selling dealer's place of business or to any other authorized dealer for the performance of warranty work. Husker Dodge, which had consummated the sale, was fully responsible for all service requirements under the warranties given by Chrysler, and, by reason of its agency relationship with Chrysler Corporation, made the corporation liable as principal and seller for the warranty work performed. See, *Kure v. Chevrolet Motor Division*, 581 P.2d 603 (Wyo. 1978); *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974). Although the record in this case indicates that the plaintiff brought her car back to Husker Dodge on various occasions during a period of approximately 6 weeks following the sale of the vehicle to her, for the purpose of repairing various defects in the automobile, the record is clear that the plaintiff was never denied repair services by

Husker Dodge, nor was she charged for same. The record reveals that Chrysler Corporation was billed for the repairs by Husker Dodge under its warranty repair agreement and, in fact, paid Husker Dodge for such repairs. There is testimony that the principal defect complained of was with regard to the transmission of the vehicle, and the transmission was, in fact, once replaced prior to the date that plaintiff's father returned the automobile to Husker Dodge. There was testimony at the trial of this matter by a representative of the service department of Husker Dodge that following the abandonment of the car by plaintiff's father on July 25, 1978, when demand was made for a new car, Husker Dodge, in fact, replaced the transmission a second time, although without knowledge on the part of the plaintiff at that time that such was being done. The service representative testified that after the installation of the second transmission, he had road tested and checked the vehicle and found that the transmission was working properly and was not defective. The Koperskis never picked up the automobile, but left it with Husker Dodge. The defendant U.S. National Bank subsequently repossessed the automobile and sold it at private sale and applied the proceeds on plaintiff's loan with the bank, as previously stated.

In its decree entered in this matter, the trial court specifically found that plaintiff had failed to prove that Chrysler Corporation had breached its warranty. We believe that under the rule regarding scope of review previously set out, there was sufficient evidence in the record to sustain this finding on the part of the trial court, and that the court was not clearly wrong.

We are aware of a line of cases which have afforded relief to the buyer of an automobile on the theory that the contract for the purchase of the automobile has failed of its essential purpose because of the fact that the warrantor has failed, neglected, or refused to make necessary and adequate repairs within a reasonable

time to place such vehicle in operating condition. In *Goddard v. G.M.C.*, 60 Ohio St. 2d 41, 396 N.E.2d 761 (1979), the court stated: "Although in most cases a limited remedy may be fair and reasonable, and satisfy the reasonable expectations of a new car purchaser, other courts and some commentators have generally recognized that when a seller is unable to fulfill its warranted obligation to effectively repair or replace defects in goods which are the subject matter of the sale, such as in the instant cause, the buyer is deprived of the benefits of the limited remedy and it therefore fails its essential purpose." *Id.* at 45, 396 N.E.2d at 764.

"In accordance with R.C. 1302.93(B), we conclude that where a new car express warranty limits a buyer's remedy to repair and replacement of defective parts, but when the new car is so riddled with defects that the limited remedy of repair and replacement fails its essential purpose, the buyer may institute an action to recover damages for breach of warranty under R.C. 1302.88(B) and, in a proper case, incidental and consequential damages under R.C. 1302.88(C) and 1302.89." *Id.* at 47, 396 N.E.2d at 765. To the same effect, see, *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977); *Eckstein v. Cummins, supra; Ehlers v. Chrysler Motor Corp.*, 88 S.D. 612, 226 N.W.2d 157 (1975); *Kure v. Chevrolet Motor Division, supra; Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978). However, as stated above, since we have found that the trial court was correct in its finding that plaintiff had failed to prove that Chrysler Corporation had breached its warranty, and that there was evidence in the record to support that finding, the rule enunciated in the above-cited cases cannot be applied to this case. While the result in this case might appear to be harsh, we are obligated to follow established principles of law, and we must conclude that the decree of the

trial court was correct. We affirm the action of the court in dismissing plaintiff's petition against all of the defendants herein.

AFFIRMED.

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## IN RE INTEREST OF BLYTHMAN. STATE OF NEBRASKA ET AL., APPELLEES, V. THEODORE W. BLYTHMAN, APPELLANT.

302 N.W.2d 666

Filed February 13, 1981. No. 43174.

1. **Mental Health: Prior Acts.** Under the Nebraska Mental Health Commitment Act, the determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances.
2. ____: ____. In order for a past act of violence to have any evidentiary value under such act, it must form some reasonable basis for a prediction of future dangerousness and be probative of that issue.
3. ____: ____. An act occurring 5 years prior to the mental health commitment hearing is recent within the meaning of Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980) where: (a) There is evidence that the act is still probative of the subject's future dangerousness; (b) The subject has not had an opportunity to commit a more recent act because he has been in confinement; and (c) There is reliable medical evidence that there is a high probability of repetition of such act by the subject.

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

Sean J. Brennan, Shelley K. Stall, and Scott P. Helvie, Public Defenders of Lincoln County, for appellant.

George E. Clough, Lincoln County Attorney, and Marvin L. Holscher for appellee.

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

HASTINGS, J.

Theodore W. Blythman has appealed from the District Court for Lincoln County, which affirmed an

order of the Board of Mental Health of Lincoln County finding Blythman to be a mentally ill dangerous person and committing him to the Lincoln Regional Center. Blythman assigns the following as errors: (1) The evidence is insufficient to support the conclusion reached by the board; (2) There is insufficient evidence of recent acts or threats of violence; (3) Constitutional guarantees of due process and equal protection are not met by proof of acts or threats of violence committed more than 5 years prior to the filing of the mental health proceeding; (4) The District Court should have reversed the order of the mental health board for procedural due process violations in ordering a predispositional evaluation; and (5) The board did not impose the least restrictive treatment alternative available. We affirm the judgment of the District Court.

Blythman was incarcerated in the Nebraska Penal and Correctional Complex after a District Court found, on April 14, 1975, that he was a sexual sociopath and that he could not be benefited by treatment. Several hearings were subsequently held pursuant to defendant's motions for annual evaluation to determine whether or not defendant remained a sexual sociopath and whether or not he could be benefited by treatment. One such review has been appealed to this court, and further background into defendant's mental illness and the prior proceedings can be found at *State v. Blythman*, 201 Neb. 285, 267 N.W.2d 525 (1978).

Pursuant to our opinion in *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979), Blythman was returned to the District Court for Lincoln County for sentencing on the original conviction of fondling a girl under the age of 16, in violation of Neb. Rev. Stat. § 28-929(2) (Reissue 1975). On May 9, 1979, the District Court sentenced the defendant to 4 years, with 4 years' credit for time served, and thereafter returned him to the penal complex as a untreatable sexual sociopath. His return to the complex for an indefinite period of time was the only option open to the court under the sexual sociopath

laws then existing, Neb. Rev. Stat. §§ 29-2901 et seq. (Reissue 1975), until he was found to be "a fit subject for discharge." § 29-2906.

On June 1, 1979, the District Court ordered that the defendant be returned to Lincoln County for further proceedings, pursuant to Neb. Rev. Stat. §§ 29-2920 and 29-2921 (Reissue 1979), a part of 1979 Neb. Laws, L.B. 378, and the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. Ch. 83, art. 10 (Reissue 1976). L.B. 378, which was effective May 23, 1979, also repealed §§ 29-2901 to 29-2910 (Reissue 1975) under which statutory provisions the defendant was then being held. Section 29-2921 provides in part: "All persons now committed under Chapter 29, article 29 . . . shall forthwith be returned to the district court which committed them for review and disposition consistent with the terms of sections 29-2911 to 29-2921." Section 29-2920 requires in part: "Ninety days prior to the release from custody of any mentally-disordered sex offender . . . the . . . unit of government having final release authority shall give notice to the county attorney . . . that the release . . . is so pending. Upon receipt of such notice . . . the county attorney shall cause mental health commitment proceedings to be commenced . . . pursuant to the Nebraska Mental Health Commitment Act." As of May 23, 1979, for the first time, there was reason and authority to proceed with a civil mental health commitment against the defendant.

On June 28, 1979, a petition was filed before the Board of Mental Health of Lincoln County, alleging Blythman to be a mentally ill dangerous person and requesting involuntary commitment and board-ordered treatment. A final hearing was held on August 10, 1979, in which both the State and the defendant adduced evidence and rested. The board then ordered a predisposition investigation of Blythman by a qualified psychologist before making its final decision as to the allegations in the petition. On August 28, 1979, the mental health board reconvened and took testimony from Dr. Donald

E. Fischer of the Great Plains Mental Health Center concerning his evaluation of Blythman. Dr. Fischer diagnosed the subject as having a personality disorder of a mixed passive-dependent type and immature type; having borderline or mild mental retardation; and suffering from pedophilia. He concluded that this constituted a dangerous mentally ill person in the sense of being potentially dangerous to others by sexually, impulsively, and directly acting out in a very forceful manner as he has done in the past. The doctor further recommended treatment. The testimony of Dr. Fischer was admitted by the board over the objection of Blythman's counsel.

The board concluded that there is clear and convincing proof that Blythman is a mentally ill dangerous person and that neither voluntary hospitalization nor other treatment less restrictive of the subject's liberty than board-ordered treatment are available or would suffice to prevent the harm described in Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980). The board ordered that Blythman be committed to the Lincoln Regional Center and there remain until transferred or discharged, as provided by law.

An appeal from the order of the board was taken to the District Court for Lincoln County and was affirmed. Blythman appeals now from the order of the District Court, which we affirm.

The first three assignments of error are related and will be considered together, i.e., that the evidence is insufficient to support the conclusion of the board; that there is insufficient evidence of recent acts or threats of violence; and that constitutional guarantees of equal protection and due process are not met by proof of acts committed more than 5 years prior to the filing of the mental health proceeding. Neb. Rev. Stat. § 83-1037 (Cum. Supp. 1980) requires a conclusion based on clear and convincing proof that the subject is a mentally ill dangerous person and that less restrictive alternatives are not available or would not suffice to

prevent the harm described in § 83-1009. The latter section states in pertinent part: "Mentally ill dangerous person shall mean any mentally ill person or alcoholic person who presents: (1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of *recent violent acts* or threats of violence or by placing others in reasonable fear of such harm . . . ." (Emphasis supplied.) The appellant asserts that proof of acts which occurred prior to his incarceration in the Penal Complex and more than 5 years previous to the filing of the mental health commitment proceeding are not "recent acts" within the meaning of § 83-1009.

In order for a subject to be civilly committed pursuant to the Nebraska Mental Health Commitment Act, there must be both a finding that the subject is mentally ill as well as a finding that he is dangerous, either to himself or to others. § 83-1009. *Benson v. Meredith*, 455 F. Supp. 662 (D.C. 1978). Mr. Blythman concedes that he suffers from some mental illness; however, he challenges the finding that he is dangerous. For there to be compliance with the fourteenth amendment's due process clause, there must be an independent finding of dangerousness. *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). By the same token, "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975). Section 83-1009 requires that such dangerousness must be evidenced by some recent act or threat.

There is little doubt that the Nebraska Mental Health Commitment Act was passed in response to a number of federal cases defining constitutional safeguards for the commitment of the mentally ill. The act was enacted after the U.S. District Court for the District of Nebraska declared Neb. Rev. Stat. §§ 83-325 and 83-328 (Reissue 1971), and § 83-306(4) (Cum. Supp.

1974), to be unconstitutional in *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975). The Federal District Court stated: "To permit involuntary commitment upon a finding of 'mental illness' and the need for treatment alone would be tantamount to condoning the State's commitment of persons deemed socially undesirable for the purpose of indoctrination or conforming the individual's beliefs to the beliefs of the State. Due process and equal protection require that the standards for commitment must be (a) that the person is mentally ill and poses a serious threat of substantial harm to himself or to others; and (b) that this threat of harm has been evidenced by a recent overt act or threat." *Doremus* at 514-15.

The requirement that there must be a recent overt act or threat stems from the necessity of defining mental illness requiring confinement as where the person's potential for doing harm to himself or to others is great enough to justify a massive curtailment of his liberty. See *Humphrey v. Cady*, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972). The prediction of dangerousness is a difficult and often elusive task. Hagel, *Defending the Mentally Ill: A Discussion of Nebraska's Involuntary Commitment Proceedings*, 57 Neb. L. Rev. 1 (1978).

"Although attempts to predict future conduct are always difficult, and confinement based upon such a prediction must always be viewed with suspicion, we believe civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another." *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others. Indefinite preventive detention cannot be

authorized for those "who have a propensity to behave in a way that is merely offensive or obnoxious to others; the threatened harm must be substantial." *Cross v. Harris*, 418 F.2d 1095, 1100 (D.C. Cir. 1969). That court further stated: "But when a determination of 'dangerousness' will result in a deprivation of liberty, no court can afford to ignore the very real constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts .... Incarceration for a mere propensity is punishment not for acts, but for status, and punishment for status is hardly favored in our society. In essence, detention for status is preventive detention.

. . . .

"[T]he test of what anticipated conduct may justify preventive detention cannot be simply whether the legislature has power to prohibit such conduct or to attack the evil it portends. . . . But while it [the legislature] may prohibit ugly billboards because they give offense, it may not lock up ugly people for the same reason. The power to control an evil does not remove all restrictions on the means that may be employed for that purpose. This principle is fundamental to the constitutional order." *Cross* at 1101-03.

To comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied. "While the actual assessment of the likelihood of danger calls for an exercise of medical judgment, the sufficiency of the evidence to support such a determination is fundamentally a legal question. . . . To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another." *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

In determining whether a person is dangerous, the focus must be on the subject's condition at the time

of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. "But a mere recitation of past acts, in the absence of a showing that such clearly forms the foundation for a prediction of future dangerousness, cannot serve as the basis for a finding that one is a mentally ill person pursuant to ORS 426.005(2)." *State v. Lucas*, 31 Or. App. 947, 950, 571 P.2d 1275, 1277 (1977).

In order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue. Blythman argues that proof of acts committed 5 years prior to the hearing are not "recent acts" within the meaning of § 83-1009. In *Hill v. County Board of Mental Health*, 203 Neb. 610, 279 N.W.2d 838 (1979), we stated that there is no way to establish a definite time-oriented period to determine whether an act is recent. Each case must be decided on the basis of the surrounding facts and circumstances.

In *Hill* we held: "The term recent should be given a reasonable construction. We hold that an act or threat is 'recent' within the meaning of section 83-1009, R. S. Supp., 1978, if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person and the protection of society in general." *Hill* at 617, 279 N.W.2d at 841.

In the case at bar, Blythman was committed as a sexual sociopath in 1975; was returned to the District Court on May 9, 1979, for sentencing on the original conviction; and on June 1, 1979, was returned for further proceedings pursuant to the Nebraska Mental Health Commitment Act. Considering the changes in the law during these proceedings, the complaint was carried

on with reasonable diligence. Blythman argues that *Hill* should not be applied here because such an interpretation of "recent" would permit involuntary civil commitment regardless of how remote in time the acts or threats of violence are. The argument is well taken. However, such a result does not necessarily follow if it is kept in mind that any act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness. It is conceivable that an act more recent than another would be less probative of the subject's future conduct than the earlier act. Considering all of the factors, we cannot say that as a matter of law an act which occurred 5 years ago is too remote to be probative of the subject's present state of dangerousness. This is particularly true since the subject did not have an opportunity to commit a more recent act in the intervening years.

The fact situation in this case is somewhat unique in that the subject's mental illness manifests itself in sexual acts toward young girls. He has not had the opportunity to commit such an act in the past 5 years because he has been incarcerated in the Penal Complex, where he has had no access to prospective victims. We cannot believe that the Legislature intended that by requiring a recent act or threat, a mentally ill person should be given the opportunity to commit a more recent act once a sufficient amount of time has passed since the last act. Judicial action need not be forestalled until another young girl is sexually assaulted, or some other harm takes place. *In re Powell*, 85 Ill. App. 3d 877, 407 N.E.2d 658 (1980); *In re Janovitz*, 82 Ill. App. 3d 916, 403 N.E.2d 583 (1980).

A similar argument was advanced in *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978). There, we stated that an incident occurring in May 1975 was sufficiently recent to conform to the meaning of the statute. "Any other view would require, as to those already committed when

the enforcement of the former act was enjoined and who were entitled to a new hearing under section 83-1072, R. R. S. 1943, the discontinuance of treatment and release in order to afford an opportunity for a more recent act of violence before any rehearing and further confinement could take place. Such would be contrary to the evident and expressed purposes of section 83-1072, R. R. S. 1943, when read in conjunction with the entire act." *Kraemer* at 799, 261 N.W.2d at 634.

In the present case, the testimony indicated that there was a very high probability that Blythman would repeat the behavior for which he was originally determined to be a sexual sociopath. Expert testimony by Dr. L. E. Woytassek, a psychiatrist, was that, based on a reasonable medical certainty, he believed Blythman to be mentally ill as well as dangerous. This testimony was based on the expert's knowledge of Blythman since 1965. Dr. Woytassek testified that Blythman had a history of sexual deviation with reference to children, and that "there was a very high probability he would repeat." There was testimony by Dr. Fischer, the board-ordered expert, which reinforced the prior testimony. Blythman was diagnosed as suffering from pedophilia, which is the diagnostic term for the crime of molesting minors. Dr. Fischer testified that to a reasonable medical certainty, if Blythman did not obtain treatment, the sexual incidents which happened before would happen again. This testimony was based both on the incidents which occurred prior to confinement in the Penal Complex as well as a recent examination, showing that there had been no demonstration by Blythman of real growth in the awareness of his needs and how he will meet those needs and control his impulsiveness.

There was no evidence presented by Blythman to rebut the testimony of either psychiatrist. Neither was there any evidence that the acts which occurred 5 years previous to the hearing were too remote to be probative of Blythman's present state of dangerousness and prob-

able future conduct. Blythman did not present any evidence that he had learned to cope with his immaturity and impulsiveness, or that he had been "cured" of his pedophilia.

We therefore hold that there is sufficient evidence to support the conclusion reached by the board that Blythman is a mentally ill dangerous person. We further hold that proof of acts committed more than 5 years prior to the filing of the mental health proceedings does not contravene Blythman's due process and equal protection guarantees where there is sufficient evidence that such acts are still probative of the subject's present state of dangerousness.

The fourth assignment of error refers to the testimony by Dr. Fischer. Blythman argues that the board had no authority to order further testimony by an independent psychiatrist prior to making a finding that the subject is mentally ill and dangerous. He relies on Neb. Rev. Stat. § 83-1040 (Reissue 1976) which authorizes the board to request a predisposition investigation to be conducted to determine the best available treatment alternative. Inherent in that authorization is the requirement that the board must first make the determination that the subject is mentally ill and dangerous. The board in this case did not make that finding prior to ordering an independent evaluation of Blythman. We have reviewed the record de novo, as we are required to do. *Hill v. County Board of Mental Health, supra.* We find that there was sufficient evidence before the board that it could have found Blythman to be mentally ill and dangerous before ordering the predisposition investigation. The evidence by the State's psychiatrist, Dr. Woytassek, was unrebutted, that Blythman is mentally ill and dangerous, having a history of sexual deviation with reference to children, and that there was a very high probability that he would repeat.

The board further asked for recommendations from counsel for both parties as to where a predisposition

evaluation should be made. Counsel for the subject made his recommendations at that time, and did not object to the predisposition evaluation. It was not until after the evaluation was made and the psychiatrists had been called before the board to testify that Blythman's counsel objected to the testimony of Dr. Fischer. The objection was overruled and testimony was taken by the board. Attorneys for Blythman were given the opportunity to extensively cross-examine Dr. Fischer, and did so.

Neb. Rev. Stat. § 83-1059 (Reissue 1976) makes the general rules of evidence, Neb. Rev. Stat. Ch. 27 (Reissue 1979), applicable to proceedings under the Nebraska Mental Health Commitment Act. *Kraemer v. Mental Health Board of the State of Nebraska, supra.* Section 27-614 authorizes a judge, on his own motion, to call witnesses, in which event all parties are entitled to cross-examine such witnesses. Section 27-706 permits a judge to enter an order to show cause why expert witnesses should not be appointed.

Although the board may have been in error in failing to first make the determination that Blythman was mentally ill and dangerous, the subject was not prejudiced. As we have previously stated, the board could have made the necessary findings prior to ordering the predisposition evaluation. The board gave counsel the opportunity to recommend the facility to conduct the evaluation, and further allowed extensive cross-examination of the psychiatrist. Based on the foregoing, we find that Blythman's rights to a fair and impartial board were safeguarded and there was no deprivation of his rights to due process. Any error on the part of the board was, in this instance, harmless and is not cause for reversal.

The final assignment of error is that the board did not impose the least restrictive treatment alternative that was available. Neb. Rev. Stat. § 83-1038 (Cum. Supp. 1980) requires: "The disposition ordered by the mental health board shall represent the alternative which

imposes the least restraint upon the liberty of the subject required to successfully treat the particular mental illness and prevent the particular harm which was the basis for the board's finding the person to be a mentally ill dangerous person. . . ." Blythman argues that he should have been allowed to follow an outpatient treatment on a voluntary commitment basis. The testimony by Dr. Fischer, in response to a question regarding the possibility of treatment on an intensive outpatient basis, was: "The supervision would have to be spelled out so articulately, provisions so iron-clad, if you will, that I can't really envision them. And I think that the patient would feel he was hounded. It may well be that it could follow in-patient care."

The statement by the chairman of the mental health board at the time of commitment explained that the reason Blythman was committed to the Lincoln Regional Center was that it was the only state facility with adequate security features. After reviewing the evidence and testimony, we agree that such a secured facility is necessary to successfully treat this particular mental illness and prevent the harm which the subject is likely to repeat in a less secure environment.

The evidence is clear and convincing that Theodore W. Blythman is a mentally ill and dangerous person, and the order of the District Court is affirmed.

AFFIRMED.

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LAKESHORE COMMERCIAL FINANCE CORPORATION, APPELLEE, V.
NORTH PLATTE H. J. MOTEL, INC., A CORPORATION, ET AL., APPELLANTS.

302 N.W.2d 39

Filed February 13, 1981. No. 43339.

**Mortgages: Parties.** The interest of a party claiming under the mortgagor but prior to the mortgage may be determined in an action to foreclose the mortgage.

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

Jerome Rinzel of Rinzel and Panlick, S.C., and Robert E. Roeder for appellants.

Robert K. Steuer of Weiss, Steuer, Berzowski & Kriger and Richard W. Satterfield of Kay & Satterfield for appellee.

Heard before BOSLAUGH and WHITE, JJ., and KELLY and BARTU, District Judges, and RONIN, Retired District Judge.

BOSLAUGH, J.

This was an action to foreclose mortgages upon the property in Lincoln County, Nebraska, upon which the North Platte Howard Johnson Motel and Restaurant is located. The motel and restaurant are owned by the defendant, North Platte H. J. Motel, Inc. The other principal defendant is Virginia K. Lesperance.

In 1971, the plaintiff, a commercial finance corporation, loaned funds to the defendant motel corporation pursuant to a promissory note dated March 1, 1971, in the amount of $150,000, secured by two mortgages upon the property, also dated March 1, 1971. One of these mortgages was recorded on March 18, 1971. The plaintiff made additional loans to the motel corporation in 1971, 1972, and 1973. The construction of the motel and restaurant commenced in September 1971 and was completed in September 1972. Permanent financing for the project was obtained from The Lincoln National Life Insurance Company. A release of the plaintiff's mortgage dated June 18, 1971, was recorded on January 29, 1973, so that the insurance company mortgage would be the first mortgage.

On March 27, 1975, a deed purporting to convey the property to Virginia K. Lesperance was recorded. This deed, which was dated September 6, 1971, was purportedly executed on behalf of the corporation by "V. Lesperance" as the president.

On September 3, 1974, the plaintiff recorded the other mortgage dated March 1, 1971. On January 13, 1976, the plaintiff obtained a further mortgage from the motel corporation, which was recorded on January 23, 1976.

The trial court found that the deed to Virginia K. Lesperance was void, and the failure to record it for an extended period of time was either a fraud or an estoppel; that the plaintiff's mortgage dated January 15, 1976, was valid and subject only to the insurance company mortgage and the leasehold interest of the Howard Johnson Company; that the sum of $301,196.37 was due the plaintiff from the motel corporation; and that the plaintiff was entitled to foreclosure. The defendants have appealed.

The controlling issue on the appeal is the validity of the deed to Mrs. Lesperance.

The evidence shows that in all of the transactions between the plaintiff and the corporation, Joseph W. Restle represented the motel corporation. Mrs. Lesperance testified, by deposition, that she had never been an officer of the motel corporation and that Restle and his wife were the officers of the corporation. Mrs. Lesperance was a secretary in the Milwaukee County department of welfare. She was unfamiliar with the property, had never seen it, did not know whether it was mortgaged, and could not "recall" what she had paid for the property. The inference from the evidence as a whole is that there was no consideration for the deed to her. It is clear from the evidence that the deed to Virginia K. Lesperance was void as against the plaintiff and that the decision of the trial court on this issue was correct.

The defendants argue that the validity of the Lesperance deed could not be litigated in the foreclosure action under the rules stated in *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943). In that case, authority is quoted to the effect that the validity of a title paramount and adverse to the

mortgagor *and not derived from him* cannot be litigated in a proceeding to foreclose a mortgage. The rule, even if valid, has no application here. See 59 C.J.S. *Mortgages* § 627 (1949).

It is unnecessary to consider the other assignments of error. The judgment of the District Court is affirmed.

AFFIRMED.

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MANUEL G. AGUALLO, APPELLANT, V. WESTERN POTATO, INC., A CORPORATION, ET AL., APPELLEES.

302 N.W.2d 41

Filed February 13, 1981. No. 43478.

1. **Workmen's Compensation: Proof.** The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition.
2. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the compensation court after rehearing have the effect of a jury verdict and may not be set aside unless clearly wrong.

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

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Carney for appellant.

Wright & Simmons for appellees.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

KNAPP, District Judge.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff, Manuel G. Aguallo, was employed as a laborer by the defendant Western Potato, Inc., a corporation. The plaintiff

alleged that on March 26, 1976, while at work unloading potatoes, his left knee was injured when pinned against a wall by a conveyor, tearing the medial meniscus, and that on February 25, 1978, while at work sewing potato sacks, his left knee was again injured when three full sacks of potatoes "leaned against" the knee, causing a severe strain thereto. Plaintiff further alleged that the injuries to his left knee caused him to limp, thus placing an inordinate burden upon his right leg and accelerating the progress of an existing arthritic condition in both knees, ultimately resulting in plaintiff becoming permanently disabled.

At a hearing before a single judge of the compensation court, the plaintiff recovered an award for temporary total disability, for a 50 percent permanent partial loss of use of the left leg, for hospital and medical expenses, for attorney fees, and for an additional assessment of 50 percent of all payments found delinquent for more than 30 days. Defendants were given credit for $1,494.65 medical and hospital expenses and for $3,800 temporary total disability compensation paid prior to trial. The judge found that the alleged second injury was not the result of an accident but was merely a manifestation of the injuries resulting from the accident of March 26, 1976.

Both plaintiff and defendants filed refusals to accept the findings and award of the single judge. Upon rehearing before a three-judge panel of the compensation court, the award was reversed and plaintiff's petition dismissed, the panel finding that plaintiff had failed to sustain his burden of proving that the permanent disability of which he complained was the result of a compensable accident, in that the testimony of plaintiff's physician failed to causally connect that disability with either of the alleged accidents, and that plaintiff offered no other medical evidence to supply the necessary causation. Plaintiff appeals. We affirm.

The evidence shows that, following the accident of March 26, 1976, plaintiff was X-rayed at the Slagle

Clinic and a cast was applied to the left knee on June 3, 1976, and removed on June 17, 1976. He next visited the clinic on October 20, 1976, when he was referred to Dr. Paul Phillips, whose deposition was introduced at the trial. In February of 1977, a Dr. Jardon surgically repaired a torn medial meniscus in plaintiff's left knee. Dr. Jardon did not testify. The sole medical testimony was that of Dr. Phillips, who stated, in essence, that arthritis was present in plaintiff's knees prior to March 26, 1976; that he did not know how much or whether the trauma of March 26, 1976, had affected plaintiff's arthritic condition; that this was a question no one could really answer; that he had no opinion as to whether plaintiff's right leg was adversely affected by the limp caused by the injuries to the left knee; that any opinion would be speculation; that while it is conceivable that the right leg was so affected he could not state with any certainty that it was in fact so affected; and that plaintiff's arthritic condition would naturally progress to that point anyway.

The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. *White v. Western Commodities, Inc.*, 207 Neb. 75, 295 N.W.2d 704 (1980). The issue on appeal, whether or not a causal connection was established between the disability and the accident, is an issue of fact. Findings of fact made by the compensation court after rehearing have the effect of a jury verdict and will not be set aside unless clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1978).

The compensation court's finding complained of cannot be said to be clearly wrong.

AFFIRMED.

# STATE OF NEBRASKA EX REL. CHARLES E. SCHULER, APPELLANT, V. FLOYD DUNBAR ET AL., APPELLEES.

302 N.W.2d 674

Filed February 20, 1981. No. 42976.

1. **Political Subdivisions: Public Meetings.** The provisions of a statute requiring the spreading upon the record of the governing body the vote on an action taken are intended to require an indisputable record of the action actually taken, so that the public might have an opportunity to know how the elected officials voted thereon.
2. ____:____. A governing body may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a motion, resolution, or ordinance, and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the governing body was performed prior to the time that the spreading upon the minutes actually took place.
3. ____:____. The provisions of Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), providing: "The record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place.
4. **Witnesses: Constitutional Law.** Where a defendant in a civil case refuses to testify on the ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal.

Appeal from the District Court for Loup County: JAMES R. KELLY, Judge. Remanded with directions.

George Rhodes for appellant.

Joseph M. Casson for appellees.

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

CLINTON, J.

The relator, a citizen and taxpayer of Loup County, Nebraska, brought this action in the District Court for Loup County, Nebraska, under the provisions of Neb. Rev. Stat. § 84-1414(3) (Reissue 1976), against Floyd Dunbar, Robert Schrup, and Glen Pollard, the persons who constitute the board of county commis-

sioners of Loup County, Nebraska, to have declared void an act of the commissioners taken on January 3, 1978, setting salaries of various county officials for the year 1979. The basis for the claim of nullity is Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), which provides: "Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting."

The relator introduced certain documentary evidence and called the defendant Dunbar as his witness. The defendants called the relator as their witness in an apparent effort to establish estoppel as a defense. That defense is not urged in this court.

The trial judge found that "the Defendants did take a roll call vote on their action regarding the setting of salaries for Loup County officers and same was recorded in the minutes of Defendants' January 3, 1978 meeting." The determinative issue before us on this appeal is whether the evidence supports the above finding.

The action attacked, as described in the minutes, was as follows: "The Board set the following Salaries for County Officials for the term beginning January 1979 and the amount in parenthesis represents the present salaries:

| | | |
|---|---|---|
| "Treasurer | 6700.00 | (6000.00) |
| "Service Officer | 600.00 | (600.00) |
| "County Clerk | 9000.00 | (8000.00) |
| "Sheriff | 7850.00 | (6850.00) |
| "Attorney | 6700.00 | (6000.00) |
| "Commissioners | 3000.00 | (2400.00)" |

Nothing in the original minutes of the January 3, 1978, meeting indicates that a motion was made and seconded, that there was a rollcall vote, or that votes were recorded in any manner. The introductory portion of those minutes states that the members of the board, the three defendants in this action, were present.

Other documentary evidence, offered by the relator and received without objection, shows that at the meeting of January 10, 1978, "Minutes of the January 3, 1978 meeting were read and approved." Additional documentary evidence, also received without objection, indicates that at a meeting of the board of commissioners on January 15, 1979, after this action had been commenced, the following action was taken: "Motion made by Pollard, seconded by Schrup the [sic] the minutes of the January 3, 1978 meeting of the Loup County Commissioners be corrected to reflect the vote of the Board on the action taken in setting the salaries of the county officials for the terms of office beginning January 4, 1979, said vote being yes, unanimous." The above-quoted words were apparently then typed at the bottom of the minutes of the January 3, 1978, meeting, under the apparently previously affixed signature of the county clerk. On the margin opposite the quoted words appeared, in script, the underscored words: "As corrected January 15, 1979."

During the direct examination of defendant Dunbar by relator's counsel, the following testimony was elicited:

"Q. Could you explain the procedure which you customarily follow when you audit and allow claims, Mr. Dunbar?

"A. On the salary claims we — it is understood that they are approved but the others — you know — like the road claims and all of them they are reviewed and we sign them and anything that needs hashed over we hash it over to make sure they are legitimate claims."

Earlier in the testimony, counsel had called to the attention of the witness the language of paragraph 6 of the defendants' amended answer, as follows: "Defendants allege that the Loup County Board of Commissioners, with the actual or constructive knowledge of the relator, have audited and allowed claims against Loup County in substantially the same manner in

excess of one year prior to and including the June 19, 1978 meeting of the said Board and that by relator's failure to previously object to such alleged irregularities, relator is guilty of laches," and asked the following question:

"Q. Now, are you admitting there you failed to record a roll call vote on the taking of a motion to allow the claim for more than a year prior to the filing of this action?" At that time, the defendant's counsel made objection on the grounds that the open meetings law made certain violations crimes and that the defendant was being asked to incriminate himself in violation of the fifth amendment. The court asked the witness if he desired to invoke the fifth amendment. He said he did, and the court sustained the objection.

Counsel then asked a question concerning the taking and recording of a rollcall vote on the motion to allow claims. Objection was made by defendant's counsel and the objection was sustained. The relator's counsel then apparently abandoned his attempts to establish violations by Dunbar's own testimony.

On offer of the relator and over objection by defendants, there was received in evidence copies of various minutes covering the period May 16, 1977, to January 16, 1978, which indicate that claims were approved and allowed in substantially the following language: "motion to audit and allow claims, carried." Then followed a list of claims, including, in some instances, claims for salaries. There was no indication at any of these meetings that the roll had been called and the vote recorded.

We summarize the positions of the parties insofar as they relate to the point on which we decide the case. The relator contends the evidence shows that no rollcall vote was called and recorded on the motion of January 3, 1978, and that the purported correction made more than 1 year later is void.

The defendants assert that the minutes of a public body may be corrected, nunc pro tunc, to show what

actually occurred, and that this action may be taken either by the body itself or by its recording officer, in this case the county clerk. They further rely on the presumption that public officers have acted in accordance with the law. They claim the relator has failed to sustain his burden of showing that a rollcall vote was not taken.

Our consideration of the merits in this case must begin with an examination of the pertinent statutory provisions. Section 84-1413(2) specifically and clearly provides that when a governing public body (as defined by Neb. Rev. Stat. § 84-1409 (Reissue 1976)) acts on any question or motion duly moved and seconded, it shall do so by rollcall vote in an open session and the record shall state how each member voted, or if the member was absent or not voting.

Section 84-1414 provides that any motion, resolution, rule, regulation, ordinance, or formal action taken in violation of certain statutory provisions, including § 84-1413, shall be void. It further grants to any citizen the right to commence an action in the District Court for the purpose, among others, of declaring an action of the governing body void. It also provides penal sanctions for violations of the act committed knowingly. Actions to obtain a declaration of nullity must be commenced within 1 year of the governing body's final action.

It is to be noted that not only does § 84-1413(2) require a rollcall vote in open session but it also requires that "the record shall *state how each member voted, or if the member was absent or not voting.*" (Emphasis supplied.)

Neb. Rev. Stat. §§ 23-1301 and 23-1302 (Reissue 1977) make it the duty of the county clerk to keep the records of the board of county commissioners and "[t]o record in a book provided for that purpose all proceedings of the board."

The statutory provision makes it plain that actions by a public body in violation of certain portions of the

act are void. The concept that when the Legislature makes a certain requirement mandatory, failure to comply makes the action void, is not new. Statutes of this state have long required that "yeas" and "nays" shall be called and recorded whenever the governing body of a city enacts an ordinance, bylaw, or resolution entering into a contract. When such requirement is not met, the action is void. *Payne v. Ryan*, 79 Neb. 414, 112 N.W. 599 (1907); *Beverly Land Co. v. City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928); *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963).

The defendants, however, rely upon the principle that public officers are presumed to have acted lawfully in performance of their duties, and that public records may be corrected, nunc pro tunc, to conform to the facts and to correct clerical errors. They argue that when these two principles are applied to the present case, the corrective action taken on January 15, 1979, remedies the deficiency and supports the trial court's finding. We must determine whether these principles are applicable here.

The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts. *Beverly Land Co. v. City of South Sioux City, supra; City of Valentine v. Valentine Motel, Inc., supra.*

The relator produced the original minutes. The minutes do not indicate that a rollcall vote was made, nor do they show how each member voted. The record indisputably shows that the rollcall vote, if taken, was not recorded until more than 1 year later. Relator also introduced the minutes of other meetings showing a practice of not recording rollcall votes. Inquiry of a witness who presumably had knowledge of the facts as to what actually occurred on January 3, 1978, was prevented by the fifth amendment objection before the subject could be reached.

We note also that where a defendant in a civil case refuses to testify on the ground that the evidence may

incriminate him, the trier of fact may draw an adverse inference from his refusal. *Eldridge v. Herman*, 291 N.W.2d 319 (Iowa 1980); *Morgan v. United States Fidelity & Guaranty Co.*, 222 So. 2d 820 (Miss. 1969). The relator thus made a prima facie showing that a mandatory requirement had not been complied with. Was the corrective action itself, taken together with the presumption that a public official has acted lawfully, sufficient to overcome that prima facie showing and thus support the trial judge's factual findings?

The trial judge's finding that the rollcall vote was taken and recorded in the minutes was, as appears from comments made by him, based upon two factors: First, his interpretation of Dunbar's testimony, which we earlier quoted, concerning what took place when claims were allowed; and, second, his feeling that the corrective action taken in January 1979 satisfied the recording requirement under the nunc pro tunc principle. Dunbar's testimony related to a meeting which took place several months after the meeting of January 3, 1978. Its substance was that claims were discussed before they were allowed. It in no way pertained to what had occurred on January 3, 1978. There is, therefore, no testimony that a rollcall vote was taken, nor any testimony as to how a particular member voted or whether a member abstained. This leaves the corrective action of January 15, 1979, as the sole support for the trial court's finding. Is that sufficient? We think not, for if it were, the statute would be effectively emasculated. It is clear that the Legislature intended the statute to be mandatory; otherwise, it would not have provided that action taken in violation of the statute is void. This court is not free to disregard statutory requirements which are clearly within the legislative power to prescribe.

The primary obligation for properly recording proceedings by a board of county commissioners rests under statute upon the county clerk. §§ 23-1301 and 23-1302. Nonetheless, the open meetings act clearly places some supervisory obligations upon the commis-

sioners. When, at the meeting of January 10, 1978, the commissioners approved the minutes of the meeting of January 3, 1978, they could have observed that the minutes did not show that a rollcall had been taken, nor how the individual members had voted, nor whether there were abstentions. A correction to conform with the actual facts could have been made at that time.

We have previously held that the presumption that a public official has acted in conformity with the law is not sufficient to meet a statutory requirement that action mandated by statute be spread on the record. *Hull v. City of Humboldt*, 107 Neb. 326, 186 N.W. 78 (1921); *City of Valentine v. Valentine Motel, Inc.*, *supra*.

The first-cited case involved the validity of an ordinance. The applicable procedural statute required that "'on the passage or adoption of every by-law or ordinance, the yeas and nays shall be called *and recorded.*'" (Emphasis supplied by the court.) *Hull*, *supra* at 328, 186 N.W. at 79. The statute also required the reading of the ordinance on final passage, but made no specific provision that the fact of reading be recorded. The court held that, since the statute did not specifically require the recording of the fact of reading, the fact that the mandatory requirement of spreading the yeas and nays on the record had been met was sufficient to raise the presumption that the ordinance had been read.

*City of Valentine v. Valentine Motel, Inc.*, *supra*, involved a statute (Neb. Rev. Stat. § 17-407 (Reissue 1962)) regulating the passage of an annexation resolution or ordinance, which provided: "'[T]he resolution, and the vote thereon, shall be spread upon the records of the council or board.'" *City of Valentine*, *supra* at 64, 125 N.W.2d at 100. The record of the minutes showed that the resolution of annexation had been offered and seconded. The resolution was contained in the minutes. No vote on the ordinance was recorded. About 6 months later, after litigation attacking the validity of the ordinance had been commenced, the

council adopted an amendment, nunc pro tunc, to show that the vote had been taken and spread on the record. This court held: "The provisions of such a statute requiring the spreading upon the record of the council of the vote thereon were intended to require an indisputable record of the action actually taken, and so that the public might have an opportunity to know how the elected officials voted thereon. . . . A city council may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a resolution or ordinance and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the council was performed prior to the time that the spreading upon the minutes actually took place." (Syllabus of the court.) The opinion in the above-cited case sufficiently develops the rationale for the holding.

We hold in this case that the provision of § 84-1413(2), "the record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place.

The cause is remanded for further action in accordance with this opinion.

REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

If, in fact, the majority opinion holds, as I believe it does, that the provisions of the open meetings law (Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1976)) preclude a public body from correcting its own records, nunc pro tunc, to reflect what in fact took place, I must respectfully dissent. I believe that the majority in this case has both misconstrued the open meetings law and the evidence in this record.

It is clear beyond dispute that at common law a municipal council may at any time correct its minutes

to reflect the truth. The general rule as stated in 56 Am. Jur. 2d *Municipal Corporations* § 179 (1971) is as follows: "A municipal council may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, although the record has once been approved."

Many jurisdictions which have been called upon to examine this proposition have reached such a conclusion. In *Williams v. Longtown School Dist. No. 71 of Perry Co.*, 468 S.W.2d 673, 675-76 (Mo. App. 1971), the court said: "The board of directors of a school district has the power to correct the record of the proceedings had at a previous meeting so as to make them speak the truth and especially when the correction consists of supplying some omitted fact or action and is done, not to contradict or change the original record, but to have the record show that a certain action was taken or thing done which the original record fails to show. Parol evidence is also admissible for the same purpose."

Likewise, in *State ex rel. Wineholt v. LaPorte Superior Court No. 2*, 249 Ind. 152, 157, 230 N.E.2d 92, 95 (1967), the court there said: "There is no question that a County Council has a right to correct the minutes of its council meetings and make *nunc pro tunc* entries where errors have occurred by the secretary in properly recording the same. Modifications and amendments may be made where no intervening vested rights are involved."

For other cases supporting the general rule that county boards and councils have the authority to amend or correct their minutes, nunc pro tunc, see the following: *Olympian-Tribune Pub. Co. v. Byrne*, 28 Wash. 79, 68 P. 335 (1902); *R.R. v. Cherokee County*, 195 N.C. 756, 143 S.E. 467 (1928); *Oliver v. Highway Commission*, 194 N.C. 380, 139 S.E. 767 (1927); *R.R. v. Forbes*, 188 N.C. 151, 124 S.E. 132 (1924); *Marengo*

*County v. Barley*, 209 Ala. 663, 96 So. 753 (1923); *Jeffers v. Wharton*, 240 Ala. 21, 197 So. 358 (1940); *Bathurst v. Course*, 3 La. Ann. 260 (1848); *The People v. Wabash Ry. Co.*, 314 Ill. 513, 145 N.E. 733 (1924); *The People v. C. & E.I. Ry. Co.*, 314 Ill. 382, 145 N.E. 714 (1924).

Moreover, the authorities are clear that "[a]fter the record has been amended, it is entitled to the same respect as an original record." 56 Am. Jr. 2d *Municipal Corporations* § 179 at 231 (1971). See, also, 20 C.J.S. *Counties* § 91(c) (1940).

For the action of the county board, as reflected by the minutes herein, to be invalid and for the decision of the trial court finding the action valid, we must therefore find something in the open meetings law which compels that result. In *Egbert v. Wenzl*, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977), we said: "Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated." Likewise, see, *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979); *Davis v. Walker*, 170 Neb. 891, 104 N.W.2d 479 (1960). I find nothing in the open meetings law or the evidence in this case which justifies the conclusion reached by the majority. Neb. Rev. Stat. § 84-1413 (Reissue 1976) provides that "[a]ny action *taken* on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting." (Emphasis supplied.) This obviously means the entire record and not just any single line in the record.

Likewise, § 84-1414 provides: "Any motion, resolution, rule, regulation, ordinance or formal action of a public body *made or taken* in violation of . . . shall be declared void by the district court." (Emphasis supplied.) The act which will result in a declaration of invalidity is the failure to *make* or *take* the vote in accordance with the statute, not, as suggested by the

majority, the failure to *record* the vote. Nothing in the open meetings law has made the failure to record the vote, if in fact it was properly taken, grounds to nullify the action of the public body.

The particular minutes under attack provide that Commissioners Schrup, Dunbar, and Pollard were present. They are all of the commissioners. Moreover, they now provide: "Motion made by Pollard, seconded by Schrup, that the minutes of the January 3, 1978 meeting of the Loup County Commissioner be corrected *to reflect* the vote of the Board on the Action *taken* in setting the salaries of the county officials for the terms of office beginning January 4, 1979, *said* vote being *yes, unanimous.*" (Emphasis supplied.) To be sure, the language is not as articulate as one might desire. Nevertheless, no one can reach any other conclusion but that the "vote being yes, unanimous" meant that Commissioners Schrup, Dunbar, and Pollard all voted yes. In my view, not only has the spirit of the open meetings law been met but I believe that the letter has likewise been met. To hold otherwise, as we are here doing, is to impose technical requirements upon part-time county commissioners beyond that which should be made and far in excess of anything the open meetings law was intended to require. The majority is now saying that persons who relied upon a salary increase and who ran for office in reliance on that salary increase should now be denied their just compensation because the minutes of the meeting of the county commissioners were not as artfully drafted as they might otherwise have been. Such a conclusion is neither required nor desirable.

There is no evidence in this record to discredit the record of the commissioners' meeting. The relator concedes that he does not know what in fact took place at the meeting. We are called upon to set aside an official record based upon the fact that a single county commissioner, at the direction of his lawyer, sought to exercise the fifth amendment for whatever

reason he may have chosen to do so. There is, however, not a single shred of evidence that a vote was not taken on the date and at the meeting in question. Yet, without hesitation, we set aside that action and ignore the finding of fact made by the trial court, which had the opportunity to see and observe the witnesses.

The trial court specifically found that the county board did take a rollcall vote on its action regarding the setting of salaries for Loup County officers on January 3, 1978. I see no basis for disregarding that finding and I certainly find no legal basis for declaring that the open meetings law precludes a public body from lawfully reflecting what in fact took place. To be sure, if it did not take place, such could not be done after the fact. That is not the record we have before us here and is not the ruling we are asked to make. I am not unmindful of our earlier decisions in *Payne v. Ryan*, 79 Neb. 414, 112 N.W. 599 (1907); *Beverly Land Co. v. City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928); and *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963). They can be distinguished if one attempts to do so, but admittedly the distinctions are narrow.

It appears strange to me for the court to conclude that if an erroneous statement is "spread upon the records," it may be corrected, nunc pro tunc, to reflect the truth; but if, in fact, the legally required action was taken but omitted from the record, a correction cannot be made nunc pro tunc. I find no basis for that rule and do not believe the above-cited cases holding such to be the rule were correctly decided. I would overrule *Payne v. Ryan, supra; Beverly Land Co. v. City of South Sioux City, supra;* and *City of Valentine v. Valentine Motel, Inc., supra,* and affirm the judgment of the trial court.

McCOWN and BRODKEY, JJ., join in this dissent.

# WAYNE LAVALLEUR, APPELLEE, AND A & A EQUIPMENT CO., A CORPORATION, APPELLANT, V. STATE AUTOMOBILE & CASUALTY UNDERWRITERS, APPELLEE.

302 N.W.2d 362

Filed February 20, 1981. No. 43012.

1. **Insurance: Liability.** Insurance companies have the same right as individuals to limit their liability.
2. **Insurance: Contracts.** In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed.

William H. Sherwood and Charles J. Cuypers of Sherwood Law Office for appellant.

Kenneth H. Elson for appellee.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

CASE, District Judge.

This case arose in the District Court of Phelps County; the plaintiff Wayne Lavalleur being the owner and operator of a welding and repair business in Holdrege, Nebraska. His coplaintiff A & A Equipment Co. was the owner of a backhoe which was repaired by Lavalleur. The defendant insurer issued a manufacturers' and contractors' liability policy to Lavalleur. Lavalleur repaired a broken bracket on a hydraulic cylinder of the backhoe owned by A & A Equipment Co. After Lavalleur completed the repairs and departed the premises, the backhoe was severely damaged by fire.

Lavalleur, in a separate action, was sued by A & A Equipment Co. on this set of facts. The defendant insurer refused to defend Lavalleur in that action; whereupon Lavalleur retained counsel and defended at his own expense. A judgment was rendered in that

action for A & A Equipment Co. in the sum of $2,761.31, together with interest and costs of the action.

Lavalleur then assigned his rights under the policy to A & A Equipment Co., the sole appellant herein, and it filed this action under the assignment. In this action, A & A Equipment Co. alleged the fire, the insurance coverage, assignment of rights, and the refusal of the defendant to defend the original action, and prayed for judgment it had recovered from Lavalleur and costs of rental during the period of repair.

The defendant, in its answer, admitted to refusing to pay Lavalleur's claim or to defend the suit, also admitting the entry of the judgment. The defendant, for an affirmative defense, alleged the policy provided an exclusion to coverage under the clause "completed operations hazard," and that the damage to property was not covered within that clause.

The clause in the policy provides that this insurance does not apply to property damage within the completed operations hazard (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed, (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, and (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project. "Products hazard" is defined as property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the property damage occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

The position of the appellant is that Lavalleur was

obligated to inspect and extinguish any spark or flames; that the fire which damaged the backhoe was already ignited at the time that Lavalleur left the premises; and that the operation was not completed because of his failure to inspect.

The matter was tried to the District Court on stipulated facts, the parties agreeing to a series of 23 stipulations encompassing the factual situation. The stipulations include the following:

"7. When Lavalleur left the farm where he repaired Plaintiff's backhoe, he did not leave any tools, equipment or repair parts at the farm and the repairs had been completed.

"8. Immediately after completing the welding repair work on plaintiff's backhoe, Lavalleur left the farm where the repair was done, and approximately twenty minutes later the backhoe was severely damaged by fire.

"9. Immediately before and at the time he left the farm where he repaired the backhoe, Lavalleur had not seen any flames, smoke or any other indication of fire in any part of the backhoe repaired by Lavalleur using his welding equipment.

"10. The damage to Plaintiff's backhoe was caused by Lavalleur's negligence."

The District Court, on the stipulated facts, dismissed the action and taxed costs to the plaintiffs.

The sole issue here is whether the operation was completed when Lavalleur left the premises, with the liability of the defendant insurer terminating at that point. This court has had opportunity to decide a like question in *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 281 N.W.2d 539 (1979). There, the plaintiff was in the cattle feed business and had mistakenly given out a product which was thought to be a mastitis preventative in dairy cattle, when, in reality, the product was a very strong disinfectant for sterilizing hog barns. The purchaser made claim against Steinheider; and upon denial by the insurer to

defend under the completed operations hazard clause, Steinheider brought the action against his insurer. There, we held that while it may very well be true that the alleged negligence occurred on the premises and, in fact, Steinheider may have liability to the customer, it is likewise clear the property damage did not occur until after delivery and was off the premises, as contemplated by the completed operations hazard or a products hazard.

Also, in *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976), we had the opportunity to pass on a similar question. There, one Gilbert O. Huston excavated a sewer trench in 1959, damaging the plaintiff's natural gas line. Huston refilled the trench without notifying the gas company. In 1965 Huston purchased a policy from the defendant which did not provide coverage for completed operations, as in the instant case. In 1966 a fire occurred at the site, resulting in a death; the fire being caused by a leak caused by Huston's earlier damage to the gas line. There, the gas company took an assignment of Huston's rights and brought action against the insurer, alleging coverage under the policy issued to the defendant Huston. The defendant insurer denied coverage for completed operations. We there held, and so hold here, that in the resolution of a controversy concerning the meaning of an insurance contract and the coverage therein, the contract must be viewed as a whole, and the insurance contract must be construed as to give effect as to the intent of the parties at the time the contract was made. See, also, *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964).

Both Huston and the insurer did not intend completed operations coverage. If Huston had desired completed operations coverage, he could have done so by paying an additional premium.

The policy herein provided for five different areas of coverage, including manufacturers' and contractors'

liability, completed operations, and products liability. The insured, Lavalleur, purchased only the manufacturers' and contractors' liability; and, although available, he did not purchase the other coverages.

In a few cases dealing with the time when an operation could be deemed completed, within the meaning of a completed operations exclusionary provision, it has been held that the operation was or could be considered completed, notwithstanding that some part of the work, including inspection, had not been performed at the time of the injury.

In *Standard Acc. Ins. Co. v. Roberts*, 132 F.2d 794 (8th Cir. 1942), it was held that the exclusion applied to an injury suffered by purchasers of a gas-operated refrigerator when the connection between the refrigerator and the gas pipes in the house permitted gas to escape into the house during the night following installation. The court rejected the contention of the insured that the policy covered results from improper installation, including improper inspection to make sure the installation was safe.

In *Green v. Aetna Insurance Company*, 397 F.2d 614 (5th Cir. 1968), where a repairer of a drilling-rig collar returned the collar without having repaired one end of it as required by the repair agreement, the court held that the injury was excluded under the "completed operations" section of the products liability exclusion. The court took the position that the failure of the repairer to repair both ends of the collar did not preclude the resulting injury from being considered as within the completed operations exclusion.

In *Tidewater Associated Oil Co. v. Northwest Casualty Co.*, 264 F.2d 879 (9th Cir. 1959), where an injury occurred because an oil company truckdriver apparently negligently poured gasoline instead of stove oil into an oil can, causing an explosion and injury, it was held that the injury was within the products liability exclusion since the operation of the insured oil company in delivering the oil to the company had

been completed the day before the injury occurred. The court pointed out that any possible contention that it had not been completed was negatived by the provisions in the policy with respect to the effect of improper, defective performance upon a determination of completion of operations.

In *Dickert v. Allstate Insurance Co.*, 121 Ga. App. 760, 175 S.E.2d 98 (1970), where an insured connected certain water pipes and 3 days after completion of installation leakage occurred, causing damage to the residence, the court held that the damage was excluded under the products liability completed operations exclusion; thus adopting the position, without express discussion, that the installation operation had been completed when the insured left the premises within which the work was done, and that the question of completion was not considered affected by negligence in the performance of the work or the failure of the completed work to function properly.

Liability of the plaintiff Lavalleur, which arose after he had completed his work, left the scene without leaving any tools, equipment, or repair parts, and upon leaving had not seen any flames, smoke, or any other indication of fire in any part of the backhoe, in our opinion, could only arise under the completed operations and products liability insurance coverage which Lavalleur had failed to purchase from the insurer.

We conclude that there is complexity involved in the policy provisions herein, but there is no ambiguity; as such, the insurance company had the right to limit its liability by including those limitations in the policy definition. For the reasons stated above, the judgment of the District Court is affirmed and the costs of the action, including the cost of appeal, are herewith taxed to the appellant, A & A Equipment Co.

AFFIRMED.

# ROY MEIERHENRY AND JOSEPH ERMAN, APPELLEES, V. WAYNE SMITH, APPELLANT.

302 N.W.2d 365

Filed February 20, 1981. No. 43079.

1. **Injunction: Restrictive Covenants: Waiver.** Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant.
2. **Injunction: Restrictive Covenants.** Injunction is an appropriate remedy for violation of a restrictive covenant.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Philip H. Forehead for appellees.

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

STUART, District Judge.

Plaintiffs and appellees (owners and residents in Royalwood Estates, a residential subdivision in Douglas County, Nebraska) brought this action for injunctive relief. After trial, the District Court enjoined the defendant and appellant (a neighboring owner and resident) from having a free-standing 40-foot CB radio antenna on his lot.

Protective covenants on all parties' property provided in part: "No outside radio, television or other electronic antenna or aerial shall be erected on any building plot without the written consent of the undersigned." Defendant attempted to obtain permission from the developer to construct this antenna. Although a letter was written by the developer, this letter did not give such permission.

Defendant showed that over one-fourth of the landowners in the development had erected and maintained roof-mounted TV antennas, and thereupon argues that plaintiffs are estopped to complain about this violation.

The right to enforce restrictive covenants may be

lost by waiver or acquiescence of violation of the same. However, the circumstances of each case control whether there has been such a waiver or acquiescence.

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

"'As a rule, nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant by injunction, and acquiescence in violations * * * which are immaterial and do not affect or injure one will not preclude him from restraining violations thereof which would so operate as to cause him to be damaged. . . .' 20 Am Jur. 2d, Covenants, Conditions, etc., s. 274, p. 835." *Pool v. Denbeck*, 196 Neb. 27, 34, 241 N.W.2d 503, 507 (1976).

We conclude that plaintiffs' failure to complain about the construction of roof-top TV antennas does not estop them from preventing the maintenance of a 40-foot free-standing CB radio antenna.

Defendant next argues that injunction is too harsh a remedy, particularly when others are permitted to continue their violations. However, defendant was aware of the restrictive covenants prior to purchasing his home. He knew he had not received permission to erect the antenna tower and knew that the neighbors were upset. In spite of this knowledge, defendant took the chance of erecting his antenna tower. "Injunction is a proper remedy to prevent violation of a restrictive covenant. A remedy at law may be inadequate, may result in a multiplicity of actions, and may permit the subversion of the plan of improvement and development to continue." *Reed v. Williamson*, 164 Neb. 99, 82 N.W.2d 18 (1957) (syllabus of the court).

The judgment of the District Court issuing a man-

datory injunction directing the removal of the antenna is affirmed.

AFFIRMED.

BRODKEY, J., concurs in result.

KRIVOSHA, C.J., dissents.

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STATE OF NEBRASKA, APPELLEE, V.
ROBERT RECORD, APPELLANT.

302 N.W.2d 367

Filed February 20, 1981. No. 43142.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial on the ground 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.
2. **Motions for New Trial: Evidence.** Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result.

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

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

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

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

BOSLAUGH, J.

The defendant, Robert Record, was convicted of first degree murder and was sentenced to life imprisonment on July 2, 1976. The judgment was affirmed in *State v. Record*, 198 Neb. 530, 253 N.W.2d 847 (1977).

On September 30, 1976, the defendant filed a motion for a new trial for newly discovered evidence. Later,

the motion was amended to also ask for post conviction relief. An evidentiary hearing was held on September 26, 1977. The motion was denied on November 20, 1979. The defendant has appealed from the order denying him relief.

The motion relates to the failure of the State to comply with a pretrial discovery order which directed the county attorney to furnish "a copy of all police reports" to counsel for the defendant. Although the form of the order was broader than the statute requires, apparently there was no objection to the order. See Neb. Rev. Stat. § 29-1912 (Reissue 1979).

The evidence shows that on or about September 1, 1976, the defendant's counsel discovered that the sheriff's office had made an investigation concerning a suspect named Frank Pilant, but that none of the reports concerning Pilant had been furnished to the defendant.

The record shows that while the crime was under investigation, the sheriff's office received information that the victim, Hendrik Dohmen, had been running around with Judy Pilant, the suspect's wife. The sheriff's office then made an investigation which included interviews with the suspect, his employer, and some of his friends, and a polygraph examination of the suspect. Further investigation substantiated that the suspect had been at a drive-in theater on the night of the crime. On the basis of this investigation, the sheriff's office concluded that Pilant had not committed the murder.

At about this time the sheriff's office received information that the murder had been committed by the defendant. Subsequently a confession was obtained from Edward Domalakes, an accomplice of the defendant, who was an eyewitness to the crime. Statements were obtained from several other witnesses who said that the defendant had told them that he had killed Dohmen. Ballistics tests established that

Dohmen may have been shot with a gun recovered from Domalakes.

A motion for new trial on the ground 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. Mays*, 205 Neb. 730, 289 N.W.2d 545 (1980). Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980).

The newly discovered evidence in this case did no more than show that someone else might have had a motive for killing the victim. The suspect and his wife had been separated for about a 2-week period and during this time the suspect's wife and the victim had been out together on three occasions. When the suspect and his wife reconciled, she told him about her relationship with the victim. There was no other evidence which suggested the suspect was connected with the crime.

The evidence concerning the suspect, which has been summarized above, must be contrasted with that produced by the State at the trial of the defendant. The testimony at the trial included that of the accomplice who was an eyewitness to the murder, together with several witnesses to whom the defendant had admitted that he committed the murder. There is additional evidence in the investigation file which was received at the hearing on the motion which corroborates the evidence of the State against the defendant.

The record fully supports the ruling of the trial court on the defendant's motion. It is not probable that the newly discovered evidence would have produced a different result at the trial if it had been offered and admitted. The failure to disclose the reports concerning this evidence in accordance with the pretrial discovery

order was not prejudicial to any substantial right of the defendant. Any error in that regard was harmless.

The judgment of the District Court is affirmed.

AFFIRMED.

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## IN RE INTEREST OF GOLDFADEN. STATE OF NEBRASKA, APPELLEE, V. BARBARA GOLDFADEN, APPELLANT.

302 N.W.2d 368

Filed February 20, 1981. No. 43159.

1. **Child Custody: Juvenile Courts: Jurisdiction.** The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings.
2. ____: ____: ____. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes.
3. **Child Custody: Appeal and Error.** We review a child custody order de novo, giving due regard to the trial court which observed the witnesses and their manner of testifying, and will not ordinarily disturb such order unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

George H. Moyer, Jr., of Moyer, Moyer & Egley and Wilbur L. Johnson of Johnson & Skorupa for appellant.

Paul Schumacher, Platte County Attorney, for appellee State of Nebraska.

Clay M. Rogers of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for James Goldfaden.

Mark M. Sipple of Luckey, Sipple & Hansen, guardian ad litem for Michael and Lisa Goldfaden.

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

HASTINGS, J.

This action was commenced by the county attorney of Platte County pursuant to Neb. Rev. Stat. § 43-202(2) (b) and (c) (Reissue 1978) on behalf of two minor children, Michael James and Lisa Ann Goldfaden. The mother, Barbara Goldfaden, who had custody by reason of a marriage dissolution decree of the District Court for Douglas County, has appealed from an order placing custody of the children in their father, her ex-husband, James Goldfaden, subject to reasonable visitation privileges in herself and the maternal grandfather. The appellant assigns the following as error: (1) The county court erred in proceeding with an adjudication even though the record reflected that the children were wards of the District Court for Douglas County; and (2) The county court erred in granting custody of the children to the father. We affirm the District Court order which approved the county court adjudication.

On December 13, 1978, the Platte County attorney filed a petition in the county court of Platte County, alleging that Michael and Lisa were neglected children, as defined in § 43-202(2) (b) and (c). The petition alleged that the children lacked proper parental care by reason of the fault or habits of their mother, Barbara Goldfaden. The petition further alleged that after a preliminary hearing before the Platte County Mental Health Board on December 12, 1978, Barbara was determined to be dangerously mentally ill, and that the children were in danger because of the acts of violence by Barbara upon her father in the presence of the children.

The children were placed in the custody of the Platte County Department of Public Welfare under the supervision of Multi-County Service Unit 143, and the court appointed an attorney and guardian ad

litem to represent them. Barbara was admitted to the Norfolk Regional Center, where she was diagnosed as suffering from alcohol addiction and a passive-aggressive personality with hysterical and inadequate features. It was also later determined that she was addicted to valium.

On December 16, 1978, the children's father, James Goldfaden, filed a motion in the county court of Platte County, alleging that he was a person more fit and proper than foster care to have possession during the pendency of the proceedings. He further stated that he intended to file an application for modification of the divorce decree in the District Court for Douglas County to obtain custody of the children. On December 26, 1978, the county court entered an order finding Barbara to be in the Norfolk Regional Center, continued the adjudication hearing, ordered James to pay $190 per month per child as child support, and continued custody with the Platte County Department of Public Welfare.

On January 10, 1979, Barbara entered a general appearance in the Platte County Court by and through her attorney, and on March 26, 1979, she appeared personally and admitted the allegations contained in the juvenile petition. Based on that admission, the court found Michael and Lisa to be children as defined by § 43-202(2) (b) and (c), and set the matter for a final dispositional hearing on May 30, 1979. Pending the final dispositional hearing, the court ordered custody to remain in the Platte County Department of Public Welfare, granted both parents visitation privileges, and ordered Barbara to continue treatment programs which were in progress.

The adjudication hearing was held on May 30, 1979, in which Dr. Roger Cutshall, staff psychiatrist at the Norfolk Regional Center, was called to testify on Barbara's behalf. He stated that Barbara had been released from the hospital on April 4, 1979, as improved, but with an agreement requiring her to

continue on prescribed medications, to return for periodic medication checks, to abstain from the use of any alcoholic beverages, and to allow outpatient visits in her home. The doctor testified that Barbara was making satisfactory progress, and in his opinion she was not at that time dangerous to her children since the main source of the problem was alcohol, and as long as she remained sober the problem would probably disappear. On examination by the court, Dr. Cutshall testified that it was very important that she continue the treatment program because without it she would probably return to drinking. The doctor further stated that he would recommend the outpatient treatment for 6 months to a year to really see if she was functioning or not.

At the conclusion of the hearing the court determined that the best interests of the children would be to place them in the custody of their father under the supervision of Lutheran Family and Social Service of Nebraska and Multi-County Service Unit 143. The court granted Barbara twice-a-month visitation privileges. The court also retained jurisdiction, requiring Multi-County Service to monitor the placement of the children as well as the progress made by Barbara and to make periodic reports to the court. A review was scheduled for approximately 1 year in the future, to be heard on June 2, 1980. Barbara appealed the county court decision to the District Court for Platte County, which was subsequently affirmed. This appeal followed.

Appellant's first assignment of error is that the county court erred in proceeding with an adjudication even though the record reflected that the children were wards of the District Court for Douglas County, pursuant to the divorce decree of the parties. Barbara agrees that the county court had jurisdiction through the juvenile statutes to detain the children because of lack of parental care. However, she insists that once the emergency ended, the county court no longer

had original jurisdiction to determine the custody of the children. She further asserts that once the county court of Platte County had notice that Michael and Lisa were wards of the District Court for Douglas County, the county court should have stayed further proceedings and remanded the parties to the District Court to determine custody.

The juvenile court in each county has "(2) Exclusive original jurisdiction as to 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 or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child . . . ." § 43-202(2)(b) and (c). Further, the jurisdiction of the juvenile court continues over a child brought before the court or committed under the act, "and the court shall have power to order a change in the custody or care of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change." Neb. Rev. Stat. § 43-209 (Reissue 1978).

Appellant calls our attention to Neb. Rev. Stat. § 43-201(4) (Reissue 1978), which states in pertinent part: "Nothing in this act shall be construed to deprive the district courts of their habeas corpus, common law, or chancery jurisdiction or jurisdiction acquired in an action for divorce, legal separation, or annulment . . . ." The issue raised was considered by this court in *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979). Is the exclusive original jurisdiction given to the county court sitting as a juvenile court diminished by § 43-201, where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings? In *Schleuter* we answered the question in the negative for the following reasons:

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

"Second, this was a proceeding to terminate parental rights. . . . It is true that parental rights were in fact not terminated in the county court proceeding. However, if we were to hold that the county court deprived itself of its jurisdiction by electing not to terminate parental rights after a full hearing on the merits, we would be basing the court's jurisdiction on the outcome of the proceeding, a result which would be patently absurd.

"We hold section 43-201, R. S. Supp., 1976, did not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978." *Schleuter* at 108-09, 277 N.W.2d at 671.

The reasoning in *Schleuter* is sound, and we decline the invitation to abandon it. The juvenile court jurisdiction as exercised pursuant to the juvenile statutes is to some extent exclusive and the proceeding brought by the county attorney is not just another custody proceeding. "Both the divorce court and the juvenile court are concerned on a primary basis with the welfare of the child, but, while their functions overlap, the basis of their jurisdiction and the scope of their powers differ. The divorce court is concerned with the legal custody of the children as between the parents.

The juvenile court can intervene between the parent and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the statute." *State ex rel Juv. Dept. v. Christy*, 7 Or. App. 608, 616, 492 P.2d 476, 479 (1972).

The juvenile court is not depriving the District Court of its jurisdiction acquired in the divorce action. It is merely exercising its exclusive original jurisdiction to intervene for the protection, welfare, and safety of the child. Once this jurisdiction has been invoked, the court has the authority to order a change in custody where necessary, if in the best interests of the child. § 43-209.

The appellant further assigns as error the award of custody to the father. We review the case de novo, giving due regard to the trial court which observed the parties and the witnesses and their manner of testifying. A custody order will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. *Curfman v. Curfman*, 207 Neb. 1, 295 N.W.2d 299 (1980).

The evidence indicates that Michael has been experiencing adjustment problems due to the frequent shifting of family caretakers, producing in him a sense of insecurity and uncertainty. This has resulted in an increase of immature behavior at school and at home. A psychologist who evaluated Michael recommended that he be placed in a settled and secure home. The Multi-County Service Unit 143 caseworker, after doing a complete evaluation of both the homes and living situations of the parents, recommended placement of the children with the father. The same recommendation was made by the guardian ad litem. The evidence fully supports placement of the children with the father, James Goldfaden, and that decision will not be disturbed. The judgment of the District Court for Platte County is affirmed.

AFFIRMED.

MARY JANE RITCHEY, APPELLEE AND CROSS-APPELLANT, V. MARVIN RAY RITCHEY, APPELLANT AND CROSS-APPELLEE.

302 N.W.2d 372

Filed February 20, 1981. No. 43211.

1. **Child Custody: Sexual Misconduct.** Custody of minor children is to be determined by their best interests. In making this determination, the sexual misconduct of a parent is only one of several factors to be considered. Other factors are general considerations of the moral fitness of the parents; the emotional relationships between the children and their parents; and the age, sex, and health of the children.
2. **Child Custody: Appeal and Error.** Although we review an award of custody de novo, 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.
3. **Attorney Fees: Costs.** The award of attorney fees and the taxing of costs are discretionary with the District Court.

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

Vestecka, Gorham & Tegtmeier for appellant.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

HASTINGS, J.

Marvin Ray Ritchey has appealed from an order of the District Court for Lancaster County dissolving the marriage of the parties and awarding custody of their minor child to the mother, Mary Jane Ritchey. The overlapping assignments of error are substantially as follows: (1) The court erred in failing to compel the petitioner to answer 33 interrogatories and sustained her objections on fifth amendment grounds, and the court erred in refusing to accept the interrogatories and objections into evidence; (2) The court erred in failing to find that the petitioner's relationship

with another man adversely affected the minor child; and (3) The evidence is not sufficient to support the finding that it is in the best interests of the child that he remain in the custody of the mother.

The petitioner, Mary Jane Ritchey, has cross-appealed, assigning as error: (1) The court erred in awarding the respondent 2 months' visitation each year during the summer months; and (2) The court erred in failing to allow the petitioner attorney fees and court costs. We affirm.

The parties were married on August 21, 1971, and had one child, Dean Edward Ritchey, born June 30, 1977. Both parties are employed by Burlington Northern, and both earn between $900 and $1,000 per month; Marvin as a brakeman and Mary Jane as a stenographer. Mary Jane's work hours are 7:30 to 4 p.m., Monday through Friday, and Marvin's hours fluctuate, but are normally 2:30 p.m. to 10:30 p.m., or 4 p.m. to midnight, with Sunday and Monday off. There is ample evidence showing that both parents are fit to have the care and custody of the child. A court-ordered custody investigation undertaken by the juvenile probation office concluded that either parent is fit to have the custody of the child, and no recommendation was made in favor of either one.

The main thrust of the appeal concerns what the appellant terms the moral fitness of Mary Jane. Most of the testimony and evidence concerned certain alleged actions on the part of Mary Jane which, according to the appellant, indicates that the father adheres to higher moral standards than does the mother. Specifically, when the couple separated and Mary Jane and their son, Dean, moved out of the home of the parties, Marvin undertook a full-scale monitoring of all activities of Mary Jane and her alleged paramour. Marvin, two male friends, and one hired private investigator watched her home day and night, followed her in cars, and communicated among themselves on their citizens band radios. Marvin went

so far as to have Mary Jane's garbage picked up and made available to him for his examination. He also took photographs of the interior of Mary Jane's home, including her laundry basket, her bedroom, and her dressing table. There was no indication in the record as to how Marvin gained access to the home on the date those pictures were taken, nor whether he had permission to do so.

The first assignment of error refers to 33 interrogatories which were served on Mary Jane prior to trial, all dealing with her relationship with her alleged paramour. Mary Jane objected to the interrogatories, based on the fifth amendment and Neb. Const. art. 1, § 12. One interrogatory was objected to as privileged. The trial court sustained the objections to the interrogatories. However, when the case was tried, Mary Jane was questioned on direct examination regarding her relationship with the particular man involved. The court commented that any privilege had been waived at that point and the respondent could cross-examine Mary Jane on nearly anything involving her relationship with that man.

The trial court's initial ruling permitting Mary Jane to invoke the privilege against self-incrimination was supported by Neb. Rev. Stat. § 25-1210 (Reissue 1979). Whether the sanction of dismissal of the action could have been invoked within the rule stated in *Schrad v. Schrad*, 186 Neb. 462, 183 N.W.2d 922 (1971), we need not consider because the respondent did not make such a motion at that time. We would observe in passing, however, that *Schrad* was decided on the basis of the "clean hands" doctrine, under the fault concept of divorce actions then existing. Respondent's motion to dismiss was not made until the close of petitioner's case, which was after the trial court had ruled that Mary Jane had waived any privilege and that Marvin's attorney was free to cross-examine her regarding her alleged extramarital activities. The court's refusal to admit the written inter-

rogatories and the petitioner's written objection into evidence was proper, since they had no relevance. There is no merit to the appellant's first assignment of error.

The second error assigned is that the court erred in failing to find that the petitioner's relationship with another man adversely affected the minor child. Mary Jane denied that her relationship with the "other man" was anything more than a friendship. However, assuming the man was her paramour, and there was sufficient evidence that the trial court could have come to that conclusion, that does not automatically make Mary Jane an unfit mother. In *Fisher v. Fisher*, 185 Neb. 469, 176 N.W.2d 667 (1970), we held that where a wife has been guilty of adultery, the court will give consideration to the nature of the act and the circumstances, its probable effects on the future welfare of the children, and the best interests of the children under all the circumstances of the case. We have also stated: "The fact that one of the parties to an action for the dissolution of marriage has committed adultery, although a relevant consideration, will not necessarily be determinative of who shall be awarded custody of the minor children of those parties." *Lockard v. Lockard*, 193 Neb. 400, 402-03, 227 N.W.2d 581, 583 (1975).

Sexual misconduct is only one of the factors which may be properly considered in determining the best interests of minor children. *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980). Other factors are "general considerations of the moral fitness of the parents; . . . the emotional relationships between the children and their parents; and the age, sex, and health of the children . . . ." *Kringel* at 244, 298 N.W.2d at 153.

We review an award of custody de novo. However, 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. *Batenhorst v. Batenhorst*, 205 Neb. 601, 288 N.W.2d 740 (1980). We recognize that it is the trial court which saw the witnesses and observed the attitude of the parties at trial. Considering the youth of the child, the working hours of the parties, as well as the evidence that both parents are fit to have custody, we cannot say that the trial court abused its discretion in awarding custody to the mother. This is particularly true since there was no showing that any sexual misconduct on the part of Mary Jane has adversely affected the child, nor will have an adverse effect on him in the future. We therefore find that appellant's second and third assignments of error do not merit reversal.

The errors assigned by Mary Jane on cross-appeal involve, first, the question of whether 2 months of visitation per summer with Marvin is excessive. This was part of the extensive visitation schedule which basically included: (a) The father has visitation one weekend each month; (b) On weeks of no weekend visitation, the father has visitation 1 full day and ½ day per week; and on weeks with weekend visitation, the father has only the ½-day visitation; (c) The father has the child 1 week each Christmas holiday, alternating Christmas Day each year with the mother; the party not having visitation on Christmas Day will have visitation on Christmas Eve; (d) The father has visitation for up to 2 months each summer, and during those summer months the mother has the same visitation as granted the father in (a) and (b); and (e) The parties are to have reasonable visitation on birthdays and other holidays, to be worked out between the parties themselves.

"In a post-divorce custody proceeding a determination of what constitutes reasonable visitation rights, or periodic possession of minor children, lies within the discretion of the trial court. On appeal we will not disturb the determination except to remedy abuse of discretion." *Lueders v. Lueders*, 187 Neb. 539, 541, 192 N.W.2d 161, 163 (1971).

It is evident that a great deal of thought and work was put into establishing the visitation schedule, even to the extent of setting the exact hour when visitation is to begin and end. An attorney had been appointed by the court to represent the child in the negotiations for custody and visitation. We will not disturb this visitation schedule, because we find no abuse of discretion in awarding an extended visitation each summer. See *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975).

On cross-appeal, Mary Jane further assigns that it was error for the court to fail to allow to petitioner the payment of her attorney fees and court costs. "The award of attorneys' fees and the taxing of costs is discretionary with the District Court." *Badberg v. Badberg*, 193 Neb. 844, 847-48, 229 N.W.2d 552, 555 (1975). There was no abuse of discretion.

The judgment of the District Court is affirmed. Petitioner is allowed $500 for the services of her attorney in this court, and the costs on appeal are taxed to the respondent.

AFFIRMED.

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## O'NEILL PRODUCTION CREDIT ASSOCIATION, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. JOHN SCHNOOR ET AL., APPELLEES, AND GALYEN PETROLEUM COMPANY, A CORPORATION, INTERVENOR-APPELLANT AND CROSS-APPELLEE.

302 N.W.2d 376

Filed February 20, 1981. No. 43247.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of the court to read a meaning into

a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

2. ____. Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it.

3. **Crops: Words and Phrases.** In general, the word "crops" means all products of the soil that are grown and raised annually and gathered in a single season.

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

Arlen D. Magnuson for appellant.

Edward E. Hannon for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and RONIN, District Judge.

KRIVOSHA, C.J.

The instant appeal presents to the court a question of first impression involving the issue of whether cattle may be included within the meaning of crops as set out in Neb. Rev. Stat. § 52-901 (Reissue 1978). If cattle are considered crops, we are further asked to decide whether a petroleum products lien has priority over a previously filed security agreement covering the same cattle.

The trial court found that cattle are included within the meaning of the word "crops," but that the petroleum products lien does not have priority over a properly filed financing statement. There are a number of circumstances involved in the instant case, including matters between O'Neill Production Credit Association (O'Neill), appellee, and the various parties involved in this action other than Galyen Petroleum Company (Galyen), the intervenor-appellant. However, due to the manner in which we decide the issue of whether cattle are included within the meaning of crops, we

need not concern ourselves with any of those other matters and can dispose of this appeal as a matter of law. For the reasons more particularly set out hereinafter, we find that cattle are not included within the definition of crops pursuant to the provisions of § 52-901 and, accordingly, reverse and remand the instant appeal with instructions to the trial court to enter an order consistent with this opinion.

It is uncontested that Galyen had, at various times, sold to David P. Mueller petroleum products for which Galyen claimed a petroleum products lien, though there was a dispute at trial as to whether all the products sold to Mueller entitled Galyen to a petroleum products lien. Again, because of the manner in which we dispose of this appeal, we need not resolve that dispute. The parties further acknowledge and concede that O'Neill had a valid security agreement superior to the rights of Galyen, unless Galyen had a petroleum products lien covering the cattle which was superior to O'Neill's lien.

Section 52-901 provides as follows: "Any person who furnishes gasoline, diesel fuel, tractor fuel, oil, grease, or other petroleum products to another to be used in farm machinery for power or lubricating purposes in the production of any agricultural crop shall be entitled to a lien upon *all such crops produced* and owned by the person to whom such fuel or lubricant had been furnished to secure the payment of the purchase price thereof, upon compliance with the provisions of sections 52-901 to 52-904." (Emphasis supplied.) While Galyen concedes that the petroleum was not sold for use in the cattle, it argues that the petroleum was sold for the purpose of operating a pivot irrigation system which watered grass which was fed to the cattle, thereby entitling Galyen to a petroleum products lien upon the cattle. Galyen conceded at oral argument that if cattle are not held to be crops within the meaning of the petroleum products lien law, Galyen does not have a lien upon the cattle and the question of the

priority between the petroleum products lien and the security agreement is not reached. The principal reason underlying that premise is that agricultural liens are wholly dependent upon statute or special contract, and no such lien was given at common law. Courts are not to add to the terms of the statute in determining who is entitled to benefit. See 3 Am. Jur. 2d *Agriculture* § 10 (1962).

Turning then to the specific question of whether cattle are included within the meaning of crops under the petroleum products lien, we first must direct our attention to the oft-cited and well-established rules of construction concerning the interpretation of statutes. In *Bachus v. Swanson*, 179 Neb. 1, 4, 136 N.W.2d 189, 192 (1965), we said: "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute."

Likewise, we have held that: "Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it." *State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc.*, 178 Neb. 87, 90, 132 N.W.2d 302, 304 (1964). See, also, *Peck v. Dunlevey*, 184 Neb. 812, 172 N.W.2d 613 (1969).

Our reading of the statute leaves us with the conclusion that there is no ambiguity contained within the provisions of § 52-901 which requires us to resort to any form of interpretation and we may, as the rules suggest, resort to the ordinary meaning of the word

"crops" to determine the scope of the word.

Neither party has cited to us any cases in which this question has been resolved, and we have found relatively few. In the case of *Ellis, McKinnon & Brown v. Hopps*, 30 Ga. App. 453, 454, 118 S.E. 583, 584 (1923), the Georgia Court of Appeals defined crops as follows: "[C]rops are the product of the soil and do not include the increase of live stock." Likewise, in the case of *State Mutual Ins. Co. v. Clevenger*, 17 Okla. 49, 50-51, 87 P. 583 (1906), the Oklahoma court defined crops as follows: "'The word "crop," in its general signification, means the product of cultivated plants while growing, or that product after it has been harvested or severed from the stalk or root to which it was attached.'"

Black's Law Dictionary 338 (5th ed. 1979) provides the ordinary meaning of crop to be: "Products of the soil, as are annually grown, raised, and harvested." The word "crops" is defined in 25 C.J.S. *Crops* § 1 (1966) as follows: "In general, the word 'crops' means all products of the soil that are grown and raised annually and gathered in a single season." Similar definitions of the word "crop" may be found in Words and Phrases. All of the authorities indicate that the word "crops" refers to the product of cultivated plants and not of livestock. Nothing which has been brought to our attention nor which we are able to discover ourselves could possibly lead one to believe that the word "crops" in its ordinary meaning encompasses cattle. There may be even some question as to whether the natural grasses eaten by the cattle involved in this case and watered by the pivot irrigation system are crops. The demurrer filed by O'Neill to Galyen's petition in intervention claiming a petroleum products lien on the cattle should have been sustained. For that reason, we reverse the judgment of the trial court and remand the matter back to the District Court with instructions to enter an order in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

# THE OMAHA FISH AND WILDLIFE CLUB, INCORPORATED, APPELLANT, V. COMMUNITY REFUSE, INC., ET AL., APPELLEES.

302 N.W.2d 379

Filed February 20, 1981. No. 43258.

1. **Administrative Agencies: Jurisdiction: Injunction: Zoning.** Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances.
2. **Administrative Agencies: Injunction: Zoning: Parties.** The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance.

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

Michael J. Mooney of McCormack, Cooney, Mooney & Hillman, P.C., for appellant.

Herbert J. Elworth of Casey & Elworth for appellees.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

HIPPE, District Judge.

The plaintiff sued for an injunction. The object was to stop the defendants from establishing a solid waste disposal area on lands zoned for other purposes. A demurrer was sustained, the case dismissed, and plaintiff has appealed. We reverse and remand.

The Omaha Fish and Wildlife Club, Incorporated, asserted in its amended petition that it owns 269 acres of real property in Cass County. It complains that the defendants began establishing a solid waste disposal area on 320 acres of land zoned by the county, but the zoning does not permit such a use. The petition acknowledges that the defendants secured a license for their endeavor from the Nebraska Department of

Environmental Control and that the Cass County board and zoning administrator have approved the site. The petition concludes that Neb. Rev. Stat. § 23-114.05 (Reissue 1977) establishes the right to an injunction. That statute provides: "The . . . use of any . . . land in violation of . . . any [zoning] regulation made by the county board . . . shall be a misdemeanor. . . . In addition to other remedies, the county board or the proper local authorities of the county, as well as any owner or owners of real estate within the district affected by the regulations, may institute any appropriate action or proceedings to prevent such unlawful . . . use . . . . Any taxpayer may . . . compel specific performance, by the proper official or officials, of any duty imposed by . . . this act . . . ."

The defendants are Community Refuse, Inc., Community Refuse Disposal, Inc., Regional Landfill Systems, Inc., and Ronald B. Roots. Their demurrer raises two points. First, defendants claim that enactment of the Environmental Protection Act, Neb. Rev. Stat. §§ 81-1501 to 81-1532 (Reissue 1976), exclusively governs operations relating to solid waste disposal. By making the Department of Environmental Control the licensor for such enterprises, a court is without subject matter jurisdiction in a suit such as this one. Second, they claim that the department is essential to a complete adjudication of this suit and that plaintiff cannot proceed without making it a party.

There are two issues raised: (1) Did enactment of the Environmental Protection Act divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal operations alleged to be in violation of county zoning ordinances? and (2) Are the Department of Environmental Control and/or county zoning officials indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance?

The District Court agreed with the defendants on the first issue and sustained the demurrer. We disagree on both issues, and reverse and remand with directions to overrule the demurrer.

The statute pertaining to injunctions against a violation of a county zoning ordinance is clear. There must be such a procedure, because § 23-114.05 enacts it. In this way, county zoning ordinances are self-policing. Not only can the county officials begin a suit, but other "affected" owners of real estate also can do so.

Jurisdiction in suits for injunction are in the district courts. Neb. Const. art. 5, § 9. This cannot be legislatively limited or controlled. *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975). Thus, even if the provisions of the Environmental Protection Act could be read to "preempt" the field, as defendants assert, that could not divest the District Court of its constitutional chancery jurisdiction.

Neither does the licensing by the Department of Environmental Control affect local zoning rules. The act itself states, in § 81-1516: "Nothing in sections 81-1501 to 81-1532 nor any act of the director shall usurp the legal right of a local governing body to develop and enforce local ordinances, codes or rules and regulations on solid waste disposal equal to or more stringent than [these] provisions . . . nor shall [they] relieve the applicant from obtaining a license from a local governing body when required or relieve the person owning or operating a disposal area from responsibility for securing proper zoning permits or complying with all applicable local ordinances, codes or rules and regulations not in conflict with the provisions of sections 81-1501 to 81-1532."

We therefore conclude that enactment of the Environmental Protection Act did not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal operations alleged to be in violation of county zoning ordinances.

The demurrer was not sustained on the basis of lack of indispensable parties. The question has been briefed and argued, however, and was presented here for decision.

When this case was originally filed, it had two causes of action. One was against the developers for an injunction, and the case still has that form. The other was against the county officials to order their enforcement of the zoning ordinance. Certain of the defendants demurred for improper joinder. Apparently, without action by the trial court, the plaintiff filed an amended petition eliminating the individual county officials and left as defendants in the first cause of action only, the following: Community Refuse, Inc.; Community Refuse Disposal, Inc.; Regional Landfill Systems, Inc.; and Ronald B. Roots. Those remaining defendants now contend that all of the original named defendants should be parties, and, in addition, they claim that the Department of Environmental Control is an indispensable party to the suit. On the question of parties, these defendants have had three distinct positions.

First, they claimed that the county officials could not be included in the suit, so the plaintiff dismissed them out by filing an amended petition. They then filed a written demurrer claiming that the Department of Environmental Control had to be included. In argument on the written demurrer, they added that the county officials were likewise indispensable, and that position is advanced here.

If this controversy cannot be determined without additional parties, then the court must order them brought in. Neb. Rev. Stat. § 25-323 (Reissue 1979). The controversy here involves the use of land. That is all an alleged zoning violation can involve. Neither the county officials nor the Department of Environmental Control will be using the land. Neither the Department of Environmental Control nor the county officials have authority to adjudicate whether the

proposed uses will violate the zoning regulations. We have just held that the jurisdiction for that subject is constitutionally lodged in the District Court. Therefore, there is no reason for the presence of either in this case to get the controversy determined. Thus, the controversy can be determined without their presence, and should be.

The order sustaining the demurrer and dismissing the amended petition should be reversed, and the case is remanded to District Court with directions to do so.

REVERSED AND REMANDED WITH DIRECTIONS.

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## STATE OF NEBRASKA, APPELLEE, V. DONALD HOLMES, APPELLANT.

## STATE OF NEBRASKA, APPELLEE, V. JAMES BEARDSLEE, APPELLANT.

302 N.W.2d 382

Filed February 20, 1981. Nos. 43345, 43403.

1. **Wiretaps.** Neb. Rev. Stat. § 86-705 (Reissue 1976) requires that each application for a wiretap shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The application shall give 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.
2. ——. Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Neb. Rev. Stat. § 86-703 (Reissue 1976); (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and (d) There is probable cause for belief that

the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person. Neb. Rev. Stat. § 86-705(3) (Reissue 1976).

3. ____. Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976) does not require the exhaustion of all possible or reasonable avenues of investigation. The statutory requirements are stated in the alternative, i.e., that other methods must have been tried and failed "or" that other procedures are unlikely to succeed or are too dangerous.

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

Robert B. Creager of Berry, Anderson & Creager, and Toney Redman for appellants.

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

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

BRODKEY, J.

Donald J. Holmes and James Beardslee, defendants below, appeal to this court from their convictions and sentences by the District Court of Lancaster County, Nebraska, for the offense of conspiracy to possess marijuana with the intent to deliver, in violation of Neb. Rev. Stat. § 28-4,129 (Reissue 1975) (repealed 1979). The two separate cases involved in this appeal were consolidated for trial below and were also consolidated for argument and briefing in this court. The evidence on which the convictions were based was obtained by means of a wiretap interception of oral communications over defendant Holmes' telephone line, such wiretap having been authorized by an order of the District Court dated June 29, 1978, and issued pursuant to an application filed by the county attorney of Lancaster County under Neb. Rev. Stat. §§ 86-701 et seq. (Reissue 1976). We affirm.

By way of factual background, it appears that on June 29, 1978, an application for the wiretap was

executed by Ronald D. Lahners, county attorney for Lancaster County, Nebraska. The application sought an order authorizing the interception of telephone communications between Donald Holmes, Paul Barzar, William Prettyman, James Beardslee, Inez Beardslee, David Finn, and Kathy Hayes, as well as other individuals whose identities were then unknown, over three designated Lincoln telephone listings. The affidavit signed by Detective Thomas Rathbun of the Lincoln Police Department in support of the wiretap application, dated June 28, 1978, recited that the telephones in question were being utilized by the aforementioned parties in connection with the "possession, use, manufacturing, and delivery of controlled substances, which are narcotics and dangerous drugs. . . ." The affidavit, which is 20 pages in length and contains numerous pages of exhibits, includes a section entitled "History of Investigation," which, among other things, reviews in detail the surveillance of the parties conducted by the Lincoln Police Department over a period of 4 years and documents the possession and importation of narcotics between defendant Holmes in Lincoln, Nebraska, and defendant Beardslee in Wetmore, Texas; and also includes references to prior convictions of Holmes for the possession of various controlled substances.

The affidavit also contains a section entitled "Objectives of Investigation," which also sets forth the reasons and necessity for the wiretap, as follows:

"Affiant has been engaged in investigation of criminal activities relative to controlled substances, narcotics, and dangerous drugs for several years, and has received the benefit of training by fellow officers who have been engaged in such investigation for more than six years, and affiant and said fellow officers have conducted numerous investigations into networks for distribution of controlled substances, including schemes whereby communications concerning possession and delivery of controlled substances

are transmitted by telephone, as well as investigations whereby drug distribution networks are infiltrated by civilian and commissioned undercover officers. It is the experience of affiant and his fellow officers related to affiant that infiltration of a drug distribution network by an undercover agent requires at least several weeks time, may extend over a period of several months before undercover agent is able to gain the confidence of parties involved in such distribution networks to the extent that such parties will confide in the agent about possession and delivery of such substances, and that in many cases infiltration of established distribution by undercover agents is impossible because the agents are not long time acquaintances of the operators of such networks. It is further the experience of affiant and his fellow officers that infiltration of drug distribution schemes conducted by persons of the black race of Lincoln, Nebraska, cannot be readily accomplished by undercover agents of the white race due to cultural and racial traditions in Lincoln, Nebraska, and affiant states that no law enforcement agency conducting operations in Lincoln, Nebraska, currently has a black employee whose identity as law enforcement officer is not well known, nor any non-white undercover agents available to conduct such investigation. It is further the experience of affiant and fellow officers as reported to affiant that continuing optical surveillance of places known to be residences of persons suspected of engaging in distribution of controlled substances, is likely to produce information about the registered owners of vehicles who visit the premises, observations about the shape and size of parcels being carried to and from such residences by visitors, and some information about the occupant but is unlikely to produce, and in the experience of affiant, has failed to produce information concerning arrangments for delivery of controlled substances, the time and place of their arrival, or the location in which such sub-

stances are kept. Affiant states that interception of wire communications is necessary in order to overhear complete conversations which are in and of themselves evidence of conspiracies or other schemes or arrangements for possession, distribution, and delivery of controlled substances, narcotics and dangerous drugs, and affiant knows of no other investigative technique available in this case for obtaining such evidence. Affiant further states that he is aware of no undercover agent currently operating by authority of or in cooperation with the Lincoln, Nebraska, Police Department, the Lancaster County Sheriff's Office, or the Nebraska State Patrol, Division of Drug Control, or any other law enforcement agency, who has gained the confidence of or in any way infiltrated or has been otherwise able to hear conversations by the suspects mentioned in this affidavit, other than CI-1 [confidential informant]; affiant and other officers of the Lincoln, Nebraska Police Department have attempted to use CI-1 by equipping said CI-1 with electronic listening devices, and then sending said CI-1 into the residence of Donald J. Holmes, but said CI-1 has not been able to gain the confidence of either Donald J. Holmes or William Prettyman, Jr."

Based upon this affidavit, the District Court, on June 29, 1978, entered an order finding that there was probable cause to believe that the parties named in the affidavit had committed, or were about to commit, certain offenses which were among those enumerated in Neb. Rev. Stat. § 28-4,125 (Reissue 1975); and that probable cause existed to believe that the telephones from which the communications which were to be intercepted were being used in connection with the possession and delivery of narcotics and other drugs within the State of Nebraska. The court also found that there was probable cause to believe that communications pertaining to the possession and delivery of said drugs would be obtained through the interception proposed by the applicant; and that

normal investigative procedures had failed to or appeared unlikely to be successful in determining the time or place of the arrival of such controlled substances, the identities of the persons supplying, receiving, and delivering said substances, or the plan by which the distribution of the substances would be effectuated. The court ordered that the proposed interception could proceed, and directed that all intercepted communications of an incriminatory nature be transcribed into writing verbatim and filed with the court.

As a result of the information gathered from the interceptions authorized by the court in its order of June 29, 1978, defendant Holmes was charged, as was also James Beardslee, with conspiracy to possess marijuana with the intent to deliver and with possession of marijuana with intent to deliver. Defendant Holmes was also charged, in an additional count, with possession of a controlled substance, to wit: dihydrocodeine.

The defendants each moved the District Court for an order suppressing the intercepted telephone communications, and a hearing on the motion was held on June 13, 1979. On October 3, 1979, the District Court entered an order overruling the motions. A jury was waived by the defendants, and at trial, on October 17, 1979, the cases were consolidated for trial under facts stipulated by the agreement of the parties. At that time, the defendants also renewed their motion to suppress the communications intercepted under the court order.

In its well-reasoned and documented memorandum opinion, dated December 6, 1979, the District Court ruled that the affidavit in question was sufficient; that it alleged sufficient facts to establish probable cause; and that the court's order authorizing the wiretap was proper. On December 14, 1979, the District Court found the defendants guilty of the conspiracy charges, and the remaining counts were

dismissed on motion of the county attorney. The defendants' subsequent motions for a new trial were overruled, and each defendant was sentenced to serve a term of 1 year in the Nebraska Penal and Correctional Complex.

On appeal to this court, the defendants make the following assignments of error: (1) That the District Court erred in overruling defendants' motions to suppress evidence obtained as a result of the wiretap; and (2) That the court erred in finding that the order permitting the wiretap was supported by a sufficient affidavit.

At the outset, we note that § 86-705, the Nebraska statute governing the procedures to be followed to obtain the court's authorization for a wiretap, requires *inter alia* that each application shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The statute also requires that the applicant shall give 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. Section 86-705(3) then provides: "Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 86-703; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if

tried or to be too dangerous; and (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

The principal issue raised by the defendants on appeal is the sufficiency of the allegations in the affidavit for the wiretap order to support the finding of the District Court with respect to the failure or futility of investigative procedures other than wire interception. In their brief on appeal, the defendants allege that the affidavit fails to demonstrate that any normal investigative techniques had been tried and failed or reasonably appear unlikely to succeed, if tried.

The court has, in several previous opinions, addressed the issue raised by the defendants, and we have consistently held that it is not necessary for the State to utilize all investigative techniques before making an application for a wiretap. See, *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977); *State v. DiMauro and Kessler*, 205 Neb. 275, 287 N.W.2d 74 (1980); *State v. Trader*, 205 Neb. 282, 287 N.W.2d 78 (1980). In discussing this issue this court, in *State v. Kolosseus, supra* at 414-15, 253 N.W.2d at 163, 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 wire taps 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 — wire tap "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 wire tap 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."

Our examination of the application and affidavit in evidence in this case satisfies us that all the necessary requirements for justification for issuance of the wiretap order in this case existed (including the subpoenas for the toll call records from the telephone company), and that normal police investigative techniques had either failed or were likely to fail.

The findings and judgment of the District Court

are correct, and we affirm the convictions of the defendants in their respective cases.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. HAROLD J. L. IRWIN, APPELLANT.

302 N.W.2d 386

Filed February 10, 1981. No. 43517.

1. **Sexual Assault: Appeal and Error: Courts.** The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender.
2. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
3. **Constitutional Law: Appeal and Error.** For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court.
4. **Constitutional Law.** A person may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right. A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Affirmed.

Stephen A. Scherr, Adams County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy for appellee.

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

BRODKEY, J.

Harold J. L. Irwin, the defendant and appellant herein, appeals to this court from an order entered by the District Court of Adams County, Nebraska, sentencing the defendant to six consecutive terms of imprisonment of 5 years each, stemming from his 1972 conviction on six counts of rape. We affirm.

While the factual background of this case is amply set out in our decision of *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974), we will restate the pertinent facts that are applicable to this appeal. On February 17, 1972, Irwin was convicted after a jury trial on six counts of rape and one count of robbery. The offenses for which the defendant was convicted occurred in or near Hastings in Adams County, Nebraska, on separate occasions dating from April 21, 1969, to February 21, 1971. Irwin was sentenced on March 10, 1972, to a term of 20 to 25 years' imprisonment on the robbery charge. With regard to the rape convictions, a separate proceeding was instituted under the sexual sociopath act, Neb. Rev. Stat. §§ 29-2901 to 29-2910 (Reissue 1975), which statute was subsequently repealed in 1979. In the original proceedings, the defendant was found to be a sexual sociopath and was committed to the Nebraska Penal and Correctional Complex for an indefinite period. The defendant thereafter appealed his conviction and sentence to this court, and we affirmed the decision of the trial court in *State v. Irwin, supra.*

In 1979 the sexual sociopath act under which the defendant had been committed was repealed. It was superseded and replaced by L.B. 378, the new mentally disordered sex offender act, now appearing as Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979). Thereafter, the defendant was returned to the District Court for disposition pursuant to the provisions of the new statute.

On May 8, 1980, the trial court determined that the defendant was a mentally disordered sex offender

under the new law; that the disorder was treatable; and that the recommended treatment was available in Nebraska. The defendant was sentenced to consecutive terms of 5 years each on the six rape convictions, each sentence to run consecutive to the other and concurrently with the balance of defendant's robbery sentence. The District Court also granted the defendant a credit of 8 years and 220 days on the aforementioned sentences for time spent in custody.

Irwin has appealed to this court, assigning as error: (1) That the District Court erred in imposing an indeterminate sentence of 20 to 25 years for the robbery conviction; (2) The court exceeded its discretion by imposing consecutive sentences of 5 years each for six counts of rape; and (3) The appellant's right to constitutional due process and equal protection is denied by imposition of a sentence under the new mentally disordered sex offender act.

At the outset, we note that § 29-2921, the statute under which the defendant was sentenced, states: "All persons now committed under Chapter 29, article 29, as either a sexual psychopath or a sexual sociopath, shall forthwith be returned to the district court which committed them for review and disposition consistent with the terms of section 29-2911 to 29-2921." The proceeding from which this case is appealed was instituted in the District Court pursuant to the directive found in the aforementioned statute in order to review the defendant's 1972 commitment as a sexual sociopath.

In his brief on appeal, the defendant would have us review his 1972 robbery sentence. This we cannot do. Section 29-2921 calls for the review of commitments made under the sexual sociopath law alone, and in no way authorizes this court, or the District Court, to review a conviction or sentence which is unrelated to the defendant's status as a sexual sociopath. The defendant's original commitment, based on the six rape charges was made under the old sexual sociopath act in a separate and distinct proceeding from the

criminal proceedings in which he was sentenced for the robbery conviction. The crime of robbery is not a sex offense. We are convinced that the new mentally disordered sex offender act does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. The defendant already has had an opportunity to and did have his robbery conviction reviewed by this court in *State v. Irwin, supra,* and the opinion in that case clearly states that all *seven* offenses were before the court in that appeal.

Defendant's second assignment of error alleges that the trial court exceeded its discretion by imposing consecutive sentences of 5 years each on the six rape convictions. In *State v. Bridgmon,* 196 Neb. 714, 717, 246 N.W.2d 57, 59 (1976), this court stated: "The rule is firmly established in this state that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal." See, also, *State v. Painter,* 195 Neb. 183, 237 N.W.2d 142 (1976). While this court undoubtedly has the authority to reduce the sentences imposed upon the rape counts, we find no circumstances requiring or persuading us to do so in this case. We note that the defendant was originally convicted of rape under Neb. Rev. Stat. § 28-408 (Reissue 1964), since superseded by Neb. Rev. Stat. § 28-319 (Reissue 1979). Section 28-408, then in effect, provided for a penalty of imprisonment for a period not less than 3 years nor more than 20 years in the Nebraska Penal and Correctional Complex. At sentencing, the trial court imposed a penalty which was well within the statutory limits. The seriousness of the offenses committed by the defendant fully justified the six sentences imposed by the trial court. There was no abuse of discretion by the trial court in this case, and the sentences it imposed are approved.

Finally, we consider defendant's contentions with regard to the unconstitutionality of the new mentally

disordered sex offender act, in that the imposition of a sentence under that act deprives him of constitutional due process and equal protection of the law. We decline to review the issue of constitutionality of the statute in this appeal for several reasons. First, we have carefully reviewed the record of the proceedings before the District Court, and it is clear that the defendant did not raise the issue of the unconstitutionality of the statute in that proceeding, but raises it for the first time in this appeal. The general rule is stated in *State v. McConnell*, 201 Neb. 84, 89, 266 N.W.2d 219, 221 (1978), where we stated: "Defendant did not raise the constitutional issue in the trial court. It is raised for the first time on appeal. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court." See, also, *State v. Jacobsen*, 194 Neb. 105, 230 N.W.2d 219 (1975).

Second, it appears that the defendant is not at present facing any disadvantage under the statute in question. The defendant's constitutional arguments are difficult to follow, but it appears that he bases his contention of unconstitutionality on § 29-2920, under which section the state is required to notify the county attorney of the county where the mentally disordered sex offender was convicted within 90 days prior to the pending release from custody, and the county attorney is then required to commence a mental health board commitment proceeding against the offender. Defendant argues that under this procedure a person convicted of a sexual offense is subject to being recommitted in the mental health proceeding, which, defendant argues, constitutes double jeopardy inasmuch as it has been held that such confinement is in effect criminal punishment. Finally, defendant argues that the right of a convicted mentally disordered sex offender to request review of his case by the parole board is eliminated

because of the threat of a future mental health board commitment.

It is clear at the present time no such action for commitment has been filed or is pending against the defendant, and, in fact, may never be filed against him in view of the fact of the rather extensive sentences which he must serve on the various charges for which he had been convicted. However, even if the defendant should face commitment proceedings under the alleged unconstitutional statute, he will at that time have the opportunity to present his constitutional claim, and also an opportunity to appeal any adverse ruling to the District Court pursuant to the provisions of Neb. Rev. Stat. § 83-1043 (Reissue 1976) and to the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 24-204 (Reissue 1979). At that time the court would be presented with properly framed issues and would have the advantage of a District Court ruling on the claim. As stated in *State ex rel. Nelson v. Butler*, 145 Neb. 638, 651, 17 N.W.2d 683, 691-92 (1945): "It is firmly established as the universal rule that a person 'may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right . . . .' [Citation omitted.] We have held that, 'A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions.' *State v. Brandt*, 83 Neb. 656, 120 N.W. 196."

For the above reasons, therefore, we conclude that the issue of the constitutionality of § 29-2920 cannot be considered in this appeal, and must be deferred at this time.

There being no other errors appearing in the record, the judgment and sentences of the District Court must be, and hereby are, affirmed.

AFFIRMED.

# HELEN M. AHRENS AND ELDEN AHRENS, WIFE AND HUSBAND, APPELLEES, V. STEVEN K. DYE ET AL., APPELLANTS, IMPLEADED WITH KARL R. DYE ET AL., APPELLEES.

302 N.W.2d 682

Filed February 27, 1981. No. 42798.

1. **Tenants in Common.** Tenants in common can deal with third parties just as fully as owners of property held individually, including the right to terminate a lease as to the cotenant's interest.
2. ——. A nonleasing tenant in common who does not himself wish to cultivate the property may not prevent his cotenant's lessee from doing so.
3. **Unjust Enrichment.** A person is enriched if he has received a benefit, and he is unjustly enriched if the retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Roy I. Anderson and Gregory P. Drew for appellants.

David B. Latenser for appellees.

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

KRIVOSHA, C.J.

On June 10, 1980, this court released its opinion in the above-entitled matter, reported at 206 Neb. 423, 293 N.W.2d 388. That opinion was decided by a division of this court. Thereafter, a motion for rehearing was filed and we granted leave to reargue to the entire court. We have now concluded that the judgment of the trial court was correct, and we therefore withdraw our previous opinion and in place thereof file this opinion affirming the judgment of the trial court.

Though the facts of the action are set out in our earlier opinion, for ease of understanding we will repeat them herein. The property in question was originally owned by John A. Dye, who died testate on June 9, 1974. By the terms of his will, the property

descended as follows: a one-third interest to Helen M. Ahrens; a one-third interest to Karl R. Dye; a one-sixth interest to Steven K. Dye; and a one-sixth interest to David A. Dye. Following the death of John A. Dye, David A. Dye and Steven K. Dye and Steven's spouse, Deborah Dye, conveyed their interest in the real estate to Joan E. Siemonsma (Mrs. Siemonsma) and Steven K. Dye (Steven), mother and son, as joint tenants.

The land was leased by the owners to the husband of one of the joint owners, Elden Ahrens, on November 25, 1974. The agreement named Karl R. Dye, Helen M. Ahrens, David A. Dye, and Steven K. Dye as landlords and Elden Ahrens (Elden) as tenant. On August 29, 1977, Mrs. Siemonsma and Steven served a notice to quit on Elden and Helen Ahrens. Notwithstanding the notice to quit served by Mrs. Siemonsma and Steven on Elden, he nevertheless proceeded to plant a crop pursuant to the lease remaining in effect with the other co-owners.

Thereafter, an action in partition was filed; and on June 6, 1978, a decree was entered by the trial court ordering the land to be sold in partition. That decree specifically found that the notice to quit served by Mrs. Siemonsma and Steven on Elden terminated the landlord interest of Mrs. Siemonsma and Steven but did not terminate the landlord-tenant relationship of Helen Ahrens and Karl Dye to Elden.

Subsequently, the land was sold by the referee at a partition sale. Both the land and the growing crops were sold together and the purchaser was advised that it would acquire both the landlords' and tenant's interests in the land being sold.

In November of 1978 the owners of the property, other than Mrs. Siemonsma and Steven, filed an application for payment by the referee to Elden as tenant for the reasonable value of his services rendered as tenant in the production of crops which had been sold with the land. Mrs. Siemonsma and Steven

objected to the application and urged that their distributive shares of the proceeds be taken free and clear of any claim for compensation by the tenant for services or expenditures. They based their claim on the fact that they had terminated their relationship with the tenant.

On November 13, 1978, the court entered an order finding the value of the growing crops on the premises to have had a value at the time of the sale in the amount of $34,437.50. At the same time, however, the trial court found that Mrs. Siemonsma and Steven's objections should be sustained and ordered their shares to be received without any deduction for the costs of growing the crops. The referee was ordered to pay Elden as tenant the sum of $13,775, to be deducted from the distributive shares of Helen Ahrens and Karl Dye. This was apparently computed on the basis that the farm lease entitled Elden to 60 percent of the value of the crops. The trial court, however, found that Elden should only receive 60 percent of two-thirds of the value of the crops and that only two-thirds of the co-op bill should be paid from the proceeds of the sale, thereby imposing upon the tenant the cost of all the remaining costs without any corresponding right to the value of the crops. Likewise, Mrs. Siemonsma and Steven received an amount equal to one-third the value of the growing crops without paying for any of the costs of growing those crops.

Subsequently, appellees filed a motion for new trial. On January 2, 1979, the District Court sustained the motion for new trial and entered an amended judgment ordering the referee to pay to Elden for his services as tenant the sum of $20,662.50, to be deducted from the distributive shares of all of the former owners, including Mrs. Siemonsma and Steven. The trial court apparently concluded that Mrs. Siemonsma and Steven should not receive all of the benefits without incurring any expenses. The trial court thereafter overruled a motion for new trial. It was from that order which the appellants now appeal.

As noted in our earlier opinion, appellants raise several assignments of error. The principal issues concern Elden's relationship to the appellants and whether that relationship or some other doctrine entitles him to reimbursement from their distributive shares for his services and expenses.

It is true, generally speaking, that tenants in common can deal with third parties just as fully as owners of property held individually, including the right to terminate a lease as to the cotenant's interest. In 86 C.J.S. *Tenancy in Common* § 113(c) at 519-20 (1954) it is noted: "[O]ne tenant in common may terminate a lease as to his own interest without the concurrence of the other cotenants." The other side of that, however, as noted in the same work, is that: "A nonleasing tenant in common who does not himself wish to cultivate the property may not prevent his cotenant's lessee from doing so. . . ." § 113(e) at 521. While no cases in Nebraska may be found exactly on point, cases from other jurisdictions supporting the general rule that one cotenant may terminate a lease as to his own undivided interest in the property include *Cook v. Boehl*, 188 Md. 581, 53 A.2d 555 (1947); *Matteo v. Ginger Estates, Inc.*, 94 Misc. 2d 302, 404 N.Y.S.2d 533 (1978). See, also, 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 100 (1965). After the notice to quit was served on Elden, the court correctly concluded that Elden's tenancy as to those appellants' shares of the land was terminated. The notice to quit did not, however, operate to terminate the interest of landlord and tenant between Helen and Karl on the one hand, and Elden on the other.

Had the evidence disclosed that the land was sold subject to the tenant's rights in the crops, or at least not included in the sale as they were, perhaps the contentions of appellants would be correct. However, the evidence is uncontradicted that the land was sold with the tenant's rights. The evidence clearly establishes that the value of the crops at the time of the

sale was in the amount of $34,437.50. Presumably, whoever purchased the land paid an additional $34,437.50 by reason of the value of the crops and would not have paid that additional sum had the crops not been there. Mrs. Siemonsma and Steven therefore gained their proportionate shares of the $34,437.50 by reason of the unharvested crops being on the land and accepted the benefits resulting from the tenant's efforts. We believe, therefore, that the principle of unjust enrichment applies in a case of this nature, as apparently the trial court concluded. In 66 Am. Jur. 2d *Restitution and Implied Contracts* § 3 at 945 (1973), the author notes that unjust enrichment is "a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated where it is just and equitable that such restitution be made . . . . A person is enriched if he has received a benefit, and he is unjustly enriched if the retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."

In *Bush v. Kramer*, 185 Neb. 1, 3, 173 N.W.2d 367, 369 (1969), we said: "Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving the benefits to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay the reasonable value of them." See, also, Restatement of Restitution § 125 (1937).

In this case, Mrs. Siemonsma and Steven received one-third of the value of the growing crops as part of their distributive shares. They received that sum as a result of Elden's efforts in growing them and his incurring of expenses in connection with the crops. Should we permit them to keep it free of any charge, we, in effect, would be requiring Elden to have la-

bored for the benefit of Mrs. Siemonsma and Steven without any compensation and, in addition, be requiring Elden to absorb all the expenses of growing those crops. We believe that does, indeed, fall within the equitable doctrine of unjust enrichment and should not be permitted. The trial court correctly concluded that such was the case. We believe the judgment of the trial court was correct. The judgment is therefore affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

I concur in the judgment of the court but dissent from that part of the opinion which holds that a tenant in common may terminate a lease as to his interest without the concurrence of the other tenants in common. I believe the rule is unsound and will lead to confusion and uncertainty in an area of the law where certainty is of utmost importance.

Although some authority may be found to support the rule stated in the majority opinion, *Cook v. Boehl*, 188 Md. 581, 53 A.2d 555 (1947), and *Matteo v. Ginger Estates, Inc.*, 94 Misc. 2d 302, 404 N.Y.S.2d 533 (1978), cited in the majority opinion, do not support the position taken. In the *Cook* case, the lessee's interest in the property was not affected by the notice of termination by one cotenant and the interests of the cotenants were determined after the partition of the property. The *Matteo* case involved the right of one tenant in common to maintain a holdover action without joining the other tenant in common. This is a well-established rule relating to joinder in such cases, but has no application in this case.

I believe the correct rule is expressed in the following statement in *Fredeking v. Grimmett*, 140 W. Va. 745, 762-63, 86 S.E.2d 554, 564 (1955), relating to termination of a lease by forfeiture: "A forfeiture provision in a contract of lease upon real estate owned jointly by tenants in common is indivisible and such lease can not

be forfeited by less than all the owners of the undivided interests for the reason that if the lease could be forfeited by less than all the owners of the undivided interests the lessee would be bound by the lease as to some of such owners and discharged as to other such owners. *Eurengy v. Equitable Realty Corporation*, 341 Mo. 341, 107 S.W.2d 68.

"In *Howard v. Manning*, 79 Okla. 165, 192 P. 358, 12 A.L.R. 819, the Court used this pertinent language:

"'If the right to enforce a forfeiture accrues and a part of the tenants in common are allowed to elect to enforce the forfeiture, then the lessee is placed in the inequitable position of being bound by the lease as to part of the tenants and discharged by a part, which means that the lessee is still liable as a lessee to some of the tenants in common, although he cannot enjoy any of the benefits of his lease without becoming a trespasser and liable for damages to the other owners of the land. A fair conception of honesty and fair dealing negatives a construction of the lease imputing to the lessor and lessee an understanding or intention that the lessee's covenants of the character involved in this case are subject to apportionment by the death of the lessor leaving more than one heir. If the death of the lessor operates to apportion the benefits of the covenant among his heirs, then there can be a partial forfeiture, leaving the lessee bound to part of the heirs but denied all practical benefits under the lease. This would create a sort of tenancy which, we believe, it would be unreasonable to hold that the lessor and lessee intended or contemplated.

"'Under the American authorities the lessee's covenants, unless expressed otherwise, are joint and indivisible under a lease executed jointly by all the tenants in common. The heirs of a deceased lessor are in no higher position with respect to the covenants in the lease than they would be if they jointly executed the same lease, although the lease may expressly reserve to each his proportionate interest in the rents.'"

See, also, 51C C.J.S. *Landlord & Tenant* § 103 (1968).

McCOWN, J., joins in this dissent.

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## NEBRASKA STATE BANK, A CORPORATION, APPELLEE, V. MARVEL L. GADDIS, APPELLANT.

302 N.W.2d 686

Filed February 27, 1981. No. 42994.

1. **Adverse Possession.** A claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for a full period of 10 years.
2. _____. Where one enters upon and takes possession of land of another under mistake as to the true boundary line, claiming the land as his own to a definite and certain boundary, he acquires title thereto by adverse possession by actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more.
3. **Adverse Possession: Intent.** It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character.
4. _____: _____. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
5. **Equity: Appeal and Error.** The law requires this court in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and remanded with directions.

Smith, Smith & Boyd for appellant.

Leamer Law Office for appellee.

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

MCCOWN, J.

Plaintiff's petition sought to quiet title to a 20-foot strip of land in or adjacent to South Sioux City, Nebraska. The defendant, by cross-petition, claimed title by adverse possession. The District Court, after trial, entered judgment quieting title to the land in the plaintiff. Defendant has appealed.

In 1955 defendant, Marvel L. Gaddis, and her husband purchased a residential property located on the north side of East 39th Street on the edge of South Sioux City, Nebraska. The property was conveyed by a metes and bounds description which conveyed a rectangular tract 295 feet north and south by 73 feet 8 inches east and west. The property to the east of the disputed strip was cultivated farmland. The disputed tract of land is a 20- x 295-foot strip of land located immediately east of the land described in defendant's deed.

At the time defendant and her husband purchased the property, they did not have it surveyed. On the south portion of the property there was a house facing East 39th Street surrounded by a yard with bushes and trees. At the north edge of the backyard a fence running east and west divided the north and south portions of the property. A gate at the east end of the fence was located on the disputed tract. A wire fence fastened to the trees and some iron posts ran from the east end of the gate to somewhere near the northeast corner of the disputed tract. There was also a snow fence which ran along the north boundary of the property. The area enclosed by the wire fence was used for horses. On the north portion of the property there was a horse barn, a flower garden, and some trees, referred to as an orchard, all of which were located partially on the Gaddis land and partially on the disputed strip. There was also a rock or refuse pile located on the disputed strip.

Near the east edge of the disputed strip there was a dropoff in level down to the farmland to the east. There was no fence, but the crop line of the farmland formed a boundary line between the two properties. The land was cultivated each year and the crop line did not vary over the years. None of the disputed strip was cultivated by the persons who farmed the cropland.

The defendant and her husband assumed that their property extended to the cropland to the east. The disputed tract was always maintained and used as an integral part of the Gaddis property. The lawn was mowed down over the dropoff, weeds were cut, and trees were trimmed and removed. No one except the defendant and her husband has used or had possession of the disputed strip since 1955.

In 1958 or 1959 the defendant and her husband placed a septic tank on the disputed strip in the area east of the house. The owner of the land to the east raised some question as to whether the tank encroached upon his property, but it was installed anyway without further action or protest and used and maintained continuously for more than 10 years thereafter. When the defendant and her husband separated in 1973 the horse barn and the wire fence on the north portion of the property were removed.

In 1972 Town and Country Realty Company acquired title to the agricultural land to the east of the Gaddis property. Sometime shortly after Town and Country Realty acquired that land the telephone company became interested in purchasing a portion of the agricultural area and had a survey made which revealed that the 20-foot strip involved here was occupied by the defendant. As a result, the telephone company purchased the agricultural real estate to the east of the Gaddis property except for the disputed 20-foot strip. In November 1977 Town and Country Realty Company conveyed the disputed 20-foot strip to the plaintiff by quitclaim deed for $200. Town and Country never had or claimed possession of the disputed tract.

In 1974 the defendant and her husband were divorced. The decree assigned the residential property to the defendant and the description in the decree was the same as the description contained in the 1955 deed to the defendant and her husband. Thereafter, the State of Nebraska, in a condemnation proceeding necessitated by the widening of 39th Street, acquired a few feet of land from the owners of the property along the north side of East 39th Street. The defendant received payment for the 73 feet 8 inches shown on her deed and Town and Country Realty received payment for the few feet on the south end of the disputed strip. Neither the defendant nor her husband has ever paid taxes on the disputed strip.

The District Court found that defendant's estranged husband testified that he never intended to occupy more land than was purchased in 1955; that no open claim was made to the disputed tract by the defendant prior to the plaintiff's contractor entering upon the property in 1978; and that the record was devoid of any evidence tending to prove that the defendant at any time since 1955 possessed the disputed tract adversely, exclusively, notoriously, or actually. The District Court entered judgment against the defendant on defendant's cross-petition and quieted title to the disputed strip in the plaintiff.

It is well settled in this state that one who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981).

The plaintiff contends, and the trial court found, that the defendant's possession of the property involved here was not adverse because defendant and her husband conceded that they did not intend to claim more property than they had purchased. Plaintiff argues that their possession was therefore not under claim of ownership.

This case is a classic case of a mistaken boundary line. This court has consistently held that a claim of adverse possession is founded upon the intent with which the occupant had held possession and that this intent is ordinarily determined by what he has done in respect thereto. In *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957), we said: "The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held rather than an intention to hold in accordance with his deed that is controlling. . . . '[T]he possession is the important element, and it is held that such possession is not the less adverse because the person takes possession of the land in question innocently and through mistake. In other words, it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor.'" *Id.* at 893-94, 81 N.W.2d at 334-35.

In an adverse possession case, intent may be either actual or implied or inferred from the circumstances. In most cases it is inferred from the circumstances. Actual assertion of claim of ownership is not necessary. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979).

In *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980), this court held that adverse possession is founded upon the intent with which the occupant held possession and can best be determined by his acts. We said: "'It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action there-

after and the title of the claimant is complete.'" *Id.* at 805, 290 N.W.2d at 217.

The record in the case now before us establishes that the defendant and her husband appropriated and used the disputed strip as their own, to the exclusion of all others. Their acts establish their intent and a claim of ownership which was adverse to the plaintiff. Adverse possession does not depend upon the remote motivations or purposes of the occupant nor upon whether his motivation is guilty or innocent. The evidence is uncontradicted that no one ever interfered with defendant's open, exclusive, and continuous possession and use of the disputed strip from 1955 until the plaintiff's contractor attempted to enter on the property in 1978.

The law requires this court in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. *Svoboda v. Johnson, supra.* In the case at bar, the evidence is essentially uncontradicted and is not in conflict on any material issue.

In our view the evidence established that the defendant was in actual, continuous, exclusive, notorious, and adverse possession of the disputed strip under a claim of ownership for a full period of 10 years. The judgment of the trial court is reversed and the cause remanded with instructions to enter judgment for the defendant on her cross-petition.

REVERSED AND REMANDED WITH DIRECTIONS.

# RIESCHICK DRILLING COMPANY, A PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. AMERICAN CASUALTY COMPANY, A PENNSYLVANIA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

303 N.W.2d 264

Filed February 27, 1981. No. 43013.

1. **Judgments: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it.
2. **Pleadings: Appeal and Error.** Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct.
3. _____: _____. On appeal to this court, a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis.
4. **Contractors and Subcontractors: Contracts: Notice.** Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978).
5. **Contractors and Subcontractors: Proof.** There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.
6. **Insurance: Contracts: Attorney Fees.** In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978).

7. **Attorney Fees.** The amount of attorney fees to be allowed under Neb. Rev. Stat. § 44-359 (Reissue 1978) rests in the sound discretion of the court.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed as modified, and remanded with directions.

Richard L. Halbert for appellant.

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

Robert J. Huck of Croker & Huck for appellees except Rogers.

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

BRODKEY, J.

Plaintiff, Rieschick Drilling Company (Rieschick), which was engaged in the business of drilling wells, appeals to this court from a judgment entered in the District Court of Otoe County in an action brought by Rieschick against the defendants, Charles J. Rogers Construction Company (Rogers), a subcontractor, and against Darin & Armstrong, Inc., the general contractor, and also against American Casualty Company and National Fire Insurance Company, the bonding companies for the general contractor. In its action in District Court, Rieschick sought to recover the reasonable value of well-drilling labor, materials, and equipment furnished pursuant to alleged oral requests by Rogers, the subcontractor; and also sought in the same action to recover against the bonding companies under Neb. Rev. Stat. § 52-118.01 (Reissue 1978), and to recover an attorney fee under Neb. Rev. Stat. § 44-359 (Reissue 1978). Defendant Darin & Armstrong, Inc., the general contractor, was dismissed from the action prior to trial, and no error is assigned in this appeal with regard to such dismissal.

Trial was had to the court, sitting without a jury, in the District Court of Otoe County, following which the court entered judgment for Rieschick in the amount of $13,547.19 and court costs. The trial court did not award Rieschick attorney fees in this action. The principal issues raised in this appeal are whether the trial court erred in its assessment of its award to Rieschick and whether it erred in failing to award Rieschick attorney fees pursuant to the aforementioned statute, § 44-359. Rogers has cross-appealed, alleging that the work and materials performed and supplied by Rieschick were within the scope of its original contract with Rieschick; and Rogers prayed for the dismissal of Rieschick's petition and also for judgment on its counterclaim against Rieschick for the amount of $4,831.78 and costs, in which counterclaim it sought to recover the value of labor performed by Rogers' employees in assisting Rieschick in performing its contract.

The facts in this case reveal that Rogers, a Michigan corporation, was generally engaged in underground excavation and foundation construction, and entered into a subcontract in the spring of 1976 to do the excavation and drainage work required in connection with the construction of a coal power plant near Nebraska City. The contract between Rogers and the general contractor, Darin & Armstrong, Inc., required that a 70- x 90-foot area be excavated and dewatered so that the power plant thrust block, a massive concrete foundation, could be constructed. The plans on the project called for the thrust block to be installed at an elevation of 893.5 feet above sea level. The location of the site where the excavation was to take place had a ground surface elevation of approximately 916 feet and a water table average of 906 feet. The water table average would fluctuate because of the project's proximity to the Missouri River and also because of seasonal precipitation. The project required that the excavation site be dewatered to a level

of 890 feet to provide that the bottom of the thrust block area would be dry for the pouring and curing of the cement foundation. As Rogers did not generally engage in dewatering excavation sites, the company "put out a call" for dewatering bids in March of 1976.

In response to this call, Rogers received three bids. The first was from Layne-Western Company in the sum of $14,160 and provided for the drilling of two wells and the installation of two 40-horsepower well pumps which would dewater the excavation area to the 890-foot level. The second bid, from Stang Hydronics, Inc., was in the sum of $12,000 for the installation of wells, plus the rental sum of $1,900 per month to operate the water pumps and discharge pipes. This bid also recited that Stang Hydronics would bring the water table down to the 890-foot level. After receipt of these bids, Rogers contacted Rieschick Drilling, a partnership in Falls City, Nebraska, which is operated by Roy Rieschick and his mother, Carol Rieschick. It appears that this contact was made by Rogers because Rieschick drilled an average of 50 wells a year and was familiar with the water table in the Nebraska City area. Roy Rieschick examined the excavation site and submitted a bid of $12,240 on April 6, 1976. The Rieschick bid called for the installation of four wells and four 6-inch submersible pumps, and included the statement: "This bid is for completed well & pump installed & completely owned by C. J. Rogers. Any overtime or extra cost is billed to C. J. Rogers."

Rogers accepted this bid by issuing a purchase order the same day, and installation of the well and pump system began on April 10, 1976. This installation, however, proved inadequate and the pumps failed to lower the water table to the required 890-foot level. Rieschick then advised Rogers that it would use two 8-inch well pumps to complete the dewatering project. To avoid further delay in the construction of the power plant, Rogers informed Rieschick to proceed, relying upon Rieschick's expertise. The 8-inch pumps were

installed in May of 1976, but, notwithstanding, were not adequate to lower the water table to the required level. It finally appears that in June of 1976 Rieschick rented a well point water pump system and installed it at the excavation site. This system, together with the other pumps, was able to keep the water level down so that the installation of the thrust block could proceed. The record indicates that Rieschick presented Rogers with statements totaling $28,854.42 for labor and materials furnished in connection with the installation of the two 8-inch water pump systems. This amount did not include the rental of the well point system, which was subsequently paid to Rieschick. When Rieschick threatened to remove the well point pump system unless Rogers' supervisor signed the invoices, indicating approval, the supervisor signed the invoices, but with the notation that, while the work had been done, there was no agreement about payment or the prices charged for the labor and materials provided. Upon completion of the project, it appears that Rogers attempted to return the 8-inch pumps to Rieschick, which refused to accept them, contending that the pumps became the property of Rogers. These pumps were subsequently removed by Rogers when it completed its work in January of 1977, and have been stored at Rogers' offices in Michigan since that time as the property of Rieschick.

This matter came to trial before the District Court of Otoe County on April 25, 1979, and May 16, 1979, a jury having been waived by all of the parties. The court found that the original contract of April 6, 1976, required Rieschick to design and install a dewatering system which would lower the water table at the thrust block site to 890 feet. The court further found that Rieschick's installation was unsuccessful and inadequate in lowering the water table to the contracted level. In its memorandum opinion, filed August 8, 1979, the trial court stated:

"An issue has arisen as to whether the plaintiff was

bound by his original bid to lower the water table to the 890 foot level or whether the contract was changed at this point.

"For the purpose of this litigation, the Court determines that the contract requirements were changed by Rogers and subsequently became an oral contract. The installation of the two 8-inch pumps failed to lower the table to the desired level once again. And at this time the plaintiff suggested installation of a well point system to dewater in the thrust block area. A series of interconnected well points were sunk in the thrust block area and proved successful in dewatering to the desired level together with the submersibles which had already been installed.

"The defendant Rogers paid a total of $14,089.12 which included the original contract price together with those items appearing at Exhibit 30 [materials required to drill and install the initial wells and 6-inch pumps] and an additional $3700.00 for the rental of the well point system which the plaintiff had procured through Stang Hydronics.

"The Court here finds the basic law to be that a contractor may recover the reasonable value of extra work which is necessary because of material changes made in the contract at the request of the owner. The plaintiff's evidence on many of the items termed extras is too sparse to meet the requirement of a preponderance of the evidence.

"The Court finds that recovery here must rest upon a quantum meruit and is limited to additional costs incurred which are proven to have been performed under authorization from Rogers.

"Under any quantum meruit theory, it is the Court's opinion that the law demands adequate proofs that the charges made were fair and reasonable. With respect to the two 8-inch pumps, the Court has looked for evidence and failed to find any which would indicate that Rogers was to purchase the pumps and the $10,412.52 for the sale of the pumps is disallowed

in the Court's analysis, the pumps themselves to be the property of the plaintiff and to be returned to the plaintiff with the costs of shipping to be paid by the plaintiff.

"In an analysis of the evidence, it is believed that the following items are supported therein and that evidence is sufficient to preponderate on a quantum meruit basis:

| | |
|---|---|
| Truck Rental: | $ 304.80 |
| Labor: Regular - $1747.20 | |
| Overtime - 1094.37 | 2841.57 |
| Payments to Union for health & welfare and pension: | 400.00 |
| Fittings, parts & equipment: | 6311.12 |
| Fittings, parts & equipment: | 368.70 |
| Rental charge on drilling rig: | 3321.00 |
| | $13547.19 |

*"The parties in their presentation to the Court have submitted this under the claim 'extras' and not as a part of the contract of April 6, 1976. The Court is treating it in the same manner. It is the intention of the Court that the figure in the judgment not overlap any of the items paid under the contract of April 6th or the $3700.00 paid as rental payment on the dewatering system."* (Emphasis supplied.)

We note at the outset that the trial court entered judgment "against the defendants and each of them." Darin & Armstrong, Inc., the general contractor, was a named defendant in the lawsuit as originally filed. However, as previously mentioned, it was dismissed from the lawsuit on its motion prior to the trial of this action. Therefore, insofar as the judgment of the trial court might be interpreted as also being a judgment against Darin & Armstrong, it would obviously be incorrect; and the reference in the court's memorandum opinion to the effect that Rogers was a subcontractor to Darin & Armstrong, with no other findings as to the liability of Darin & Armstrong, would not be sufficient to constitute a judgment against Darin &

Armstrong, or render it liable thereunder. To clarify any possible misunderstanding in this regard, we find that the judgment entered by the trial court in this case does not constitute a judgment against Darin & Armstrong, and the assignment of error contained in the brief of appellees and cross-appellants (except Rogers) to the effect that the court erred in awarding judgment against Darin & Armstrong, Inc., because of its previous dismissal by the court as a party to the action, is correct, and the record should be corrected to reflect that fact.

The general rule which controls our review of this matter in this case is that the judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it. *Knight Bros., Inc. v. State*, 189 Neb. 64, 199 N.W.2d 720 (1972). In such case, the verdict will not be disturbed on appeal unless clearly wrong. *Brandt v. Mayer*, 196 Neb. 751, 246 N.W.2d 203 (1976); *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974); *Farmer's Union Co-op Company of Mead v. Flamme Brothers*, 196 Neb. 699, 245 N.W.2d 464 (1976).

As stated above, the bid submitted by Rieschick contains the language: "This bid is for completed well & pump installed & completely owned by C. J. Rogers. Any overtime or extra cost is billed to C. J. Rogers." It is undisputed that Rieschick received full payment as per the terms of its original contract, as well as payment for certain additional items as set out in exhibit 30, representing extra costs incurred in the installation of the original 6-inch pumps referred to. A review of the record in this case convinces us that

the action for the recovery of value of labor and materials not contemplated by the original contract was based upon the theory of such items clearly being "extras," and recovery therefor was allowed by the court on a quantum meruit basis. The case was tried on that theory by the parties, and the court so found in its judgment. The rule is well established in Nebraska that where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434 (1976); *Bohmont v. Moore*, 141 Neb. 91, 2 N.W.2d 599 (1942). We have also held that on appeal a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis. *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976). In *Meyer v. Moell*, 186 Neb. 397, 183 N.W.2d 480 (1971), we held that a party will not be permitted to change his theory on appeal. In the trial court's memorandum, accompanying its judgment entry, the court stated: "The parties in their presentation to the Court have submitted this under the claim of 'extras' and not as a part of the contract of April 6, 1976. The Court is treating it in the same manner." Under the rule stated above, we shall likewise do so. The court rendered judgment in favor of Rieschick for $13,547.19 for the items it found from the evidence constituted "extras" as set out in its memorandum opinion. We conclude there is evidence to support the court's findings in this regard, and that the court was not clearly wrong in so finding.

In this connection we discuss certain specific errors claimed by Rieschick in this regard. In its amended petition, Rieschick originally prayed for judgment in the amount of $42,230.57 with interest, costs, and attorney fees. The court awarded Rieschick judgment

in the sum of $13,547.19. The court also found that Rieschick's evidence on many of the items termed extras was too sparse to meet the requirement of a preponderance of the evidence. Rieschick has admitted that all the extra work incurred in the installation of the original pump system has been paid for by Rogers. With reference to the ownership of the two 8-inch submersible pumps, or the liability for payment to Rieschick for the value thereof, the court found that there was no support for Rieschick's contention that Rogers would own the pumps at the termination of the dewatering project. William Leoni, the president of Rogers, testified that no one at Rogers ever agreed to pay for the pumps. We conclude that the finding by the trial court that Rieschick had failed to prove that such pumps were to be owned by Rogers was not clearly erroneous, and that the pumps are being held for the benefit of Rieschick and subject to its disposition.

Rieschick also contends that there is due it the sum of $4,226 for costs of repairs to a mud pump. The court disallowed this item on the grounds that there was no evidence to show what repairs were actually performed on the mud pump or what the actual costs were in that regard.

Rieschick also claims that Rogers did not pay for the rental on the well point system in the amount of $3,700. The evidence reveals that Mr. Leoni, the president of Rogers, agreed to reimburse Rieschick for the costs of renting the well point system. The trial court found that Rogers had paid the $3,700, and specifically found that the award of $13,547.19 to Rieschick in the court's judgment should not overlap any of the extras Rogers had already paid for, or the $3,700 rental fee paid as rental payment on the dewatering system. The court was not clearly wrong on this item.

Defendant bonding companies contend that even if some of the judgment of the District Court is affirmed, there can be no judgment against Darin & Armstrong because that company was dismissed prior to trial.

We have previously agreed with that contention. They also contend, however, there can be no judgment against the bonding companies because there was no direct contract or dealings between Rieschick and the general contractor, Darin & Armstrong, and also because no proper statutory notice was given under § 52-118.01. With respect to the first contention, we note that that statute provides that "any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within four months from the date on which such person did or performed the *last of the labor*, or furnished or supplied the *last of the material* for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." (Emphasis supplied.) In this case, although there was no contractual relationship between Darin & Armstrong and Rieschick, there were clearly direct dealings between the subcontractor, Rogers, and Rieschick. In this connection see *McElhose v. Universal Surety Co.*, 182 Neb. 847, 158 N.W.2d 228 (1968). The bonding companies also contend that notice, to be effective under the above statute, must be given with respect to every separate invoice submitted by Rieschick during the course of the performance or construction of the project. We do not believe this contention is supported by the language of the statute itself which provides for "a right of action upon the bond upon giving written notice to the contractor within four months from the date on which such person did or performed the *last of the labor*, or furnished or supplied the *last of the material* for which such claim is made . . . ." (Emphasis supplied.) We conclude that the District Court did not err in entering judgment not only against Rogers on quantum meruit but also

against the bonding companies on the statutory remedy on the bonds as provided under § 52-118.01.

Appellees also contend that there was insufficient evidence to establish the value of some of the materials and services involved in this appeal, and that mere invoices or statements showing the cost of such materials and services are insufficient to establish the fair and reasonable value thereof. While it may possibly be true that specific evidence of reasonable value was lacking with regard to some of the items for which an award was made, we do not believe this fact is necessarily determinative of Rieschick's right to recover for such items. In *Ritzau v. Wiebe Constr. Co.*, 191 Neb. 92, 97, 214 N.W.2d 244, 247-48 (1974), this court stated: "'There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.'" We believe the court was not clearly wrong in determining the reasonable value of the items for which it awarded judgment under the evidence before it in the record.

Finally, we turn to what is probably Rieschick's main assignment of error in its appeal to this court, to wit, that the trial court erred in failing to award attorney fees pursuant to § 44-359. We note that it has, in its brief on appeal, placed this assignment at the top of its list of alleged errors. As previously stated, the trial court did not award Rieschick attorney fees in this action, although it did hold a separate hearing to consider the matter following the entry of the judgment itself. We believe the trial court erred in this determination and that Rieschick is entitled to an award of attorney fees under § 44-359, which reads in part as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any

company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, *shall* allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs." (Emphasis supplied.)

It is clear in this case that Rieschick did sue the bonding companies of the principal contractor, and recovered judgment against them. This court has previously held that the foregoing section is applicable to actions on performance bonds. *Omaha Home for Boys v. Stitt Constr. Co., Inc.*, 195 Neb. 422, 238 N.W.2d 470 (1976). See, also, *Reorganized Church of Jesus Christ v. Universal Surety Co.*, 177 Neb. 60, 128 N.W.2d 361 (1964). We have also held that the provision of § 44-359 with relation to the allowance of attorney fees is mandatory. *State ex rel. School Dist. v. Ellis*, 160 Neb. 400, 70 N.W.2d 320 (1955); *Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (1979). The amount of such fees to be allowed under the foregoing statute rests in the sound discretion of the court. *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979); *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968).

In view of what we have stated above, we conclude that the judgment of the District Court of Otoe County must be affirmed, but modified to exclude the application of such judgment to Darin & Armstrong, the principal contractor. We also remand the case to the District Court with directions to hold a hearing to determine the fair and reasonable amount of attorney fees to be awarded to Rieschick.

AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

VIVIAN WATLEY, APPELLEE, V.
ORLIN WATLEY, APPELLANT.

302 N.W.2d 690

Filed February 27, 1981. No. 43101.

**Alimony: Judgments.** An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Law Offices of Kenneth Cobb, P.C., for appellant.

David B. Downing for appellee.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

GARDEN, District Judge.

This case involves a petition to modify a divorce decree. The plaintiff, Vivian Watley (now Merrill), was divorced from the defendant, Orlin Watley, in 1972. The written stipulation of the parties provided in part as follows:

"8. The defendant agrees to pay the plaintiff the sum of $1,000.00 on or before the 10th day of July, 1972, and $1,000.00 on or before the 10th day of each month thereafter, for a total of 20 years, or 240 months.

"9. The defendant agrees that to secure the payments specified in paragraph 8. above, he will continue to maintain his present life insurance program, consisting of the following, to-wit:

| | |
|---|---|
| Policy # V-8093276 | $ 1,000.00 |
| Policy # V-818-9888 | 2,000.00 |
| Policy # 224893 | 10,000.00 |
| Policy # 5682877 | 35,000.00 |
| Policy # 60499136 | 42,450.00 |
| Total Face Value ..... | $90,450.00 |

"Defendant further agrees that he will exhibit these

policies to plaintiff at any reasonable time and he will further cause the issuing company or companies to prepare proper forms to be executed by the defendant which will provide, in effect, that the defendant shall not change the beneficiary of said life insurance policies without the written consent of the plaintiff. At such time as all 240 payments have been made, the plaintiff's claim or lien or interest in these said life insurance policies shall cease to exist and shall be released by the plaintiff to any insurance company if requested to do so. The defendant further agrees that so long as any payments shall remain due under paragraph 8. above, he will not pledge, mortgage, assign or in any way encumber the life insurance policies referred to herein.

"Defendant further agrees as additional security for the payment of the provisions in paragraph 8., not to do anything of his own act to diminish the value of the assets of his estate, including his stock in Ag-Tronic, Inc.

"10. In the event the plaintiff has remarried at the time of her death and payments are still due under paragraph 8. above, then no further obligation for payment shall exist and the judgment will be fully satisfied. In the event of the plaintiff's death and she has not remarried, then all payments due from the defendant, as set forth in paragraph 8. above, shall be payable equally to the two (2) sons of the parties hereto in the same manner and at the same rate as contained in the said paragraph 8."

The divorce decree entered on June 30, 1972, provided in part:

"8. The court further finds that the defendant should pay to the plaintiff the sum of $1,000.00 per month, commencing with the month of July, 1972, for a total of 240 months, and the Court further approves the security arrangements for these said payments, as set forth in detail in the Stipulation.

"9. The Court approves the division of property in all

respects, as set forth in detail in the said Stipulation of the parties."

The plaintiff married Harvey Merrill on July 5, 1975. The defendant filed a petition for modification on December 18, 1975, alleging the marriage of plaintiff to Harvey Merrill; that Harvey Merrill is able to provide for the needs of the plaintiff in at least as good a manner as that to which she was accustomed prior to the divorce; that it is not necessary for her support or maintenance that she receive the sum of $1,000 per month from the defendant; that it will operate as a gross injustice to the defendant to continue paying said sum during the marriage of the plaintiff to Harvey Merrill; and prayed that the decree be modified.

Thereafter, the plaintiff filed a petition for modification, alleging that her needs had materially increased; that the ability of the defendant to pay had materially increased since the date of the decree; and prayed for a modification of the decree to increase her monthly payment to $2,000 per month for the balance of the 20-year period originally specified.

Issues were joined and trial was had to the court, resulting in the dismissal of both petitions for modification. The defendant filed a motion for new trial, which was overruled, and perfected his appeal. We affirm the judgment of the District Court in dismissing defendant's petition for modification.

The defendant argues that he should no longer be required to pay alimony pursuant to the decree because of the plaintiff's remarriage. The defendant urges us to apply the provisions of Neb. Rev. Stat. § 42-365 (Reissue 1978) to this case and to terminate the alimony.

The alimony award in the June 30, 1972, divorce decree was an award of alimony in gross. It was unqualified. While it is true that paragraph 10 of the stipulation of the parties provided for termination of the monthly payments upon the death of the plaintiff after remarriage, no such provision was made in the decree that it should terminate upon death or re-

marriage of the recipient. Prior to the enactment of Neb. Rev. Stat. § 42-366 (Reissue 1978), the effective date of which was July 6, 1972, the law was clear regarding the effect of stipulations concerning property settlement and alimony. "Courts may approve property and alimony settlements made between the parties, when a divorce is granted, if it finds the same to be fair and equitable. However, when the court in its decree determines and fixes the amount of alimony and no appeal is taken therefrom, the effect of the stipulation, so far as the decree is concerned, is that it was taken merely as advisory to the court and the terms fixed by the decree are controlling." *Dunlap v. Dunlap*, 145 Neb. 735, 739, 18 N.W.2d 51, 53 (1945); *Coker v. Coker*, 173 Neb. 361, 113 N.W.2d 329 (1962). We therefore view the case from the standpoint of the provisions of the decree.

The law here is clear. "'An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification.'" *Kasper v. Kasper*, 195 Neb. 754, 755, 240 N.W.2d 591 (1976); *Bryant v. Bryant*, 191 Neb. 539, 216 N.W.2d 162 (1974). See, also, *Karrer v. Karrer*, 190 Neb. 610, 211 N.W.2d 116 (1973); *Ziegenbein v. Damme*, 138 Neb. 320, 292 N.W. 921 (1940). The facts of this case fall clearly within the above-cited authorities. There is no merit to defendant's contention.

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

AFFIRMED.

# J. C. DAUGHERTY, APPELLEE, V. ASHTON FEED AND GRAIN CO., INC., A NEBRASKA CORPORATION, APPELLANT.

303 N.W.2d 64

Filed February 27, 1981. No. 43171.

1. **Injunction: Appeal and Error.** An action for a permanent injunction is heard de novo on appeal. Where an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court.
2. **Injunction: Nuisances.** An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case.
3. **Nuisances.** Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation.
4. ____. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness.
5. ____. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
6. **Pleadings: Equity.** A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence.
7. **Jurisdiction: Equity.** A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.

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

Perry, Perry, Witthoff & Guthery for appellant.

Norman E. Stephens & Donald R. Janousek for appellee.

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

BRODKEY, J.

Ashton Feed and Grain Co., Inc., (Ashton Feed), the defendant below, appeals to this court from a permanant injunction entered on November 16, 1979, by the District Court of Sherman County, Nebraska, restraining it from operating certain fans and dryers in connection with its feed and grain storage business. The action seeking the injunction against Ashton Feed was brought by J. C. Daugherty, the appellee herein, who is the owner and resident of an 8-acre tract adjacent to the land upon which the business of Ashton Feed is located in rural Ashton, Nebraska. The record indicates that the appellee and his family have resided on their property since 1974. John Beall, president of Ashton Feed, stated that he acquired the grain elevator in Ashton in February of 1978, at which time it had a grain storage capacity of 175,000 bushels. Improvements were subsequently made to the facilities that year, which included the addition of twelve 55,000-gallon storage bins that increased the grain storage capacity of the elevator to over 800,000 bushels of grain. It also appears that two aeration fans were attached to each of the 12 bins for the purpose of controlling the moisture content in the bin in order to preserve the grain.

On October 24, 1978, Daugherty filed a "Petition for Temporary Restraining Order," with the District Court. In his petition, the appellee alleged: "5.0 That the Defendant has carried on, is still carrying on and threatens to continue carrying on the drying of the grain stored in the said bins by the use of two 28 horsepower aeration fans in each bin, which are used continuously; 6.0 That said fans have caused, still cause, and will continue to cause vibrations of the earth to take place and sundry great noises to continue night and day, thereby causing a serious change in the

character of Plaintiff's property, an injury which cannot be adequately compensated for in damages; 7.0 That the said noise and vibrations have interfered with and continue to interfere with the use and enjoyment of the Plaintiff's premises, have interfered with and continue to interfere with the comfort and enjoyment of the Plaintiff and his family in the occupation of their dwelling house situated on the Plaintiff's land, thereby making it difficult for them to sleep, have caused great disturbance to the livestock and dogs kept by the Plaintiff on his property, and have made it uncomfortable and impossible to enjoy the ordinary use of said premises and the dwelling house thereon, and to pursue the ordinary occupation of life thereon . . . ."

On October 24, 1978, the matter was submitted to the District Court, which granted a temporary restraining order "restraining the Defendant from operating any and all dryers and fans in such a manner as to interfere with the reasonable use and occupation of the Plaintiff's property by the Plaintiff upon the Plaintiff executing and undertaking in the sum of $3,000.00 as required by law." On November 2, 1978, at the hearing held for a temporary injunction, the parties stipulated that the defendant be allowed 6 months to make modifications to the fans to reduce the noise and provided that the plaintiff could reset the hearing on the temporary injunction within 10 days' notice to the defendant. An order to this effect was entered by the District Court, and the temporary restraining order of October 24, 1978, was dissolved.

It next appears that on April 11, 1979, the plaintiff moved to reset the hearing for the injunction; and on June 19, 1979, he filed an amended application in support thereof, alleging that the defendant had failed to reduce the noise nuisance within the time period stipulated by the parties.

This matter came to trial on July 13, 1979, at which time the court struck plaintiff's amended petition

and advised the parties that the case would proceed on plaintiff's original petition relating to the abatement of the noise nuisance. The record indicates that plaintiff presented his evidence that date and the trial was continued to October 25, 1979, at which time Ashton Feed presented its evidence. In its decree entered on November 16, 1979, the District Court found the noise emanating from Ashton Feed's feed-storage facility constituted a nuisance. In particular, the court stated:

"On this 16th day of November, 1979, upon consideration of the evidence and the briefs filed herein the Court finds that during 1978, the defendant erected 12 steel grain bins with ventilator fans on railroad right-of-way abutting plaintiff's land together with an unloading pit and two dryers. The unloading pit is approximately 97 feet from the plaintiff's residence. The defendant operates a feed and grain business and uses the dryers, the unloading pit, and the bins for the drying, unloading, and storage of grain which is their principal business. The plaintiff has lived in the residence since 1974. The evidence discloses that the fans on the bins are used irregularly during the year and they are used for longer periods during the harvesting season. Since the last hearing and as recently as one day prior to the last trial, the defendant has experimented with noise reduction by the erection of baffles designed to reduce the direct flow of sound from the bin fans toward plaintiff's residence. The plaintiff complains that the noise interferes with his reasonable use and occupancy of his residence and his enjoyment of his home where he lives with his wife and one son.

"The Court further finds that the plaintiff resides in the community of Ashton, Nebraska, which is a small rural community without the benefit of zoning laws. The plaintiff has somewhat of a rural residence and in his yard normally has approximately 30 hogs and 3 dogs.

"The layout of the bins and dryers shows that the

bins are arranged in two rows. One row of six closest to the center of the right-of-way have their fans pointed generally in the opposite direction of the plaintiff's house. The row of six farthest from the center of the right-of-way have their fans pointed out and away from the other bins and are directed generally toward the perimeter of the right-of-way and partially toward the residence of the plaintiff. The baffles recently erected by the defendant are partially effective in reducing the noise of the fans, but do not reduce the noise to such level as not to constitute a nuisance to the residential parties abutting the right-of-way.

"The Court further finds that had the defendant placed the bins on their leased area of the right-of-way with more space between bins, the defendant could have reasonably directed the fans toward the center of the right-of-way and away from the property of the plaintiff. The evidence indicates, however, that the bins are densely concentrated upon the leasehold leaving minimal space between the bins.

"In determining whether noise created by the defendant constitutes a private nuisance, the Court has considered the nature of the community and the nature of the residential area in which the plaintiff resides and the fact that improvements by the defendant are located upon railroad right-of-way. Further that presently the railroad only operates two trains a week upon such track.

"The Court finds that the operation of the fans on the bins and dryers can and does constitute a nuisance and unreasonably interferes with the use and occupancy of the plaintiff's residence."

Based upon the above findings, the court ordered that Ashton Feed be restrained from operating the bin fans and dryers on Saturdays and Sundays and between the hours of 8 p.m. to 7 a.m. during the week. The court also directed Ashton Feed to either baffle all the grain bin fans in the row closest to the plaintiff's property or relocate all the fans so they exhaust toward the center of the railroad right-of-way.

Ashton Feed's principal assignments of error in this appeal are that the trial court erred in finding that its operation of aeration fans located on the grain bins constituted a nuisance and in finding that the separate grain dryers were involved in the action and constituted a nuisance. Ashton Feed further assigns as error that the trial court erred in including its entire operation within the mandate of its judgment, and, also, in ordering that the fans and dryers not be operated on Saturdays.

We begin our discussion by setting forth the applicable law governing the scope of our review on appeal. This action, being one for a permanent injunction, will be heard de novo on appeal. Where an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. *Prauner v. Battle Creek Coop. Creamery*, 173 Neb. 412, 113 N.W.2d 518 (1962); *Probert v. Grint*, 148 Neb. 666, 28 N.W.2d 548 (1947). This court has also held that there is no fixed or arbitrary rule governing cases of this class, and each case must be determined by the facts and circumstances developed therein. *Sarraillon v. Stevenson*, 153 Neb. 182, 43 N.W.2d 509 (1950); *Beisel v. Crosby*, 104 Neb. 643, 178 N.W. 272 (1920). As is stated in 58 Am. Jur. 2d *Nuisances* § 151 at 731-32 (1971): "An injunction against a nuisance is an extraordinary remedial process which is granted, not as a matter of right, but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case . . . ."

We note that the operation of Ashton Feed is a lawful business under the law, and is not a nuisance per se. This does not mean, however, that it may not become a nuisance in fact, due to its operation of the storage facilities and/or its location within the community. See, *Horn v. Community Refuse Disposal, Inc.*, 186 Neb. 43, 180 N.W.2d 691 (1970); *City of Syracuse v.*

*Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394 (1968). A legitimate business may become a nuisance by reason of the conditions implicit in and unavoidably resulting from its operation. *Sarraillon v. Stevenson, supra.* It is on this basis that the plaintiff contends that the noise created by the operation of Ashton Feed's grain bin fans is a nuisance.

It is generally recognized that under certain circumstances noise may constitute a nuisance and be enjoined. "Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation . . . ." 58 Am. Jur. 2d *Nuisances* § 62 at 629-30 (1971).

Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness. 66 C.J.S. *Nuisances* § 22 (1950); 58 Am. Jur. 2d *Nuisances* §§ 62, 64 (1971); *Smith v. Western Wayne Co. Assn.*, 380 Mich. 526, 158 N.W.2d 463 (1968); *Sarraillon v. Stevenson, supra; Prauner v. Battle Creek Coop. Creamery, supra.* In *Kellerhals v. Kallenberger*, 251 Iowa 974, 980, 103 N.W.2d 691, 694 (1960), the Supreme Court of Iowa stated: "To justify abatement of a claimed nuisance the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. Such an annoyance has been shown here. There is no basis for the conclusion plaintiffs are not of ordinary sensibilities. In this connection we have held it is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities. [Citations omitted.]"

In its testimony at the trial, Ashton Feed attempted to prove that the Daughertys were not people of ordinary

sensibilities. Neil Sullivan, a witness testifying on behalf of Ashton Feed, testified with relation to noise levels at the Ashton Feed and Grain elevator; and, in reply to a question as to whether or not the noise from Ashton Feed's grain elevator would seriously disturb a person of ordinary habits and sensibilities, stated: "No, I do not think that that would normally offend an individual. I base that on a number of different studies in terms of what sound levels are present in the number of different areas." He expressed his opinion on the basis of decibel sound levels in various cities and under varying circumstances. In reply to the opinion expressed by the witness Sullivan, the court at that time stated: "I appreciate your efforts, but the Court wonders what difference it makes as to whether or not the level in the city of Ashton now approaches the average level in the city of Chicago. The real issue is this case, in this circumstance, in this community with those circumstances and not that it doesn't exceed the average of the United States of America. . . . I don't want to argue with your position but Riverdale and Ashton are probably different than where most of the people in the United States live. Maybe they're noisier." It is clear from the above-quoted evidence that the witness Sullivan was in no way testifying with regard to the sensibilities of the Daughertys themselves, but only whether, on the basis of various scientific tests he had performed in various cities and under varying circumstances, it would be his opinion that the sound levels at Ashton Feed would not offend a person of ordinary and normal sensibilities. The fact question presented on this issue was clearly for the decision of the trial court, which apparently was not convinced by Ashton Feed's evidence that the Daughertys were not people of ordinary sensibilities in view of the fact that it issued the injunction against Ashton Feed.

In the present case, plaintiff has presented evidence which indicates that Ashton Feed's grain storage

facility is in operation during the entire year and that the hours of such operation vary with the corn and wheat harvest. There is evidence in the record that the fans in question are used on an irregular basis during the year, and for a period of about 8 to 11 hours a day; but that the fans are used for longer periods during the harvesting season, and on occasions have even been operated 24 hours a day. Plaintiff's evidence reveals that not only have he and his family been deprived of sleep on occasions but that the noise also substantially interferes with the daily activities which occur within his home. The record indicates that in response to the stipulation entered into between the parties on November 2, 1978, Ashton Feed has attempted to reduce the noise emanating from the grain bin fans by regulating the hours that such fans are in use and by attempting to baffle the noise they create with insulation materials. While the regulations governing the hours the fans are in use appear to have relieved much of the complained nuisance, the baffling of the fans has proved ineffective. John Beall, president of Ashton Feed, testified that Ashton Feed tried to baffle the aeration fans by placing bales of hay around them, but that not all the fans were so insulated by the hay.

From the evidence found in the record on appeal, we agree with the trial court that the aeration fans operated by Ashton Feed on its bins constitute a nuisance and the hours of their use should be enjoined. We note that Ashton Feed is not being enjoined from operating a grain storage business, but solely restricted in the hours such fans on the bins and dryers can be operated. The rule is well settled that a court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it cannot be adequately compensated in damages and its continuation would occasion a constantly recurring grievance. *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783,

157 N.W.2d 394 (1968); *Lowe v. Prospect Hill Cemetery Ass'n.*, 58 Neb. 94, 78 N.W. 488 (1899).

We now consider Ashton Feed's assignment of error and contention that the court erred in including within the purview of its injunction Ashton Feed's entire operation, including not only the aeration fans but also the fans on the separate grain dryers. It is true that, in its original petition for a temporary restraining order, the plaintiff only complained about the noise from the operation of the aeration fans, and Ashton Feed thus argues that it was improper for the court to also enjoin the operation of the dryers. John Beall, the president and a stockholder of Ashton Feed, testified: "Mrs. Daugherty called me up and said that the fans were making a great deal of noise. I asked her if it might be the dryer and she said, no the dryer was not causing her any problems." However, Fred Vieth, the manager of the elevator, was asked on cross-examination: "One other thing you stated that Mrs. Daugherty had a conversation with you in which she said the dryer was — wasn't of a problem. Has she discussed the fans with you at any time?" To this question, Mr. Vieth answered: "Yes, they drive her up the wall." This clearly presented a fact question as to whether or not the operation of the dryer fans were part of the nuisance suffered by the Daughertys. The trial court obviously believed that the dryers were part of the noise problem, and it specifically found as follows in its injunction: "The court finds that the operation of the fans on the bins and dryers can and does constitute a nuisance and unreasonably interferes with the use and occupancy of the plaintiff's residence." Although a review in an equity case appealed to this court is de novo, we have also frequently stated that the court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the conflicting evidence over the other. In this case, we agree with the conclusions of the trial court.

It must also be remembered that in plaintiff's original petition for a temporary restraining order, and also in his subsequent application for a restraining order, he prayed "for such other and further relief as the Court may deem just and equitable." A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. See *Kellerhals v. Kallenberger*, 251 Iowa 974, 103 N.W.2d 691 (1960). A court of equity can tailor its injunction to fit the circumstances of a particular situation. It is now established law in this jurisdiction that a court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976). It is clear that in the instant situation the trial court balanced the equities of the situation. It did not by its injunction restrain Ashton Feed from doing business, but, on the contrary, only limited the days and hours during which Ashton Feed was prohibited from operating its fans and dryers. It further ordered Ashton Feed to endeavor to correct this situation by use of baffles, etc., and apparently Ashton Feed has taken steps to endeavor to do so. Should the desirable result be obtained by virtue of improvements in sound insulation techniques, or for other reasons, Ashton Feed can at that time apply to the court for further relief.

In view of what we have stated above, we conclude that the trial court was correct in its judgment and decree, and must be affirmed.

AFFIRMED.

# SHARON L. MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF WAYNE K. MILLER, DECEASED, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

302 N.W.2d 692

Filed February 27, 1981. No. 43184.

1. **Tort Claims Act: Negligence.** An alleged negligent act or omission is not actionable under the state Tort Claims Act unless it was the proximate cause of an injury.
2. **Tort Claims Act: Venue.** The statutory provisions authorizing the transfer of an action where the venue is improper are not applicable to suits under the state Tort Claims Act.

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

E. Terry Sibbernsen of Welsh, Sibbernsen and Bowen and J. Marvin Weems for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson for appellee.

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

PER CURIAM.

This is a wrongful death action against the State of Nebraska, brought in Lancaster County, Nebraska, under the state Tort Claims Act. Wayne K. Miller died as the result of injuries sustained in an automobile accident in Wheeler County, Nebraska, on January 30, 1976. The accident occurred when a pickup truck traveling in a northerly direction on U. S. Highway 281 collided with the automobile being operated by Miller. The petition alleged that the accident happened when the right front wheel of the pickup truck dropped off the hard-surfaced portion of the highway onto the soft shoulder. In attempting to turn back onto the highway, the driver of the truck lost control of his vehicle. The truck then veered across

the highway and collided head-on with the Miller vehicle.

The petition alleged that the State was negligent in failing to post warning signs; in allowing the drop-off to exist; in designing, constructing, and maintaining the highway with the shoulder 3 to 4 inches lower than the hard-surfaced portion of the highway; and in failing to provide a safe roadway.

The trial court sustained a motion of the defendant striking the allegations concerning negligent "design" of the highway from the petition. Later, the action was dismissed because it had not been filed in Wheeler County, the county where the accident occurred. The plaintiff has appealed.

Neb. Rev. Stat. § 81-8,214 (Reissue 1976) requires that the action be brought in the county where the act or omission occurred. The plaintiff's theory of the case is that the action could be brought in Lancaster County because the Department of Roads was negligent in "its policies, judgments and actions" which occurred at its principal place of business in Lancaster County, Nebraska. Only the allegation of negligent design could be considered under this theory.

The trial court sustained the motion to strike the allegation of negligence in the design of the highway on the theory that the design of the highway was a discretionary function or duty within the statutory exception. The state Tort Claims Act excludes "[a]ny claim based . . . upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused." Neb. Rev. Stat. § 81-8,219 (Reissue 1976). We do not decide that issue.

If we assume, for the purpose of discussion, that negligent design would not be exempt under the act, it could not be actionable until the highway was actually built. Design alone could never be the cause of an injury. In the event of an accident caused by

construction and maintenance of a highway in accordance with such a design, it would be the construction and maintenance of the highway which would be the proximate cause of any injury and the basis for the action. Accordingly, the action would have to be brought in the county where the act or omission occurred — the county where the accident happened. § 81-8,214. This construction appears to conform to the legislative intent as expressed during the consideration of the act.

The plaintiff requested that in the event the trial court determined the action could not be brought in Lancaster County, the action be transferred to Wheeler County. This request was properly denied. The statutory provisions authorizing the transfer of an action where the venue was improper are not applicable to suits under the state Tort Claims Act. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979).

The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

While I concur in the judgment of the court, I believe the decision of the trial court that the design of the highway was a discretionary function or duty within the statutory exception was correct.

Although there is some conflict in the authorities, the majority of the cases which have considered this issue support a rule that, generally, highway design involves a discretionary function. See, *Smith v. Cooper*, 256 Or. 485, 475 P.2d 78, 84 (1970); *Donnelly v. Ives*, 159 Conn. 163, 268 A.2d 406 (1970); D. Bennett & D. Sather, *State Tort Liability — The Design, Construction and Maintenance of Public Highways — Vehicular Accidents*, 19 Drake L. Rev. 33 (1969).

In *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978), the allegation of negligence involved the curve in the highway where the accident had occurred. We held that "the decision to adhere to

the former design involved a discretionary function or duty which fell within the statutory exceptions under the State Tort Claims Act."

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WEST NEBRASKA GENERAL HOSPITAL, A NEBRASKA NONPROFIT ORGANIZATION, APPELLANT, V. JOHN R. HANLON, COMMISSIONER, DEPARTMENT OF LABOR, STATE OF NEBRASKA, ET AL., APPELLEES.

302 N.W.2d 694

Filed February 27, 1981. No. 43221.

1. **Employment Security Law: Nonprofit Organizations.** Under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), the contribution type of financing as provided by § 48-649 and reimbursement financing under § 48-660.01 are separate and distinct systems, and a nonprofit organization must elect to use one or the other.
2. **Statutes.** In construing a statute, the court must look to the objective to be accomplished, and the purpose to be served, and to place on it a reasonable construction which will best effect its purpose, rather than a construction which will defeat it.
3. **Employment Security Law: Nonprofit Organizations.** The Employment Security Law does not allow a reimbursing employer to acquire the experience account of its contributing predecessor and apply such account against its reimbursement charges.

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

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

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

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

HASTINGS, J.

The appellant, West Nebraska General Hospital (WNGH), was directed by the Nebraska Department of Labor, Division of Employment, to reimburse the Unemployment Trust Fund in the sum of $1,412 for benefits paid to WNGH employees during the quarter ending March 31, 1978. An application for review and redetermination filed before the defendant John R. Hanlon, commissioner, Department of Labor, was denied. That decision was appealed to the District Court for Lancaster County under the provisions of Neb. Rev. Stat. § 48-650 (Reissue 1978), which ruled adversely to WNGH. This appeal followed, in which WNGH assigns as error the ruling that the reserve or experience account of St. Mary Hospital (WNGH's predecessor) could not be transferred to the credit of WNGH and used to offset the latter's reimbursement charges. We affirm the judgment of the District Court.

The underlying facts are not in dispute. WNGH is a nonprofit corporation which, on January 1, 1972, elected to become liable for payments to the Unemployment Compensation Fund in lieu of contributions, and has made payments on the reimbursable basis pursuant to Neb. Rev. Stat. § 48-660.01(2) (Reissue 1978). On August 19, 1977, St. Mary Hospital (St. Mary) executed a contract of sale of all its property, assets, and employees to WNGH as purchaser. The property sold specifically included "so much of Seller's unemployment compensation reserve fund which is legally transferable." The sale took place on November 30, 1977, and the commissioner was duly notified of the acquisition.

Prior to the sale, St. Mary was an employer subject to the Employment Security Law, and was making contributions to the Unemployment Compensation Fund on the regular contributory basis. These contributions, as provided by Neb. Rev. Stat. § 48-649 (Reissue 1978), required contributions at a maximum rate ranging from 2.7 percent to 3.7 percent of an employer's annual payroll, depending upon whether

that employer's experience account at the beginning of the year exhibits a positive or negative balance. It was stipulated that on the date of sale there was a positive balance of $81,766.18 in the experience account of St. Mary, and the contribution rate for the calendar year 1978 was .3 percent. WNGH is billed on a quarterly basis by the commissioner for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits paid during the preceding quarter, as provided by § 48-660.01(2). On May 24, 1978, the commissioner notified WNGH that benefits of $1,412 had been charged to its account for the first quarter of 1978, and demanded reimbursement of that account. WNGH filed an application for review and redetermination, requesting that the amounts which were credited to the St. Mary reserve or experience account be credited to WNGH and applied to the statement for the first quarter of 1978 for payments in lieu of contributions due from WNGH and all future statements until the St. Mary reserve account reaches a balance of zero.

As authority for its request, WNGH cites Neb. Rev. Stat. § 48-654 (Reissue 1978), which states in part: "Any employer that acquires the organization, trade, or business, or substantially all the assets thereof, of another employer shall immediately notify the commissioner thereof, and shall assume the position of such employer *with respect to the resources and liabilities of such employer's experience account* as if no change with respect to such employer's experience account has occurred . . . ." (Emphasis supplied.) The commissioner takes the position that the above statute applies to an acquisition by an employer using the contributory basis and not to an employer using the reimbursable basis. Both parties agree that the issue is one of statutory construction.

The Employment Security Law requires a nonprofit organization to pay contributions on a regular basis unless it elects to reimburse the commissioner

for actual benefits paid by him, as provided by § 48-660.01(1) and previously set forth herein. The regular basis applies a contribution rate applicable to each employer on the basis of his actual experience in the payment of contributions and with respect to benefits charged against his separate experience account. § 48-649. Experience rating is based on the proposition that those employers whose workers suffer the most involuntary unemployment should pay at a higher rate than those employers whose workers suffer little involuntary unemployment. The basic principle is that employers who stabilize employment are rewarded by lower contribution rates. [1976] 1B Unemploy. Ins. Rep. (CCH) ¶ 1120.

Reimbursement financing is a method which allows the organization to reimburse the Unemployment Compensation Fund for the amount actually paid out. Nonprofit organizations are automatically subject to the regular experience rating provisions unless they elect the reimbursement method of financing. By using this method they are, in essence, self-insurers and are liable for such benefit costs for their employees, but are not liable for the cost of any other benefits. *Maryland Empl. Sec. v. Holy Cross Hosp.*, 43 Md. App. 406, 405 A.2d 766 (1979). They further escape the burden of paying the administrative costs of the system. See *St. Joseph, etc. v. Employment Sec. Dept.*, 92 Wash. 2d 353, 597 P.2d 393 (1979).

The two systems are separate and distinct, and a nonprofit organization must elect to use one or the other. WNGH has attempted to overlap the two systems by applying its predecessor's experience account to its own reimbursement account. We find no authority which allows such action, and logic dictates a contrary conclusion. Section 48-654, which allows an acquiring organization to assume the position of its predecessor with respect to the latter's experience account, refers to the contribution rate of that employer. The experience account balance is used to determine the rate

at which the employer must contribute, and it is not a cash account which may be treated as a liquid asset. If WNGH had not elected to use the reimbursement financing method and was liable for regular contributions, then it would be required to assume the position of its predecessor with regard to its experience account and contribution rate. To that extent, it would have been entitled to assume the positive experience balance possessed by St. Mary. However, to overlap the two systems, as urged by WNGH, would result in the payment of benefits from the Unemployment Compensation Fund without a corresponding payment of contributions or reimbursement. We are certain that the Legislature could not have intended to give the reimbursing employers a "free ride" at the expense of the contributing employers. See *Mann Home v. Morgan*, 19 Or. App. 853, 529 P.2d 964 (1974).

In construing a statute, the court must look to the objective to be accomplished, and the purpose to be served, and to place on it a reasonable construction which will best effect its purpose, rather than a construction which will defeat it. *Evans v. Metropolitan Utilities Dist.*, 187 Neb. 261, 188 N.W.2d 851 (1971). We agree with the commissioner and the District Court in determining that the Employment Security Law does not allow a reimbursing employer to acquire the experience account of its predecessor and apply such account against its reimbursement charges. The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON and WHITE, JJ., participating on briefs.

# NEWMAN GROVE CREAMERY COMPANY, APPELLEE, V. HOWARD DEAVER ET AL., APPELLANTS.

302 N.W.2d 697

Filed February 27, 1981. No. 43225.

1. **Uniform Commercial Code: Consideration.** Under the Uniform Commercial Code, no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person.
2. **Pleadings: Demurrer.** A demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading.
3. **Pleadings.** Under our system of code pleading, a party is required to plead the fact, not the theory of recovery or defense; and generally speaking, the pleading of legal conclusions is insufficient to raise an issue of fact.
4. **Pleadings: Trial.** Where an objection that a pleading does not state a cause of action or a defense is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained.
5. **Pretrial Conferences.** The purpose of a pretrial conference is to simplify and to narrow the issues of the case and to avoid traps and surprises.
6. **Pleadings: Demurrer.** Generally, it constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Crosby, Guenzel, Davis, Kessner & Kuester and James F. Brogan for appellants.

Vince Kirby for appellee.

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

HASTINGS, J.

The plaintiff, Newman Grove Creamery Company (Creamery), brought suit against Howard Deaver and Betty Deaver for recovery on a promissory note in the principal amount of $15,948.11. The District

Court for Madison County, without a jury, granted judgment against the Deavers in the amount of the note, together with costs of the action. The Deavers appeal, assigning as error: (1) That the court erred in finding that no consideration is necessary for an instrument or obligation given for an antecedent debt owed by a third person; and (2) That the court erred in sustaining the plaintiff's demurrer ore tenus as to the defendants' answer alleging duress in the execution of the note. We affirm in part, and in part reverse the judgment of the trial court.

Howard Deaver was employed as manager of the plaintiff Creamery, during which time credit was extended to his son, Scott Deaver, for products purchased from the Creamery. On or about November 15, 1977, Howard and Betty Deaver executed a blank promissory note to the Creamery. The blanks were filled in sometime later by Harold Conford, chairman of the board of the Creamery, in the amount of $15,948.11. That amount was the approximate balance of the account owed by Scott as of November 30, 1977. In defendants' answer to the petition, they alleged that there was no consideration given for the execution of the note, as well as that the note was signed under duress.

A pretrial order was filed on November 9, 1979, which stated: "All pre-trial motions concerning amendment of pleadings and all motions in limine shall be filed and noticed for hearing and heard before the Court at least ten days prior to trial." Trial was held on December 4, 1979. The plaintiff offered the note in evidence, as well as parts of the pretrial stipulation, and rested. The plaintiff then demurred ore tenus to the defendants' answer, for the reason that it failed to state facts which constituted an affirmative defense to the action. The court sustained the demurrer ore tenus so far as it concerned the defense of duress. However, the court overruled the demurrer as it related to the question of consideration. The trial then

proceeded on the issue of consideration.

The first assignment of error concerns the finding by the trial court that no consideration is necessary for an instrument or obligation given for an antecedent debt owed by a third person. Neb. U.C.C. § 3-408 (Reissue 1971) states in part: "Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (section 3-305), *except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.*" (Emphasis supplied.) The comments to that code section state that the "except" clause includes a debt owed by a third person. We recognized this exception in *First Nat. Bank of Omaha v. Kizzier*, 202 Neb. 369, 275 N.W.2d 600 (1979), by declaring that no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person.

The appellants argue that the comment which refers to an antecedent debt of a *third person* goes beyond the words of the code section and should not be given effect. The appellants cite no authority for this proposition, nor have we found any. On the contrary, the case law uniformly gives effect to the comments, in holding that an antecedent debt by a third person is a good substitute for consideration.

"The comments to UCC 3-408 indicate that the drafters intended the words 'an antecedent obligation of any kind' to include the antecedent debt of a third party . . . ." *Musulin v. Woodtek, Inc.*, 260 Or. 576, 579, 491 P.2d 1173, 1175 (1971). That case was followed in *First National Bank of Elgin v. Achilli*, 14 Ill. App. 3d 1, 301 N.E. 2d 739 (1973), which states that a note signed as security for an antecedent claim or debt needs no consideration, even though the note is signed by a third party. See, also, *Kitzer v. Kitzer*, 20 Ill. App. 3d 54, 312 N.E.2d 699 (1974); *First Nat. Bank of Jackson v. Carver*, 375 So. 2d 1198 (Miss. 1979); *Dauzat*

*v. Bordelon*, 145 So. 2d 41 (La. App. 1962); *Paige v. Mesisco*, 144 So. 2d 908 (La. App. 1962).

The trial court was correct in holding that no consideration is necessary where the note was given as security for the antecedent debt of a third person. The first assignment of error has no merit.

The second assignment of error concerns the sustaining of the demurrer ore tenus as to the defendants' allegations of duress. It has been well established that a demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. *Dickinson v. Lawson*, 125 Neb. 646, 251 N.W. 656 (1933).

The pleading attacked by the plaintiff was paragraph three of defendants' answer: "3. Defendants specifically deny that any consideration was given for the execution of said note and allege that said note was signed under duress." No other facts were pleaded to support either of those allegations. To this answer the plaintiff, rather than moving to make the answer more definite or filing a demurrer to the same, filed a reply in the nature of a general denial.

At the trial, following plaintiff's rest and before the defendants called any witnesses, the plaintiff demurred ore tenus. The trial court overruled the demurrer as to the allegation of lack of consideration, but sustained it as to the claim of duress. Defendants' counsel made no attempt to adduce any evidence supporting such latter allegation, although in describing a conversation had with the chairman of the board of the plaintiff company, the defendant Howard Deaver did testify without objection that "Harold [the chairman] told me that he would fire me if I didn't sign the note."

When signatures on an instrument are admitted, as was done here, the production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. Neb. U.C.C. § 3-307 (Reissue

1971). Such a defense must be affirmatively pleaded. *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975).

"Under the Nebraska system of code pleading, the plaintiff is required to plead the facts, not the theory of recovery." *Remington v. Bryan*, 205 Neb. 372, 380, 288 N.W.2d 253, 258 (1980). "The pleading of legal conclusions is insufficient to raise an issue of fact." *Timmerman v. Hertz*, 195 Neb. 237, 244-45, 238 N.W.2d 220, 225 (1976).

However, the appellants argue that the demurrer ore tenus was not timely and therefore should not have been sustained. The trial court had entered a pretrial order requiring all motions concerning amendment of pleadings and all motions in limine to be filed, noticed for hearing, and heard before the court at least 10 days prior to trial. It has long been the rule in this jurisdiction that questions relating to the sufficiency of the petition should be determined before the cause comes on for trial. *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977). "[W]here an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained." *Id.* at 462, 253 N.W.2d at 294. The petition will be liberally construed in the light of the entire record; and if the essential elements of the plaintiff's case may be inferred from the petition by reasonable intendment, it will be held sufficient. *Gibbs v. Johns*, 183 Neb. 618, 163 N.W.2d 110 (1968).

Generally, a demurrer ore tenus is considered as an objection to the introduction of evidence, rather than a pleading. Therefore, it may be doubtful that it was included within the court's order requiring the filing of motions 10 days prior to trial. It is also true that at least since 1878 it has been the rule in Nebraska that an objection to the admission of evidence on the ground that a petition does not state a cause of action may

be made at any time during trial. *Curtis & Co. v. Cutler*, 7 Neb. 315 (1878). We might note in passing, however, that the case of *Van Housen v. Broehl*, 59 Neb. 48, 80 N.W. 260 (1899), suggests that where two or more defenses are raised in an answer, a general demurrer will be overruled where at least one of the defenses is well pleaded.

Be that as it may, we agree with the Michigan Court of Appeals that "[a] pretrial conference is conducted before trial in order to simplify and to narrow the issues of the case and to *avoid traps and surprises.*" (Emphasis supplied.) *Jamison v. Lloyd*, 51 Mich. App. 570, 573, 215 N.W.2d 763, 764 (1974). Somewhat amplifying that statement is the following from *State Highway Comm. v. Redmon*, 42 Mich. App. 642, 646, 202 N.W.2d 527, 529 (1972): "[C]ounsel cannot sit idly by and then for the first time interpose objections at trial."

The defect in the answer did not affect the substantial rights of the plaintiff and the objection, coming when it did, should have been disregarded. *Contois Motor Co. v. Saltz, supra.* Although defendants' attorney did not ask for leave to amend his answer when the deficiency was raised, he might well have done so and his request would have been granted. "It 'generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.' [Citation omitted.] We feel the ends of justice will be served in this case by permitting plaintiff to amend its petition." *Cagle, Inc. v. Sammons*, 198 Neb. 595, 604, 254 N.W.2d 398, 404 (1977).

If plaintiff was concerned as to the nature of defendants' claim of duress, it should have reached that issue by motion or a demurrer timely filed and ruled upon.

The District Court was correct in ruling in favor of the plaintiff on the issue of consideration. However,

as we have pointed out above, the court should not have sustained the demurrer ore tenus relating to the issue of duress, and its judgment in that regard is reversed and the cause is remanded for further proceedings consistent with this opinion.

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

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STATE OF NEBRASKA, APPELLEE, V. JERRY A. WREDT, APPELLANT.

302 N.W.2d 701

Filed February 27, 1981. No. 43484.

**Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

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

William B. Zastera for appellant.

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

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

HASTINGS, J.

Jerry A. Wredt, the defendant, pleaded guilty to the December 4, 1979, second degree murder of his father, Jerry L. Wredt, and was sentenced to confinement to the Nebraska Division of Corrections, Department of Institutions, for a term of life. He has appealed to this court, contending only that the sentence was excessive.

Murder in the second degree is a violation of Neb. Rev. Stat. § 28-304 (Reissue 1979) and is a Class IB felony. The punishment provided by law is a minimum term of imprisonment of 10 years and a maximum

term of life. This, in fact, is the effect of the sentence here imposed.

The defendant was 16 years old at the time of the commission of the crime, having been born on June 8, 1963. He was the eldest of four children, and his natural mother had died of a drug and alcohol overdose on April 14, 1974. The father, who was 40 years old at the time of his death, had been married to his present wife, Sheri, for approximately 5 years. She was 30 years of age and had five children by a former marriage. In addition, they had a 3-year-old child of their own. The defendant lived in Syracuse, Nebraska, with his father, stepmother, and some of the children.

The record indicates that the victim had a vile and at times uncontrollable temper, and certain vicious propensities. His own brother stated that he had heard him threaten to kill their parents, his wife Sheri, and numerous other people. The defendant told of several times seeing or hearing his father abuse and assault his natural mother. He also said that his father kept threatening to hurt Sheri.

Additionally, Sheri, the stepmother, stated that the victim and she were having a stormy marriage, and that he had threatened and abused her on occasion. The defendant said that he was afraid of his father, not only because of possible harm to himself but because he was particularly worried about possible injury to Sheri. Apparently, there had been discussions between the defendant and Sheri, as well as between Sheri and a woman friend, as to what could be done to alleviate the problem. On the evening before the homicide, Sheri asked the defendant "how we could kill him." The defendant suggested that she could use a butcher knife. Nothing more was discussed that evening. The following day, according to the defendant, Sheri again asked "how could we kill him," and the defendant suggested that they could shoot him. Various plans to make the shooting appear to be self-defense or accidental were discussed during the rest of the day. Sheri showed

the defendant where the victim kept his guns, and the defendant selected a .45-caliber revolver. The defendant test-fired the revolver outside to make certain that it functioned properly. Further, according to the defendant's statement given to the authorities, the discussion centered around the fact that the defendant would be able to have the victim's pickup truck and then would have the insurance money.

The final plan agreed upon, and executed, was that the defendant took the revolver outside and waited for the victim to come home, which he did shortly after 6 p.m. After the victim got out of his truck and started walking toward the house, the defendant stepped out from the corner of the house, aimed and cocked the revolver, and fired one shot into his father's chest. Apparently, the shot was almost immediately fatal.

The defendant was originally charged with the crime of murder in the first degree, but pleaded guilty to the amended charge of murder in the second degree. Although no issue is raised other than the claimed excessiveness of the sentence, we do observe from a complete review of the record that at the arraignment the district judge plainly and completely explained to the defendant, in the presence of his attorney, all of his rights and the consequences of a guilty plea, and the defendant freely, voluntarily, and knowingly waived these rights.

In his brief, the defendant points out 18 different mitigating factors which he insists militate against imposing the maximum sentence in this case. These may be summarized to include the defendant's chronological age, at the time, of 16 years, 5 months; a maturity level of 13 to 14 years of age; the defendant suffered from a mild to severe neurosis, was submissive to authoritarian figures, possessed a need to please, and suffered from obsessionalism; the absence of prior criminal activity and no signs of previous antisocial or violent behavior; the abusive and threatening behavior of the victim toward the family; the pressure

or influence exerted by the stepmother; and the need for treatment by experts in the field of juvenile psychiatry. We would agree that the record supports such factual findings. The question which we must decide is whether such elements are sufficient for us to conclude that the trial court abused its discretion in imposing a sentence within the statutory limits. *State v. Hawkman*, 198 Neb. 578, 254 N.W.2d 90 (1977).

The record does not disclose the consequences which the stepmother may have suffered or will be subjected to for her role in this tragic episode. Whatever influence she may have had on the defendant, it was he who made the final plans and carried them out in a cold and calculating manner, resulting in the death of his father. The facts could have supported a conviction for first degree murder for which life imprisonment would have been the minimum sentence.

The defendant cites *State v. Sturm*, 189 Neb. 299, 202 N.W.2d 381 (1972), as supporting his position that a past history of violence on the part of the victim constitutes a mitigating circumstance which should influence the sentence. However, we are not prepared to say in this case that the victim was a bad man and deserved to die and therefore the trial judge abused his discretion in imposing the maximum sentence. As announced by the trial judge at the time of sentencing, a lesser sentence would have depreciated the seriousness of the crime and promoted disrespect for the law. Neb. Rev. Stat. § 29-2260(2)(c) (Reissue 1979). This we believe was a legitimate and overriding concern in this case.

The judgment and sentence of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

To approve a maximum sentence of life imprisonment on the guilty plea of a 16-year-old boy with no prior criminal record under the specific facts and circumstances outlined in the majority opinion consti-

tutes a complete abdication of the duty of this court to review and correct excessive sentences. In my view, a maximum sentence of 20 years would have been more than sufficient to satisfy societal demands for retribution.

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## STATE OF NEBRASKA, APPELLEE, V. GEORGE L. SHEPARD, APPELLANT.

302 N.W.2d 703

Filed February 27, 1981. No. 43544.

1. **Sentences: Post Conviction.** Matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are not properly included in an action seeking post conviction relief.
2. **Post Conviction: Appeal and Error.** A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions.
3. **Post Conviction: Proof.** In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
4. **Pleas.** The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
5. **Criminal Law: Effectiveness of Counsel.** The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
6. ____: ____. In order for one to maintain ineffective counsel the record must affirmatively support the claim.

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

George L. Shepard, pro se.

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

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

KRIVOSHA, C.J.

The appellant, George L. Shepard (Shepard), appeals from an order entered by the District Court for Nance County, Nebraska, denying Shepard's request for post conviction relief filed pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979). For reasons more particularly set out below, we affirm the judgment of the District Court denying post conviction relief.

The record reflects that Shepard was originally charged with first degree sexual assault. He retained counsel of his own choosing and entered a plea of not guilty. The record available to us in this matter reflects that on March 29, 1978, Shepard appeared with his attorney before the trial court, at which time he withdrew his plea of not guilty and entered a plea of guilty to the charge.

Before accepting the plea of guilty, the trial court meticulously reviewed with Shepard all of his constitutional rights and the consequences of his withdrawing the plea of not guilty and entering a plea of guilty. Only after the trial court satisfied itself that Shepard fully understood what he was doing, and, indeed, was entering the plea of guilty freely and voluntarily, did the trial court accept the plea of guilty.

The record made before the trial court further indicates that the plea of guilty was entered by Shepard as a result of a plea bargain in which the State dismissed a charge of breaking and entering and further agreed not to make any recommendation with regard to the sentence to be imposed by the court in the instant action. Furthermore, the State, as part of the plea bargain, agreed that it would file no other charges against Shepard, including a charge of being a sexual sociopath under the provisions of Neb. Rev. Stat. §§ 29-2901 et seq. (Reissue 1975).

After accepting the plea, the trial court asked Shepard to describe to the court the circumstances surrounding the crime for which he had just entered a

plea of guilty. Shepard then freely and voluntarily described in detail all of the events connected with the sexual assault. The details as described by Shepard leave no doubt that a first degree sexual assault was committed upon the victim. There was more than sufficient evidence upon which Shepard could have been convicted had he gone to trial.

A presentence investigation was then ordered and a further hearing held. As a result of the further hearing, Shepard was sentenced to from 7 to 21 years in the Nebraska Penal and Correctional Complex.

Shepard, appearing pro se, now raises several assignments of error. They are as follows: (1) That the sentence imposed by the court was excessive; (2) That the evidence upon which the guilty plea was accepted was insufficient; (3) That the court erred in not granting Shepard a trial for the reason that perjured and false testimony was given against him by the prosecuting attorney; (4) That the court erred in not requiring (sic) as to what deals were made in order that the defendant changed his plea from "not guilty" to "guilty"; (5) That the court erred in allowing the State to threaten Shepard with a charge of sexual sociopath, when in fact there was no evidence to support the fact; and (6) That the court erred in not asking Shepard if he had anything to say before sentencing.

We may quickly dispose of all of these matters. The claims that the sentence was excessive and that the evidence of the crime was insufficient may be disregarded without further consideration. Following Shepard's conviction, he appealed his sentence to this court. He did not raise any issue about the sufficiency of the evidence in that appeal. In Shepard's earlier direct appeal we found that the sentence was not excessive and affirmed the judgment pursuant to Rule 20 of this court. See *State v. Shepard*, case No. 42274. This court has consistently held that matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are

not properly included in an action seeking post conviction relief. *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975); *State v. Taylor*, 193 Neb. 388, 227 N.W.2d 26 (1975); *State v. Birdwell*, 188 Neb. 116, 195 N.W.2d 502 (1972); *State v. Weiland*, 190 Neb. 111, 206 N.W.2d 336 (1973); *State v. Lincoln*, 186 Neb. 783, 186 N.W.2d 490 (1971). A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. *State v. Huffman*, 186 Neb. 809, 186 N.W.2d 715 (1971); *State v. Lacy*, 198 Neb. 567, 254 N.W.2d 83 (1977).

Insofar as the claim that there was perjured and false testimony given, the record is simply devoid of any evidence to support that claim, and we likewise reject that assignment of error. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief. *State v. Rapp*, 186 Neb. 785, 186 N.W.2d 482 (1971).

The balance of Shepard's assignments of error, while couched in different terms, essentially argue that his plea of guilty was not freely and voluntarily made and that he had inadequate counsel. We may likewise easily reject those two claims from an examination of the record.

The trial court inquired in great detail as to what the plea bargain was. There is no evidence to support Shepard's claim to the contrary. We have previously held that: "The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *State v. Hall*, 188 Neb. 130, 195 N.W.2d 201 (1972) (syllabus of the court). The record in this case clearly establishes that Shepard understood all of the various alternatives open to him and freely and voluntarily made that choice in entering a plea of guilty.

Insofar as his claim of ineffective counsel is con-

cerned, we likewise reject that claim. As we have frequently said, the standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Colgrove*, 207 Neb. 496, 299 N.W.2d 753 (1980). The trial court specifically inquired of Shepard whether he was satisfied with his counsel. He responded he was. The record establishes without any contradiction that the evidence was more than sufficient to convict Shepard of the crime charged. It appears that his counsel did everything that was possible under the circumstances, though admittedly there was not much which could be done. In order for one to maintain ineffective counsel the record must affirmatively support the claim. *State v. Rose*, 188 Neb. 84, 195 N.W.2d 215 (1972). The record in this case does not in any manner support that claim.

The events of this case seem to support the observations made by the Court of Appeals in *Wolfe v. Nash*, 313 F.2d 393 (8th Cir. 1963), *cert. denied* 374 U.S. 817, 83 S. Ct. 1713, 10 L. Ed. 2d 1041 (1963), where the court there said: "The truth is, of couse, that to the criminal mind no trial is fair that does not result in an acquittal, no jury is impartial that does not return a verdict of not guilty, and no counsel is effective if the defendant is convicted, notwithstanding the evidence against him." *Id.* at 401. There is no merit to any of Shepard's claims for post conviction relief. We therefore affirm the judgment of the trial court in denying such relief.

AFFIRMED.

# IN RE INTEREST OF SHAWNA KIMSEY, A MINOR CHILD. STATE OF NEBRASKA ET AL., APPELLANTS, V. DENNIS KIMSEY, APPELLEE.

302 N.W.2d 707

Filed March 6, 1981. No. 43145.

1. **Parental Rights.** Under Neb. Rev. Stat. § 43-209 (Reissue 1978), a person's parental rights may be terminated only upon presentation of clear and convincing evidence.
2. ——. The right of parents to maintain the custody of their child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
3. **Child Custody.** While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child, the best interests of the child become paramount.
4. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
5. **Parental Duties.** Both parents have duties to their children; a father cannot delegate those duties to the mother of his children and expect to be held harmless if she neglects the children.

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

James D. Livingston, guardian ad litem, of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellant Shawna.

Richard E. Weaver for appellant State.

Duane A. Burns of Mayer, Burns & Mayer for appellee.

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

WHITE, J.

This is an appeal by the State of Nebraska and the guardian ad litem of Shawna Kimsey, minor child born December 4, 1976. The appellants assign as error

the District Court's finding that there was no clear and convincing evidence presented to justify the county court's termination of parental rights of the father, Dennis Kimsey, to Shawna Kimsey. The mother's parental rights to the child were also terminated in the county court; she appealed, and the District Court affirmed the decision of the lower court. She did not appeal here and that matter is not before us.

After a hearing on September 1, 1977, the court held that Shawna Marie Kimsey was a child within the meaning of Neb. Rev. Stat. § 43-202(2)(e) (Reissue 1978), "who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child." Dennis and Karin Kimsey were allowed to retain custody of the child, but under the supervision of the Hall County Department of Welfare for a period of 1 year. As part of the court order, Karin was ordered to attend Alcoholics Anonymous meetings for a period of 1 year and Dennis was ordered to attend Al-Anon meetings for the same period of time.

On October 28, 1977, Karin Kimsey gave birth to a second child, Cynthia. The child was born with multiple physical and psychological problems. The court was informed by counsel at oral argument that Cynthia Kimsey had died during the pendency of the appeal, after having spent substantially all of her short life either in a hospital or in the care of foster parents.

On November 4, 1977, an Alcoholics Anonymous sponsor found Karin Kimsey intoxicated and passed out in her apartment and notified the welfare department. The department of welfare took temporary care of Shawna Kimsey. There was another hearing on November 9, 1977. As a result of that hearing, physical custody of Shawna was given to Dennis under the supervision of the Hall County Department of Welfare, but actual physical possession of the child was given to Dennis' father and stepmother.

In March 1978, and in violation of a court order, Dennis removed the child from Nebraska to Le Mars, Iowa. The child was recovered by Iowa authorities on March 6, 1978, initially placed in Children's Village, and then returned to Dennis' stepmother.

On March 14, 1979, Dennis' stepmother was stricken with an illness and Shawna was taken from her and placed in another temporary foster home. Again, on April 29, 1979, Shawna was removed from that temporary foster home and sent to another. Shawna had begun exhibiting evidence of severe emotional insecurity, determined to be a direct result of the many and various environments which she had been placed into and then removed from. Shawna was admitted to St. Francis Hospital in Grand Island, Nebraska, for treatment of serious nervous and psychiatric disorders, and on June 28, 1979, she was taken to the Nebraska Psychiatric Institute. Subsequently she was placed in yet another foster home.

The final termination hearing in the county court was held on July 13, 1979, 2 years after the initial hearing. By the time of this hearing, the court had received recommendations to terminate parental rights of both parents from representatives of the Hall County Department of Welfare, the Plains Area Mental Health Center at Le Mars, Iowa, and the Iowa Department of Social Services, Plymouth County, Iowa. The court also heard evidence that Dennis and Karin had been divorced on June 4, 1979, and finally determined that the best interests of the minor dictated that the parental rights of both Karin and Dennis be terminated. Dennis Kimsey then appealed the termination of his rights to the District Court for Hall County.

The District Court reversed the order of the Hall County Court and ordered that legal custody of Shawna Kimsey be given to Dennis and that physical custody be given to his natural mother who lives in Missouri. As of the date of the hearing, Shawna had

only recently become slightly acquainted with this woman.

We are concerned with one assignment of error, i.e., whether the District Court erred in finding that there was not clear and convincing evidence presented to justify the termination of Dennis Kimsey's parental rights to Shawna Kimsey. Under Neb. Rev. Stat. § 43-209 (Reissue 1978), a person's parental rights may be terminated only upon presentation of 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 right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child. *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980); *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979). Further, in a proceeding to terminate parental rights under § 43-209(6), there must be a determination that the child is one described in subsection (1) or (2) of § 43-202 and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination.

The county court first determined that Shawna was a neglected child when her mother was arrested for public drunkenness and it was discovered that her mother was an alcoholic. Although the record shows that Karin Kimsey has struggled to overcome her alcoholism, she has not yet succeeded. Karin has been an inpatient at a number of alcoholism treatment centers in both Nebraska and Iowa, and at the time of trial she was residing in a halfway house in Iowa.

Some background is necessary. Karin Kimsey is a native of Germany and the mother of a young girl who lives there still. It appears from the record that when Dennis married Karin he promised that they would continue to live in Germany after their marriage so that Karin could keep in contact with her daughter. For reasons not shown in the record, that promise

was not kept and the parties transferred to Nebraska. While they were living in Grand Island, Nebraska, Dennis was an over-the-road truckdriver and was away from home far more frequently than he was present. Karin was essentially alone and friendless in a strange community and she turned to alcohol as a solace. It was to this alcoholic condition that the first efforts of the county court of Hall County were directed in an effort to rehabilitate Karin and to help her conquer the alcoholism. It is not necessary to relate the evidence in detail. Dennis made little, if any, attempt to attend or benefit from counseling sessions. Finally, he abandoned the Al-Anon sessions altogether, continued to offer little or no support to Karin in her attempt to eliminate her alcoholism problem, and saw his daughter Shawna only infrequently, if at all.

When he removed himself to Le Mars, Iowa, it was with the pronounced intention of eliminating the overnight stays and being at home more often to assist his wife. However, in addition to his regular work schedule, which would have brought him home nearly every evening, he volunteered for additional shifts. Frequently he was gone from 3 in the morning until late at night and had very little time for his wife or daughter. He did not attend any counseling sessions, and even after being ordered to do so, he declined and refused to pay any child support for the benefit of Shawna. He defied the court's order by removing Shawna from the custody of his stepmother and taking her and Karin to his home in Iowa, knowing full well that Karin had resumed drinking and was a chronic alcoholic incapable of caring for the child.

In response to the court's concern for the daily care of the child, his only proposal was that Shawna now be placed with his natural mother in the state of Missouri. This would be at least the sixth foster home into which Shawna had been placed. The carelessly indifferent attitude of Dennis is strikingly similar to that of the father in the recent case of *In re Interest*

*of O'Donnell*, 207 Neb. 367, 299 N.W.2d 428 (1980). In that case, the father's attitude was summarized in his own words: "'See, I was brought up an old fashioned person. I go to work, I take care of the finances and she stays home and takes care of the house and kids. It's as easy as that.'" *Id.* at 371, 299 N.W.2d at 431. Dennis was at all times familiar with Karin's loneliness, her alcoholism, and her desperate need for companionship and support. He offered no support. He did not pay child support to help care for Shawna; generally, he ignored her. He now suggests that he is not at fault, that the fault lies with his former wife Karin. However, his solution to the problem does not even include establishing a home in which the child could live with her natural father. He proposes instead that she be placed in one more situation, the likes of which so far have been disastrous to her physical and mental well-being.

Dr. Agnes Gomes, a Grand Island physician, testified at the final hearing. The doctor testified that after Shawna was taken from Dennis' stepmother she showed signs of severe mental withdrawal. Shawna's physical deterioration manifested itself first by affecting Shawna's eating habits. She began to overeat and gain weight, then lost weight in spite of her huge appetite. Later, she would withdraw into a corner, bang her head against the wall, and pull large patches of hair from her head. Dr. Gomes testified that Shawna had been diagnosed as having childhood schizophrenia. Dr. Gomes' recommendation was "that Shawna should be placed permanently in her only home — so, she would not have this — right now, the thing that would bring Shawna more harm than any good — she has been moved around, and around, and around, she can not trust anybody anymore, because the minute she starts trusting somebody, she is moved around again. I feel that all this should be ended, I feel that Shawna should be placed permanently and for good, so she does not have to be moved ever again."

As we said in *State v. Jenkins*, 198 Neb. 311, 317, 252 N.W.2d 280, 284 (1977): "In this case, while there may be no direct affirmative evidence of child abuse, there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child. Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. In such a case, the best interests of the child become paramount."

In determining that Dennis Kimsey's parental rights should be terminated, the county court considered that Karin Kimsey was still a chronic alcoholic, that Dennis was still in no position to care for the child by himself, that the child was in a critical physical and emotional state, and that Dennis had not had physical custody of Shawna since November 4, 1977. The court also considered the fact that two prior placements with Dennis had failed and that yet another temporary placement was contrary to the express recommendation of Shawna's physician.

"Neither are we convinced by the argument that the father of the children should not be blamed for the mother's failure as a housekeeper and mother. Both parents have the duties as described in Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), as well as those inherent in the parent-child relationship. A father cannot delegate those duties to the mother of his children and expect to be held harmless if she neglects the children." *In re Interest of O'Donnell, supra* at 372, 299 N.W.2d at 431.

In the 2-year period in which Shawna was in the physical custody of others, Dennis, although ordered by the court to do so, sadly neglected to attempt to correct the situation. He was indifferent toward the child and felt he could limit his obligation to care for her by continuing to work away from home and ignore the rehabilitation efforts of Karin and the well-being of

Shawna. Clearly, the county court was right in its determination to terminate Dennis' parental rights.

The judgment of the District Court is reversed and the judgment of the county court is reinstated.

REVERSED WITH DIRECTIONS.

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## BANK OF VALLEY, A CORPORATION, APPELLEE, V. DUANE C. SHUNK, APPELLANT.

302 N.W.2d 711

Filed March 6, 1981. No. 43160.

1. **Summary Judgment.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law.
2. ____. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.
3. ____. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.
4. **Pleadings: Parties.** The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court.

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

David J. Lanphier of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Richard J. Butler of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

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

MCCOWN, J.

The plaintiff bank brought an action against the defendant to recover principal and interest due on a promissory note. Defendant answered and also counterclaimed, alleging fraud and requesting reformation. After the taking and filing of depositions the District Court sustained plaintiff's motion for summary judgment and entered judgment against the defendant in the sum of $25,000 plus interest and costs. The defendant's counterclaim was dismissed. Defendant has appealed.

During the times relevant here Peter L. Heintzelman was the president of the plaintiff, Bank of Valley, Nebraska, and in charge of the entire operations of the bank. He was also a director of the bank and had held both positions for several years. In 1976 Heintzelman's mother died and he was appointed as a coexecutor of the estate. Acting as president of the bank and as executor of the estate, Heintzelman made loans to the estate on several occasions, and at sometime prior to November 1976 the total amount of such loans to the estate was approximately $73,000. The bank's legal loan limit to any one borrower was $75,000. On November 16, 1976, Heintzelman made an additional loan to the estate of $50,000 which made a total indebtedness of the estate to the bank of $123,000. A large portion of the proceeds of the loans to the estate were used by Heintzelman for his own personal purposes. In addition to the estate loans Heintzelman was personally indebted to the bank on his own notes in the sum of $40,000. He was also personally indebted to six other banks, five of which had common ownership with the Bank of Valley, in the sum of $140,000.

Robert Pease, vice president and director of the bank, knew that the $50,000 loan to the Heintzelman estate of November 16 exceeded the legal lending limits of the bank. At the annual meeting of the board of directors in January 1977 the board of directors

was advised of the $50,000 loan, and the matter of the loans to the estate was discussed at the board meeting. Heintzelman assured the board of directors that the amount of the bank loans to the estate would very shortly be reduced below the legal lending limit, and the $50,000 loan was approved by the board.

Shortly after the January 1977 board meeting Heintzelman contacted the defendant Shunk and inquired if he knew of anyone that would be willing to make a loan to Heintzelman. The defendant was a commercial loan customer of the bank, a favored borrower who had obtained previous loans from the bank through Heintzelman. The defendant asserts that their previous relationships had been purely on a business basis, while Heintzelman asserts that he and the defendant were good friends. Sometime later when Heintzelman again inquired of Shunk, he was advised that Don Rogert, Wilmer Mattson, and the defendant might consider the matter but needed to know more about it. Heintzelman then informed the defendant that he needed $75,000 because he was involved in the commodities market on the board of trade and that his mother's estate was not being settled as rapidly as he had anticipated and that he was having troubles with it. The defendant told Heintzelman that the three men did not have cash on hand to make any loan to Heintzelman, but that if the bank would loan them the money they would loan it to Heintzelman. Heintzelman told Shunk that the bank would be willing to make the loans to the three individuals, and that Heintzelman would give each of them his personal note in the same amount and on the same terms. The evidence is in conflict as to what representations were made by Heintzelman to the defendant to induce him and the others to sign the notes to the bank. The defendant asserts that Heintzelman told him that the $75,000 would be sufficient to clear up Heintzelman's financial difficulties; that the assets of his mother's estate would be

sufficient to secure and repay the notes; and that the three individuals would only have to pay on their notes to the bank whatever amounts Heintzelman paid on his notes to them, and that their notes to the bank would be renewed in the same fashion as any renewal of Heintzelman's notes to them.

Heintzelman denied that he had agreed that the notes of the three individuals would be extended as long as it took Heintzelman to repay them, but conceded that he had assured the defendant that the notes would be renewed if necessary on the same basis as the notes of any other preferred loan customer of the bank. Heintzelman denied that he had mentioned any collateral and denied that defendant's obligation to pay the note to the bank was tied to or connected with Heintzelman's ability to repay his note to defendant.

On February 22, 1977, the defendant Shunk and Rogert met Heintzelman at the bank. Mattson was unable to be present that day. Since Heintzelman wanted the full $75,000 at that time, Rogert signed a note to the bank for $50,000 as president of Lake Aero, Inc., and defendant signed a note to the bank for $25,000. That note is the one involved in this case. The $50,000 for Rogert's note was deposited directly into the personal checking account of Heintzelman. The $25,000 for the defendant's note was put in defendant's checking account, and the defendant wrote a personal check to Heintzelman for $25,000 which was placed in Heintzelman's personal checking account. The defendant and Rogert received notes signed by Heintzelman for $25,000 and $50,000, respectively, which had the same 1-year maturity and 8½ percent interest rates as their notes to the bank. Heintzelman wrote a check on his personal account later and paid the bank $61,000 on principal, plus accumulated interest, and credited the payment on the bank's loans to his mother's estate. Neither Shunk nor Rogert knew that the bank had loaned Heintzelman sums in excess of the bank's legal loan limit nor that any part

of the $75,000 was to be used to reduce Heintzelman's indebtedness to the bank.

The following day, February 23, 1977, Mattson went to the bank. He signed a note to the bank for $25,000, the proceeds of which were deposited in his account. Mattson then wrote a check for $25,000 on his account, leaving the payee blank and delivered the check to Heintzelman to be applied to the $50,000 Lake Aero, Inc., loan so that the defendant, Rogert, and Mattson would each have borrowed and loaned $25,000.

The vice president of the bank reported the transactions outlined above to the individual who controlled 81 percent of the bank stock but was not a director. That individual demanded Heintzelman's resignation and Heintzelman resigned as president of the bank on February 25, 1977.

In May 1978 the Bank of Valley commenced this proceeding against the defendant to recover $25,000 plus interest on his promissory note dated February 22, 1977. The defendant's answer admitted the execution of the note but denied that the note was payable under the terms and conditions set forth in the note, and alleged that any liability of the defendant to the bank had been satisfied pursuant to the facts alleged in defendant's counterclaim. The defendant also alleged that the bank was estopped from asserting liability on the note and alleged fraud arising out of the facts alleged in the defendant's counterclaim.

Defendant's counterclaim alleged that Heintzelman, as president of the bank, had made false representations to the defendant with respect to the use of the proceeds of the bank loan and the collateral therefor, and had concealed and misrepresented material facts which constituted fraudulent inducements to the defendant to execute the note to the bank and to deliver the proceeds of the note to Heintzelman. The counterclaim alleged that the bank held all available collateral as security for loans of the bank to Heintzel-

man, and had received and utilized all such collateral and received full payment on all the bank's loans to Heintzelman. It was also alleged that because of the application of that collateral, Heintzelman would never be able to pay to defendant any indebtedness represented by Heintzelman's note to defendant. The counterclaim also alleged that if the defendant were forced to pay his note to the bank, the bank would be profiting from its own wrongdoing through the acts of its president, Heintzelman. Defendant prayed for judgment reforming the provisions of the defendant's note to the bank and Heintzelman's note to the defendant to provide that defendant has no liability for payment of his note to the bank and directing that the note of Heintzelman to defendant be reformed or endorsed so that Heintzelman's indebtedness on that note would be owed directly to the bank.

The District Court sustained the plaintiff bank's motion for summary judgment, entered judgment against the defendant for $25,000 plus interest from February 22, 1977, and dismissed defendant's counterclaim.

On appeal to this court the defendant contends that the trial court erred in sustaining plaintiff's motion for summary judgment and in dismissing defendant's counterclaim because there were several genuine issues of material fact which were in dispute. The defendant also contends that the trial court erred in entering orders limiting the defendant's discovery, and also erred in overruling defendant's motion for leave to file a third-party petition against the board of directors of the bank.

This court has consistently held that the moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

Summary judgment is an extreme remedy and

should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. *Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc.*, 199 Neb. 555, 260 N.W.2d 310 (1977).

Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits. *Farro v. Rubottom*, 202 Neb. 120, 274 N.W.2d 149 (1979).

On the record here there are apparent factual disputes as to whether Heintzelman had made fraudulent representations or engaged in fraudulent conduct and, if so, in what capacity. There are also issues of fact as to whether the various transactions were separate and distinct transactions or part of a single plan or scheme, and issues of fact as to whether the transactions were undertaken for the benefit of the bank or only for the personal benefit of Heintzelman. Under such circumstances, summary judgment was inappropriate, both with respect to the principal cause of action as well as to the designated counterclaim which alleged a possible defense to the note.

The defendant also contends that the District Court erred in denying defendant's motion to require plaintiff to produce various documents relating to the bank's dealings with and loans to Heintzelman, including the timing and scope of those dealings, and correspondence and documents submitted by the bank to the State Department of Banking in connection with excess limit loans to Heintzelman or the Heintzelman estate.

Generally, discovery should be allowed regarding any nonprivileged matter which is relevant to the subject matter involved in the pending action. See Neb. Rev. Stat. §§ 125-1267.01 et seq. (Reissue 1979). Ordinarily, the purpose and intent of discovery statutes is to leave their application to the sound discretion of the trial court. See *Haarhues v. Gordon*, 180 Neb. 189, 141 N.W.2d 856 (1966). Where the information sought is relevant it may be at least premature for the trial court to limit a party's discovery and then grant an opposing party's motion for summary judgment. Where issues of fraud are pleaded and the facts sought to be discovered may be directly relevant and material, discovery should ordinarily be permitted.

Defendant also complains that the District Court overruled defendant's application to file a third-party complaint against the individual directors of the plaintiff bank. The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court. *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 199 N.W.2d 729 (1972). In the case at bar, no showing of prejudice is made nor is the defendant prevented from litigating in an appropriate forum the possible liability of the bank's directors. We find no abuse of discretion.

The judgment of the District Court is reversed and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

KRIVOSHA, C.J., not participating.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion.

The evidence before the court on the motion for summary judgment shows without any contradiction that the defendant Shunk was not in any way deceived when he borrowed money from the bank on the note in suit and in turn loaned the money to Heintzelman,

taking Heintzelman's note in consideration of the loan to himself. The evidence shows that he knowingly made a personal loan to Heintzelman because Heintzelman was in financial difficulty. Shunk himself suggested that he would make the personal loan which Heintzelman had requested, if the bank would lend the money. The evidence shows, also without contradiction, that Shunk knew from Heintzelman himself that the latter was in financial difficulty. In fact, Shunk's counterclaim alleges: that he (Shunk) was informed by Heintzelman that the latter needed "$75,000.00 to clear up his difficulties with an estate, with Bank President's [Heintzelman] brother *and to clear up debts at bank.*" (Emphasis supplied.) The pleadings contain no allegation that Shunk relied upon any representation by Heintzelman that the latter's indebtedness to the bank was within lawful loan limits.

The evidence shows that whatever representations Heintzelman made, he was making them on his own behalf. It further shows that Shunk was relying upon Heintzelman to pay him and not upon the bank. The only allegation in the counterclaim relative to Heintzelman's liability to the bank being in excess of loan limits is simply that this fact was unknown to Shunk.

There is no evidence in the record which tends to show that Heintzelman, in requesting the loans to himself, was acting on behalf of the bank and in the course and authority of his employment with the bank.

A bank officer, in negotiating a loan from a third party on his own behalf, is not acting within the scope of his authority as a bank officer and his acts do not bind the bank. *Farmers Nat. Bank v. Ohman*, 112 Neb. 491, 199 N.W. 802 (1924); *Cozad State Bank v. McLaughlin*, 128 Neb. 87, 258 N.W. 36 (1934); *Schwenker v. Teasdale*, 206 Wis. 275, 239 N.W. 434 (1931). There is no evidence that Heintzelman was acting on behalf of the bank in arranging his personal loan so that he could pay the bank.

The defect in the majority opinion is that it does not analyze the pleadings in terms of the essential element of fraud, nor the evidence submitted in connection with the motion for summary judgment to determine whether there are any *material facts in dispute* on the issue of the alleged fraud of the bank; rather, it assumes the materiality.

Shunk also complains that the court erred in limiting discovery by sustaining objections to certain interrogatories. An examination of the interrogatories to which objection was sustained indicates that they are not relevant or material to the proof of any issue in the case, or likely to lead to any such evidence.

I would affirm the judgment of the trial court.

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JERRY GRAVES ET AL., APPELLEES, V. GEORGE GERBER ET AL., APPELLANTS.

302 N.W.2d 717

Filed March 6, 1981. No. 43173.

1. **Easements.** Where an easement such as a right-of-way is granted without fixing its exact location, the location may be subsequently fixed by express agreement between the parties, or by an implied agreement arising out of the use of a particular way.
2. ____. The failure of a grant to definitely locate an easement does not give the grantee the right to use the servient estate without limitation. In such a case the grantor may designate the location, and if he fails to do so the grantee may then make the designation which, in either case, must be reasonable.
3. **Easements: Equity.** Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe.
4. **Equity: Jurisdiction.** It is a general rule of equitable jurisdiction that where a court has assumed jurisdiction it will retain it for all purposes connected with the principal controversy.
5. **Easements.** The use of an easement existing by an express grant must be confined to the terms and purposes of the grant.
6. ____. An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where the land owned by

one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part and remanded with directions.

James H. Truell for appellants.

No appearance for appellees Graves.

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

CLINTON, J.

This is an action by the plaintiffs Graves for a mandatory injunction requiring the defendants Gerber to remove a stockade-type fence which Gerber erected upon his own residential property adjacent to the west lot line of the Graves residential lot. The basis of the suit is that the fence interferes with the use of an easement arising from a grant made by the Gerbers' predecessors in title to Graves' predecessors in title, giving to the owner of the Graves property, or the dominant tenement, the use of a portion of the Gerber property, or the servient tenement, as a means of ingress and egress to the Graves garage located on the rear of the Graves lot. The trial court ordered the fence be removed. Gerber appeals. We affirm in part and remand with directions to amplify the decree.

Gerber defends primarily on the basis that the fence does not prevent ingress and egress because, in constructing the fence, he left a 16-foot opening through which Graves' vehicles may pass in going to and from the garage.

An understanding of the issues will be facilitated by an explanation of the physical layout of the property and the ownership history, as well as the specific language of the easement.

As we have noted, both properties are residential. Located on each lot is a single-family residence and

a garage. Each house is set back from the front lot line about the same distance. Both residences face the north and abut on the south line of West Koenig Street in the city of Grand Island. The Graves property is Lot 1 of the block in which it is located. The Gerber property is Lot 2 of the same block and abuts the Graves property on the west. The garages are detached. The Graves garage lies in the southwest portion of the lot and the Gerber garage in the southeast corner of the lot, both adjacent to the alley. Each lot has a paved, concrete driveway running from the street to its respective garage. The driveways lie between the two houses and abut at the common lot line. Thus, the fence divides the two driveways except for a 16-foot gap located south of the two houses. The west edge of the Gerber driveway lies about 2 or 3 feet from the Gerber residence. The east edge of the Graves driveway abuts the residence itself. The Gerber driveway is 9 feet in width and the Graves driveway appears to be about the same width. The Graves driveway is partially obstructed by a landing and stairway which afford entry to a side entrance on the west side of the Graves house located about the center of the building. This landing and stairway appear to be approximately 4 feet in width. To the south of and behind the landing and located on the concrete drive is an air-conditioning unit.

In order for a vehicle to use the Graves driveway to leave or enter the Graves garage, it must drive around the obstructions and in so doing pass upon a portion of the Gerber driveway. Although there is no specific testimony on the point, there is a clear inference from the evidence that the existing obstruction was the reason for granting the easement.

The evidence shows that the Graves acquired their property in June 1975. Gerbers purchased their property 2 years earlier. Both had actual as well as constructive notice of the easement. The grant of the easement, which was executed in 1965, is indefinite

as to the location of the easement. The operative language is as follows:

"WHEREAS, it is necessary that the party of the second part traverse a portion of the property owned by the parties of the first part, in entering and exiting from a garage located on the property of the party of the second part,

"IT IS MUTUALLY AGREED that the parties of the first part, their heirs and assigns, hereby grant a right of way over that portion of their property to the party of the second part, for said purposes of moving vehicles to and from the garage on the property of the party of the second part.

"Said easement is granted by the parties of the first part perpetually and is to run with the land."

There is no testimony as to how the easement was used in practice by Graves' precedessors in title. There is no evidence that the original grantor or any of the mesne grantors prescribed the easement boundaries.

Graves' testimony concerning how he used the easement was as follows:

"A. We pulled off Koenig Street and go into my driveway and then around the side of the house over onto the other property to get to the back of the garage, behind the house.

"Q. Did you do this in one continuous motion?

"A. Yes.

"Q. Was your garage fully accessible for you to enter into then?

"A. Yes."

He then described how the fence interfered with that use. This was especially true in backing from the garage out to the street. He testified:

"A. . . . Also, you got to be extremely careful when you turn in that you don't catch the side of the pickup or the van on both vehicles.

"Q. Now, can you do this in both vehicles in a continuous motion?

"A. I cannot do it with the pickup, no.

"Q. What do you have to do?

"A. I have to stop with that pickup and kind of jockey around so I can get into the garage. Backing out is worse.

"Q. What happens when you leave the garage?

"A. Okay. Both vehicles I have to stop in the opening and I have to go forward and then back up again. I cannot do it in one continuous motion. The pickup, I can't do it. It's just too close. The Trail Duster, I can if I stop and pull forward and then back up again." Sometimes, in so doing, he would inadvertently back off the west edge of Gerber's driveway onto the unpaved ground.

Photographic views of the fence and the driveway indicate that the fence would prevent Graves from driving from a parked position on the portion of his driveway near the front of his house directly to the garage. He would first have to back at least part way into the street before moving forward and then do so entirely on the Gerber driveway.

Gerber, among other things, argues that the easement was one of necessity and that Graves can enter and leave the garage through the alley in any event. He also asked the court for affirmative relief by praying that he be permitted to place a gate in the 16-foot gap, which Graves could close and open as he pleased.

Gerber, in his testimony, complained that visitors at the Graves home parked in the Gerber driveway, thus blocking his access to his drive and garage. In cross-examination of Graves, it was disclosed that in order to use the easement, he sometimes removed snow from his side "over onto the easement side, also." The implication is that this resulted in piling snow on Gerber's driveway.

Gerber also justified the erection of the fence because the noise of the air-conditioner disturbed him and his family in the use and possession of their home and that the fence would reduce that noise, and also be-

cause the fence would prevent accidents such as once occurred when his car collided with the parked Graves car while backing out on the slippery driveway.

This is an action in equity and is tried de novo in this court. The principles which govern its disposition, we believe, are the following: Where an easement such as a right-of-way is granted without fixing its exact location, the location may be subsequently fixed by express agreement between the parties, or by an implied agreement arising out of the use of a particular way. *Ingelson v. Olson*, 199 Minn. 422, 272 N.W. 270 (1937); *Capital Elec. Power Assn. v. Hinson*, 226 Miss. 450, 84 So. 2d 409 (1956); *United States v. Felix O'Neill, Inc.*, 144 F. Supp. 292 (E.D. Pa. 1956); *Keesling v. Seattle*, 52 Wash. 2d 247, 324 P.2d 806 (1958); *Bruns v. Willems*, 142 Minn. 473, 172 N.W. 772 (1919); *Burnham v. Mahoney*, 222 Mass. 524, 111 N.E. 396 (1916); 28 C.J.S. *Easements* § 82, p. 761. See, also, *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977).

The failure of a grant to definitely locate an easement does not give the grantee the right to use the servient estate without limitation. In such a case the grantor may designate the location, and if he fails to do so the grantee may then make the designation which, in either case, must be reasonable. *Ingelson v. Olson, supra;* 28 C.J.S. *Easements* § 79, p. 759.

Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe. *Ingelson v. Olson, supra; Graff v. Budgett*, 69 S.D. 364, 10 N.W.2d 764 (1943); 28 C.J.S. *Easements* § 83, p. 762.

It is a general rule of equitable jurisdiction that where a court has assumed jurisdiction it will retain it for all purposes connected with the principal controversy. *Daugherty v. Ashton Feed & Grain Co., Inc.*, *ante* p. 159, 303 N.W.2d 64 (1981); *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976); *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb.

588, 223 N.W.2d 425 (1974); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956).

The use of an easement existing by an express grant must be confined to the terms and purposes of the grant. 28 C.J.S. *Easements* § 87, p. 765.

An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where the land owned by one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose. 28 C.J.S. *Easements* §§ 30-40, p. 686 et seq.

The evidence discloses that the fence interferes with the easement as established by Graves' use for a prolonged period of time. The trial court was clearly correct in directing that the fence be removed, at least as to that portion lying north of the gap. The evidence does not establish that the noise of the air-conditioner was such as to unreasonably interfere with the use of the Gerber property.

The easement plainly is not one arising by implication from necessity.

The easement must be limited to the use as established in practice. Graves' vehicles must enter on his own driveway and remain there until it is necessary to drive onto the Gerber drive to safely pass the obstructions. The vehicles must then return to the Graves drive. This same path should also be followed in making exit to the street. The owners of the dominant tenement in removing snow from their own drive and from the portion of the drive subject to the easement shall pile none of it on the servient tenement. The servient tenement shall not be used for the parking of vehicles by the owners of the dominant tenement or their visitors.

The trial court should again view the premises to determine whether the removal of the fence south of

the gap is required by the established use.

The judgment is affirmed in part and the cause remanded for entry of an amplified decree in accordance with this opinion.

AFFIRMED IN PART AND
REMANDED WITH DIRECTIONS.

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## LINDA ESBENSHADE, APPELLANT, V. NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

303 N.W.2d 272

Filed March 6, 1981. No. 43175.

1. **Directed Verdict.** 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.
2. **Juries: Negligence.** Where different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury.
3. **Directed Verdict.** It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.

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

William Jay Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler for appellant.

John R. Douglas and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

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

KRIVOSHA, C.J.

The appellant, Linda Esbenshade (Ms. Esbenshade), appeals from an order entered by the District Court for Douglas County, Nebraska, sustaining a motion for directed verdict made by the appellee, National Life Insurance Company (National Life), at the close of Ms. Esbenshade's case in chief. We believe that the evidence introduced as a part of Ms. Esbenshade's case in chief raised legitimate questions of fact which should have been submitted to the jury for its determination. We therefore reverse and remand this action for further proceedings.

Ms. Esbenshade and her husband leased an apartment from National Life, which was one of many units located in a multibuilding apartment complex owned by National Life, in Millard, Nebraska. Early in the morning of December 27, 1977, Ms. Esbenshade left her apartment unit, intending to walk to her parked car for the purpose of starting it and "warming it up" in anticipation of using it a little later in the morning.

According to Ms. Esbenshade's version of the facts, she chose what appeared to be the least hazardous route across an open common yard area of the apartment unit maintained by National Life. The area led to the parking lot where her car was located. Her evidence established that as she left her apartment building through the only practical means of ingress and egress, she observed that the sidewalk leading to the parking area was visibly slick with a thin sheet of ice covering most of the walkway.

Ms. Esbenshade's evidence tended to establish that the hazard posed by the ice upon the sidewalk was increased by reason of the fact that a portion of the walk she needed to cross to reach the parking lot consisted of a humped concrete bridge spanning a drainage ditch. The humped span, also covered with ice, had no handrails of any type. After warming up her car,

she returned to her apartment unit, again crossing the interior common yard area of the apartment unit.

National Life, as landlord, maintained all of the sidewalks and the common areas of the apartment unit. As landlord, National Life had also planted a 4-foot-high pine tree in the yard area near the sidewalk directly between the entrance of Ms. Esbenshade's apartment building and the parking lot. Attached to the tree were wires that extended 2½ to 3 feet beyond the end of the pine tree branches. The wires were attached to stakes in the ground. The wires were not flagged or in any other way marked or identified, and residents were not otherwise warned about the presence of the wires except to the extent that they might actually have seen them on previous occasions.

In returning to her apartment unit from the parking lot, Ms. Esbenshade fell over one of the guy wires, striking her knee and shattering her patella. As a result of her fall, Ms. Esbenshade was forced to undergo surgery, resulting in the removal of her kneecap. In addition to the loss of her kneecap, she suffered pain, actual loss of wages, and incurred medical expenses.

Ms. Esbenshade maintained that she was unaware of the presence of the guy wires and did not see them on the morning in question because of the absence of adequate light, either natural or artificial. As we have already indicated, the trial court sustained the motion for a directed verdict made by National Life following Ms. Esbenshade's case in chief, and dismissed her petition.

Ms. Esbenshade claims that the issues raised by her evidence involved questions of fact so that the trial court erred in sustaining the motion for directed verdict. The determination of that question depends, in part, upon certain rules heretofore announced by us in reviewing the granting of a directed verdict.

In the recent case of *Foremost Ins. Co. v. Allied*

*Financial Services, Inc.*, 205 Neb. 153, 158, 286 N.W.2d 740, 744 (1980), we said: "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. [Citations omitted.] 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." (Emphasis omitted.) Likewise, in *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 440, 56 N.W.2d 610, 612 (1953), we said: "[W]here different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury." In *Hickman v. Parks Construction Co.*, 162 Neb. 461, 470, 76 N.W.2d 403, 410 (1956), we said: "It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause the trial court may not disregard it and decide the case as a matter of law." And we noted in *Presho v. J. M. McDonald Co.*, 181 Neb. 840, 844, 151 N.W.2d 451, 455 (1967): "[N]egligence and a duty to use due care does not exist in the abstract, but must be considered against the particular set of facts and circumstances."

The first question which we must therefore address in reviewing the action of the trial court in this case is whether the evidence presented by Ms. Esbenshade, viewed most favorably in support of her position, is such that reasonable minds could reach only the conclusion that National Life was not in any manner negligent or that Ms. Esbenshade was so contributorily

negligent as to bar her recovery as a matter of law. For, if reasonable minds can dispute about the conclusion to be reached in this case, a directed verdict would be inappropriate.

The rules of law concerning the liability of a landlord in this case are relatively clear, though the application of the rules have consistently given us difficulty. Restatement (Second) of Torts § 342 (1965) provides: "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved."

Our holdings have generally been in accord with Restatement's position. In *Markussen v. Mengedoht*, 132 Neb. 472, 475, 272 N.W. 241, 243 (1937), we acknowledged the Restatement rule, saying: "[T]he owner, who reserves a portion of the demised premises for the common use of all the tenants, is required to keep the portion so reserved in a reasonably safe condition . . . ." And, again, in *Schwab v. Allou Corp.*, 177 Neb. 342, 347, 128 N.W.2d 835, 839 (1964), we said: "'[A] lessor is bound to exercise reasonable care in keeping premises used in connection with but not demised to the lessee reasonably safe for those having lawful occasion to use them for the purpose for which they were intended.'"

An examination of a series of cases decided by this court discloses that evidence similar to the type presented to the trial court in this case has led this court to conclude that questions of fact were, indeed, raised which should have been submitted to the jury. In *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d

697 (1979), we were asked to review a case involving a plaintiff who tripped upon a floormat and fell in the defendant's store while there to make a purchase. In concluding that a question of fact was raised, we said at 185-86, 277 N.W.2d 699-700: "In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in her favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for the jury. Pearson v. Richard, 201 Neb. 621, 271 N.W.2d 326. This court said in the Pearson case that: 'Negligence is a question of fact and may be proven by circumstantial evidence and physical facts.'"

In *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 56 N.W.2d 610 (1953), we determined that it was a question of fact whether the defendant store was negligent in permitting gum to remain on the store floor, thereby causing the plaintiff to catch her heel and fall to the floor.

In *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956), we held that it was a question of fact to be determined by the jury as to whether the defendant construction company was negligent in leaving an excavation in such condition that the plaintiff, while attempting to cross the parking lot to his automobile, fell into the excavation.

In *Schwab v. Allou Corp., supra*, we held that it was a question of fact as to whether the landlord was negligent in failing to remove the ice from the front porch and the plaintiff contributorily negligent in walking across the ice when there was no other means of ingress or egress.

In *Crosswhite v. City of Lincoln*, 185 Neb. 331, 175 N.W.2d 908 (1970), we held it to be a question of fact

to be determined by the jury as to whether the city and the abutting property owner were negligent in permitting a water stop box to remain elevated above the sidewalk, thereby causing the plaintiff to trip over the stop box when attempting to cross the sidewalk.

And in *Tempel v. Proffitt*, 122 Neb. 249, 240 N.W. 285 (1932), we held it was a question of fact to be determined by the jury as to whether defendant-landlord was negligent in maintaining certain stairs upon which the plaintiff fell.

To be sure, the landlord may not always be held liable. The landlord is not liable to a tenant for injuries sustained in a common area where the danger is inherent and the conditions complained of are open, obvious, and apparent to the injured party. See, *Good v. Jones*, 184 Neb. 454, 168 N.W.2d 520 (1969); *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963); *Whitcomb v. State Fed. Sav. & Loan Assn.*, 190 Neb. 26, 205 N.W.2d 652 (1973).

We need not, however, and, in fact, do not, find by our decision herein that National Life was in fact negligent in any respect. That conclusion, being a question of fact under the circumstances, we leave for the triers of fact — the jury. We only decide here either that National Life was not wholly free of negligence as a matter of law or that Ms. Esbenshade was not guilty of contributory negligence sufficient to bar recovery as a matter of law. Therefore, National Life was not entitled to a directed verdict. Our conclusion reached herein is clearly required under the law and the facts presented.

Whether National Life exercised the ordinary care required of a landlord when extending the guy wires several feet beyond the tree must of necessity be a question of fact. The answer to that question depends upon the view which the jury takes of the evidence offered by Ms. Esbenshade. Did she know of the presence of the wire? She maintains she did not.

Did National Life know that persons, including tenants, used the common area to walk upon and to get to their cars? Ms. Esbenshade maintains it did. Could the wire be seen either day or night without other warnings being given by National Life or other steps taken by it to protect users of the common area, including the tenants? Ms. Esbenshade maintains that the light was insufficient. The jury might conclude to the contrary. That is not, however, a question of law but, rather, a question of fact.

National Life argues that no reasonable mind could reach a conclusion that National Life was negligent under the facts and the law in this case. We do not believe that to be true. As we have noted earlier in our opinion, reasonable minds have reached contrary views as noted in the cases cited herein.

Likewise, other jurisdictions which have reviewed actions of this very type have concluded that reasonable minds might reach contrary conclusions as to the facts of the matter, thereby making the action properly one which should be submitted to a jury for their determination.

In the case of *Blaustein v. Levitt*, 24 App. Div. 2d 862, 264 N.Y.S.2d 318 (1965), the Supreme Court of New York, Appellate Division, Second Department, was asked to rule upon an action brought by the plaintiff to recover damages for personal injury sustained by the plaintiff when he attempted to cross a 6-foot-wide island situated between the place in the parking lot where he had parked his car and the entrance to the apartment house owned by defendant, in which house plaintiff was a tenant.

In affirming the judgment of the jury finding for the plaintiff-tenant and against the defendant-landlord, the court said at 862, 264 N.Y.S.2d at 319: "Planted in the center of the 'island' was a young tree about 4 or 5 feet high from which a wire was stretched from a height of 2½ to 3 feet to a peg about 2 or 2½ feet away. In attempting to cross the island, plaintiff

tripped on the wire, which was invisible to him on this rainy night in this unlighted area. The jury could find that defendant had the duty to anticipate that a person parking his car in the parking area would attempt to get to the entrance of the apartment house in which he was a tenant directly from the parking lot on the far side of the island, rather than to go around the island [citation omitted]. Contributory negligence was a question of fact."

Likewise, in *Laufer v. Long Island Lighting Co.*, 61 App. Div. 2d 977, 402 N.Y.S.2d 611 (1978), the same court was asked to review a negligence action to recover damages for personal injury resulting when the plaintiff fell over a guy wire extending from a telephone pole. The New York court said at 977-78, 402 N.Y.S.2d at 612: "The New York Telephone Company erected a telephone pole in the grassy area between a concrete sidewalk and the curb. It attached a cable guy wire to the pole and, in order to stabilize the pole, anchored the guy wire in the grassy area. During the evening of May 4, 1976, plaintiff and three friends attempted to cross the street in the middle of the block. Plaintiff was apparently speaking with and looking at one of his friends when he tripped over the guy wire. He testified at the trial that he did not realize what he had tripped over until he had gotten up from the ground and looked about. Plaintiff and Kevin Valentine testified that it had been very dark at the time of the accident. Only the middle of the street had been illuminated; the guy wire was not visible. . . . In view of the darkness and the dark color of the guy wire, it would have been difficult for plaintiff to ascertain the cause of his fall, while falling. Under the circumstances, only when he had gotten up and searched for the cause of the accident could plaintiff have determined what had made him fall. Had he observed the wire before the accident, and yet fallen over it, a jury might have found that his own negligence had proximately caused the accident. There was no

testimony as to the presence of any other object at the location. A jury could find that plaintiff did not trip over the curb, as the guy wire obstructed the path to the street; plaintiff would have had to pass the guy wire before reaching the curb. Plaintiff's testimony as to having tripped over something may exclude the possibility of his having fallen over his own two feet. We find that plaintiff made out a prima facie case. The questions of fact should be decided by a jury . . . ."

And in the case of *Jablonski v. City of Bay City*, 248 Mich. 306, 226 N.W. 865 (1929), the Michigan Supreme Court held that it was a question of fact as to whether the city was negligent in placing a wire along the edge of a sidewalk over which the plaintiff tripped. In so holding the Michigan Supreme Court said at 310-12, 226 N.W. at 866-67: "Such departure from the sidewalk is not negligence *per se* in the individual, nor does it relieve the city of the duty to keep its streets in proper condition for travel at the places where people may reasonably be expected probably to walk.

. . . .

"The essential question is whether the guard is a reasonable one. . . . [A]nd the question of whether it was a proper guard or a dangerous instrumentality resulting in a breach of the statutory duty of the city would be for a jury."

In view of all of these cases brought to our attention, we are unable to see how we can conclude that reasonable minds could reach but one conclusion under the facts in this case. We must, therefore, conclude that reasonable minds could differ under the circumstances. Reaching that conclusion, we must, likewise, acknowledge that there were legitimate questions of fact which should have been presented to a jury under proper instructions at the proper time, thereby making the sustaining of a motion for directed verdict improper.

What we have said concerning the issue of National Life's alleged negligence can likewise be said about

Ms. Esbenshade's alleged contributory negligence. Does the evidence establish that Ms. Esbenshade did not use "ordinary care" for her own safety? Did she know about the presence of the guy wire and could she have seen the guy wire before she fell over it? Did she place herself in a dangerous position when other, more reasonable and less dangerous alternatives were available? We cannot answer those questions as a matter of law. They might reasonably be decided either way by reasonable minds. The answer to those questions under the evidence must, therefore, be questions of fact to be decided by the jury.

We therefore reverse the action of the trial court in dismissing plaintiff's petition, and remand for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCOWN, J., concurs in result.

CLINTON, J., dissents.

BOSLAUGH, J., dissenting.

According to the majority opinion, the evidence in this case would sustain a finding that the defendant had created a condition involving unreasonable risk of harm to the plaintiff and the plaintiff did not know or have reason to know of the condition and risk of harm.

The evidence is that the tree had been planted 1 to 5 months before the accident and the plaintiff had walked past it many times. In her deposition, the plaintiff testified that at one time or another she had "probably noticed" or "observed" the wires and stakes supporting the tree. There was nothing concealed or hidden about the wires and stakes, although the wires would not be easily seen when it was dark.

The majority opinion relies upon Nebraska cases involving dangerous conditions on floors in grocery and department stores; stairways and porches of apartment houses; excavations in parking lots; and elevated

stop boxes in sidewalks. It should be readily apparent that none of these cases has any application to the facts in this case.

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## DUKANE CORPORATION, APPELLANT, V. SIDES CONSTRUCTION COMPANY AND SAFECO INSURANCE COMPANY OF AMERICA, APPELLEES.

302 N.W.2d 721

Filed March 6, 1981. No. 43176.

1. **Mechanics' Liens: Bonds: Contractors and Subcontractors.** The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply.
2. **Mechanics' Liens: Contractors and Subcontractors.** Where the general mechanic's lien laws are applicable the lien of a materialman for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in or delivered at the building for use therein.
3. **Bonds: Principal and Surety: Words and Phrases.** Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims.

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

Eugene L. Pieper of Thompson, Crounse & Pieper for appellant.

Waldine H. Olson of Schmid, Ford, Mooney & Frederick for appellees.

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

MCCOWN, J.

The plaintiff brought this action against the general contractor and its bonding company to recover on a

labor and material payment bond for materials furnished to a subcontractor whose contract was canceled. Following discovery, both parties filed motions for summary judgment. The District Court granted defendants' motion for summary judgment and dismissed plaintiff's petition.

On October 26, 1977, Sides Construction Company, as general contractor, entered into a construction contract with Bellevue school district to renovate Bellevue East High School. Sides Construction Company entered into a subcontract with Hy-Gain Electronic Systems Corporation on November 14, 1977, under which Hy-Gain was to furnish all plant labor, equipment, and materials necessary to revise the clock and program system for the school renovation. In November and December of 1977 Hy-Gain ordered various materials from Dukane Corporation, the plaintiff, which were apparently to be used by Hy-Gain in connection with its subcontract. The materials were all shipped to Hy-Gain in Lincoln, Nebraska, except for some "back boxes" which were mistakenly delivered to Sides Construction Company rather than Hy-Gain. None of the materials were ever delivered to the job site in Bellevue, Nebraska, nor used by Sides, nor incorporated into the job.

On January 13, 1978, Sides received an invoice from Hy-Gain for certain unspecified "equipment" for the school job which was identified as being located in Hy-Gain's warehouse. In January 1978 Hy-Gain filed a Chapter XI petition for a bankruptcy arrangement in the U.S. District Court for Nebraska.

After receiving Hy-Gain's invoice in January 1978, and throughout February and March of 1978, Sides attempted to locate and secure delivery of the materials through numerous phone calls to Hy-Gain and the plaintiff. Being unable to obtain delivery of the materials, Sides canceled the Hy-Gain contract by letter dated April 7, 1978.

In order to complete the school job, Sides issued a

new subcontract to Electronic Contracting Company on June 9, 1978, for a stipulated contract price of $20,800. Electronic furnished the materials and completed the new subcontract and has been fully paid by Sides.

On February 14, 1979, plaintiff filed its petition against Sides and Safeco to recover the sum of $12,708.95 for the materials that remained in the possession of Hy-Gain and which were not furnished to the job site nor used in the performance of the contract. The District Court entered summary judgment for the defendants and the plaintiff has appealed.

The bond in the present case is a statutory bond required to be furnished in connection with any contract for the erecting or repair of any public building or structure where the general provisions of the mechanic's lien laws do not apply and where the mechanics, laborers, and materialmen have no lien to secure payment for labor, material, and equipment. The relevant portions of Neb. Rev. Stat. § 52-118 (Reissue 1978) require all public boards "to take from the person, persons, firm, or corporation to whom the contract is awarded a bond, in a sum not less than the contract price, with a corporate surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract."

The bond in this case is conditioned to make prompt payment to all claimants as defined, "for all labor and material used or reasonably required for use in the performance of the Contract." The bond also provides: "A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil,

gasoline, telephone service or rental of equipment directly applicable to the Contract."

Plaintiff's position is that the language "used or reasonably required for use" extends coverage under the bond to any materialman who supplies goods to a subcontractor when those goods are reasonably required and intended for use in the performance of the contract. The position is that recovery may be had even though the goods are never delivered to the job site nor applied to or used in the performance of the contract.

The essential language of the statute requires that the bond be conditioned "for the payment for material and equipment rental which is actually used or rented in . . . performing the contract." It is also clear that the purpose of § 52-118 is to provide protection to materialmen and laborers in the construction or repair of public buildings where the provisions of the general mechanic's lien laws do not apply. Where the general mechanic's lien laws are applicable this court has consistently held that: "The lien of a materialman for materials furnished for the erection of a building, by virtue of an agreement with the contractor, extends to such materials only as are used in or delivered at the building for use therein." *The Wickes Corporation v. Frye*, 202 Neb. 23, 273 N.W.2d 663 (1979). The clear legislative policy is to provide the statutory bond coverage for the protection of laborers and materialmen who would otherwise be protected by general mechanic's and materialmen's lien laws.

The plaintiff contends that the language of the bond in the present case provides for a broader coverage than the statute itself because it covers materials "used or reasonably required for use" and argues that a contract of a surety for compensation should be construed most strongly against the surety and in a light most favorable to those entitled to protection under the contract.

Several courts have interpreted the language of

"used or reasonably required for use," although technically disjunctive rather than conjunctive, to mean materials actually used by the contractor in furtherance of the contract, and have treated the lanugage "reasonably required for use" as being inserted in the bond to protect the surety against extravagant and unnecessary use of labor and materials. See, *Gallimore, Inc. v. Home Indem. Co.*, 432 F. Supp. 434 (W.D. Va. 1977); *Middle-West Concrete v. General Ins. Co.*, 267 S.E.2d 742 (W. Va. 1980); *Standard Accident Ins. Co. of Detroit v. Rose*, 314 Ky. 233, 234 S.W.2d 728 (1950); 10 Appleman, Insurance Law and Practice, § 5941, p. 150.

It is apparent that the materials in the present case were not actually used in performing the contract nor were they delivered at the building site. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

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WILLIAM WITZEL, SR., AND MARIE WITZEL, HUSBAND AND WIFE, APPELLANTS, V. THE VILLAGE OF BRAINARD, A MUNICIPAL CORPORATION, APPELLEE.

302 N.W.2d 723

Filed March 6, 1981. No. 43268.

1. **Zoning: Eminent Domain.** Zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain.
2. ____: ____. The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations.

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

George H. Moyer, Jr., of Moyer, Moyer & Egley for appellants.

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

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

REIMER, District Judge.

The plaintiffs are owners of Lots 8, 9, and 10, Block 2, Original Town of the Village of Brainard in Butler County, Nebraska, upon which is located a dwelling house which they intend to remodel and occupy as a dwelling. The defendant Village acquired by purchase Lots 11 and 12, Block 2, Original Town of the Village of Brainard, Nebraska, and have duly proceeded to construct a fire station thereon.

The plaintiffs brought this action for injunction in the District Court of Butler County, Nebraska, alleging violations of the duly adopted zoning ordinances of the Village of Brainard, Nebraska. A temporary restraining order was issued by the county court of Butler County, Nebraska, on May 17, 1979, in the absence of a district judge within the county. The District Court of Butler County dissolved the restraining order and plaintiff's application for a temporary injunction was denied on July 9, 1979. On January 14, 1980, the District Court denied a permanent injunction and dismissed the plaintiffs' petition. Motion for new trial was denied and appeal to this court was perfected.

It appears from the evidence that the fire station, which at the time of hearing on the permanent injunction was nearing completion, did not comply with certain setback provisions of the zoning ordinance. Plaintiffs further complain that construction of a fire station within a business district zone is not a permitted use under the zoning ordinance.

The plaintiffs contend on this appeal that the District Court erred in failing to apply the terms of the zoning ordinance to the construction of the fire station. The decision of the District Court is affirmed.

This court has not previously dealt with this exact question, but did rule on a related question in *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976), by deciding that injunction against the city of Seward in its condemnation proceeding to acquire land for airport purposes was not warranted, even though the land was within the zoning jurisdiction of the Seward County board of commissioners and its use as an airport may not have been a permitted use under the existing zoning regulations applying to that specific land.

Other jurisdictions generally grant to municipalities exemption from zoning ordinances in varying degrees, depending upon the theory of exemption adopted in that jurisdiction. The discussion at 82 Am. Jur. 2d *Zoning and Planning* §§ 149, 150, 151, 152, and 153 (1976) indicates such exemptions may be based upon express exemption contained in the zoning ordinance, or pursuant to the construction of the zoning regulations themselves; also by the express language in a supervening statute suspending the applicability of the zoning regulation, and by reason of immunity of the sovereign from suit, or where the use of the property in question was in furtherance of a governmental, rather than a proprietary, function. In § 152 at 636-37, eminent domain is discussed: "The view has gained some ascendancy that zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain. The courts supporting this view have, at least tacitly, reasoned that the power of eminent domain is superior to the zoning power, and that a political subdivision with mere zoning authority should not be permitted to prevent or place limitations upon a public use of property in the furtherance of which a governmental entity has been clothed with condemnation power by the state legislature."

This court has adopted the eminent domain theory

of exemption in *Seward County Board of Commissioners v. City of Seward, supra* at 270, 242 N.W.2d at 852: "The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations."

Furthermore, the Legislature has, at Neb. Rev. Stat. § 19-901 (Reissue 1977), limited the purposes of zoning by villages by the following language: "[L]egislative bodies . . . may adopt zoning regulations which regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes," and by inference withheld zoning authority over public buildings. In addition, the Legislature has provided for conflict between overlapping zoning authority in the grant of eminent domain authority at Neb. Rev. Stat. § 19-709 (Reissue 1977), wherein it is provided: "[T]he chairman and members of the board of trustees of any village shall have power to purchase or appropriate private property or school lands for the use of the . . . village for . . . public fire stations, training facilities for firemen . . . except that no . . . village may acquire through the exercise of the power of eminent domain or otherwise any real estate within the zoning jurisdiction of any other city of the first or second class or village for any of the works enumerated in this section if the use for which the real estate is to be acquired would be contrary to or would not be a use permitted by the existing zoning ordinances and regulations of such other city or village, but such real estate may be acquired within the zoning jurisdiction of another city of the first or second class or village for such contrary or nonpermitted use if the governing body of such other city or village shall approve such acquisition and use."

The order of the District Court denying permanent injunction and dismissing plaintiffs' petition is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

HIPPE, District Judge, dissenting.

The court is holding that a municipality is not subject to its own zoning regulations, and I dissent. If the court were committed to a line of precedent which would compel this result, that would be one thing. In Nebraska, however, the question is one of first impression.

Although the answer is open in Nebraska, the problem is not new. When governments were not significant land users, and the concept of zoning was new, exemptions from zoning regulations were uniformly granted to governments. See the discussion and cases cited in 2 Anderson, American Law of Zoning, § 12.03 (1976); 2 Metzenbaum, Law of Zoning, Ch. X-i (1955); 101 C.J.S. *Zoning* § 135 (1958); 82 Am. Jur. 2d *Zoning and Planning* §§ 149 et seq. (1976); Annot., 61 A.L.R.2d 970 (1958). The notion of governmental regulation over land use was not popular. The needs of the public were thwarted by zoning complications. One government may have need for land use in an area that another government had zoned and unreasonably refused variances. Sovereign immunity was the rule, eminent domain was perceived a superior principle, and governmental accountability was nonexistent. All of these reasons contributed to the general rule that zoning regulations do not apply to governmental operations.

The absurdity of the rule is very easy to demonstrate under modern conditions. For example, one city may condemn land in the limits of another city and place its sewage facilities there. That happened in *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 368 P.2d 637 (1962), where the dissenting opinion argues for the rule proposed by this dissent. A municipality could put its sewage disposal facility in an area zoned by it for "residential A" uses. *Kedroff v. Town of Springfield*, 127 Vt. 624, 256 A.2d 457 (1969), is an example of

such a result. Or, it could do the same thing with the city dump. *Rose v. Commissioner of Public Health*, 361 Mass. 625, 282 N.E.2d 81 (1972), illustrates such a situation.

Recognizing these kinds of problems have compelled courts of first impression to adopt a more flexible rule. Recent cases so holding include *Porter v. Southwestern Public Service Company*, 489 S.W.2d 361 (Tex. Civ. App. 1972); *Orange County v. City of Apopka*, 299 So. 2d 652 (Fla. App. 1974); *Oronoco v. Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972); *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962); and *City of Fargo, Cass Cty. v. Harwood Tp.*, 256 N.W.2d 694 (N.D. 1977). This seems to be the trend and acknowledges the present-day state of affairs. Governments are now significant land users. If their operations are exempt from zoning, public anticipation for development will be dashed by the very government that encoded the rules. Urban sprawl and the concrete explosion intensifies the need for strict adherence to planning. Exempting governments makes a significant uncertainty as to how much one can count on land to be developed according to the applicable zoning plan.

These courts have articulated a "balancing-of-public-interests" test to handle problems when one public interest, such as providing a fire station, conflicts with another public interest, such as the certainty that land use planning be enforced. Each case is then analyzed to determine where the public interest lies. This makes sense, because all of the public power of municipalities has its source from state statute. The power to condemn; to establish governmental facilities such as fire stations, sewage facilities, city dumps, courthouses, etc.; and to zone are all equally important and have the same sovereign. To simply say that the power to zone must always bend if other powers come in conflict is simply *avoiding* the question, not *resolving* it. The problems in such conflict are certainly

complex and demand much more than the simplistic approach that a government with power of eminent domain may disregard anyone's zoning rules, their own included.

None of the typical problems illustrated in these types of cases are present here. The power of eminent domain was not used. Two competing governments are not involved. The Village did not exempt itself from its ordinance. The Village is clearly using its governmental, as opposed to proprietary, functions. Municipalities in Nebraska are no longer totally immune from suit. The Village of Brainard simply wants to locate its fire station next to the plaintiffs' home. Its zoning regulations prohibit it at that location. Therefore, the question is squarely presented, whether a municipality may disregard its own zoning requirements with no reason at all.

The statutory authority for village zoning mandates a comprehensive plan, including: "A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, *public buildings and lands, and other categories of public and private use of land.*" (Emphasis supplied.) Neb. Rev. Stat. § 19-903(1) (Reissue 1977).

The zoning for the land in question permits no public uses whatever. The Village has provision in the zoning regulation for securing a special permit for a governmental nonconforming use after a public hearing, but the city did not even get a regular building permit, much less apply for a special permit.

Nowhere in the Nebraska statutes is there an intimation that municipalities are exempt from their own zoning rules, nor does the ordinance of the Village of Brainard provide for that. It seems to me that the statutes assume that use by the public is one category to be designated in zoning. That being the case, it seems that zoning descriptions on uses of land must include whether it will have a public use. This one does not.

It might be argued that the zoning rules should not apply to a body that enacted them because they could change them anyway. Also, usually there is a way they could provide for exceptions. Therefore, it would be a waste of time to say the regulations apply in the first place.

The problem with this thought is that it overlooks the procedure a municipality must apply in changing its regulations. First, the public is aware of what happens because of a public hearing. Second, the pressure of politics is a factor in seeing that the right result is reached. Third, judicial review is available to guard against arbitrariness.

If the majority opinion is the law, then a municipality is not required to take those steps when it deviates from its zoning requirements. All it has to do is begin construction. Under such a scheme of justice, one could wake up to find a city dump construction starting next door in a residential area of the city. There would be no notice that the government was deviating from its own rules. There would be no public forum to air the grievance. There would not be political pressure one could bring. Worst of all, the courts would be closed to a collateral injunction under this ruling because the city is not legally required to comply with its regulations anyway. This is a colossal betrayal of legitimate public expectations. If governments cannot be trusted to follow established written rules, then who can?

The majority attempts to justify the result for two reasons. They first claim that *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976), adopts the rule that all governments possessing the power of eminent domain are exempt from zoning requirements. I would adopt the "balancing-of-public-interests" rule and hold the *Seward* case to its facts of city airport establishment power versus county zoning power.

They also intimate that Neb. Rev. Stat. § 19-901 (Reissue 1977) limits zoning power of municipalities to private uses by failing to mention public uses. Two sections later, however, the statutes insist that a comprehensive plan delineate and map the public uses of land, as well as private uses. The *Seward* case assumed that the county had power to zone regarding public uses, and I would suggest that the statutes assume likewise. This is so because the eminent domain statute, Neb. Rev. Stat. § 19-709 (Reissue 1977), provides for conflicts between certain eminent domain powers of cities of the first or second class or villages and the contrary zoning of other cities of the first or second class or villages. Thus, the Nebraska statutory scheme assumes that one city may zone according to public uses that another government may have within its limits.

Since the reasons for the result are illusory, it should be clear that more consideration must be given to formulating Nebraska law on the subject. A blanket rule proposed by the majority will come back to haunt this court, as it has others. It will permit governments possessing eminent domain powers to complicate sound planning by others. Worse yet, it permits a government to disregard its own written rules that everyone else is expected to follow. The approach urged in this dissent still permits legitimate public endeavors where their need is clearly demonstrated. It does not hamstring municipalities from providing needed services; it just makes them do so within the framework of their own regulations. It does, however, provide a forum for the aggrieved neighbor. The majority rule does not.

# STATE OF NEBRASKA, APPELLEE, V. JAMES RAY MOORE, APPELLANT.

302 N.W.2d 728

Filed March 6, 1981. Nos. 43451, 43452.

1. **Sexual Assault: Sexual Sociopath: Delayed Sentences.** Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense.
2. ____: ____: ____. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence.

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

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

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

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

MCCOWN, J.

The defendant has appealed from delayed sentences imposed upon him for sexual offenses. The defendant contends that he was erroneously denied credit on the sentences for the time he was confined as an untreatable sexual sociopath and that the sentences were excessive.

The defendant was originally charged in two separate criminal prosecutions. Case No. 43451 arose out of events which occurred on June 27, 1975. In that proceeding the defendant was charged with robbery, forcible rape, sodomy, and use of a firearm in the commission of a felony. He was found guilty by a jury on all four counts. On December 5, 1975, he was sentenced to 15 to 30 years' imprisonment on the robbery count

and to not less than 3 years nor more than 10 years on the unlawful use of a firearm count, with that sentence to run consecutively to the robbery sentence. Sentencing was delayed on the rape and sodomy counts to determine whether the defendant was a sexual sociopath. On March 19, 1976, the defendant was found to be an untreatable sexual sociopath and committed to the Nebraska Penal and Correctional Complex for an indefinite period and ordered to be kept separate from the regular prison population.

The second case, No. 43452, arose out of events which occurred on May 6, 1975, involving a different victim. In that proceeding the defendant was charged with robbery, forcible rape, use of a firearm in the commission of a felony, and by later amendment an habitual criminal count was added. On January 22, 1976, the defendant pleaded guilty to the robbery and the rape charges, and the firearm and habitual criminal charges were dismissed. On the same day the defendant was sentenced to not less than 15 years nor more than 30 years' imprisonment on the robbery count, the sentence to run concurrently with the sentences already imposed in case No. 43451. The sentence on the rape charge was deferred for determination of the defendant's status as a sexual sociopath. On March 19, 1976, the defendant was found to be an untreatable sexual sociopath as to the rape count and ordered confined in the Nebraska Penal and Correctional Complex under provisions essentially the same as in the first prosecution.

On March 27, 1979, in an unrelated case interpreting the sexual sociopath statutes under which the defendant was committed, this court held that upon completion of any proceedings to determine that a defendant was a sexual sociopath, at the earliest possible time thereafter a defendant was to be returned to the District Court and an appropriate sentence on the criminal charge was to be imposed. We said: "Such sentence shall be deemed to commence from such time as defend-

ant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration." *State v. Shaw*, 202 Neb. 766, 771, 277 N.W.2d 106, 110-11 (1979).

With respect to persons then in custody as sexual sociopaths who had not previously been sentenced, this court directed that they should be returned to the district in which they were convicted for the purpose of sentencing on the criminal charge, and we said: "Such sentence shall commence to run from the date in [sic] which such defendant was incarcerated less appropriate credit for time served prior to conviction." *Shaw* at 772, 277 N.W.2d at 111.

In 1979 the sexual sociopath laws under which the defendant had been committed to the penal complex as a sexual sociopath were repealed and replaced by Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979). The new statutes became effective May 24, 1979. The statutes require that persons convicted of a felony sexual offense and believed to be "mentally disordered sex offenders," after evaluation, are to be sentenced for the felony sexual offense. If the defendant is found not to be a mentally disordered sex offender or a nontreatable mentally disordered sex offender the defendant is to be sentenced "as provided by law on the offense for which he or she has been convicted." If the defendant is found to be a mentally disordered sex offender whose disorder is treatable, the court is to commit the defendant for treatment in a regional center. If, after commitment for treatment, it is determined that a defendant no longer has a mental disorder or that he has received the maximum benefit of treatment, the defendant is required to be returned to the sentencing court for further disposition, which can include sending the defendant to the Nebraska Penal and Correctional Complex for the remainder of his or her sentence or further disposition not inconsistent with the terms of the statutes. Credit is required to be given on the

sentence for the time spent in treatment. See §§ 29-2912 to 29-2919.

Section 29-2921 provides that all persons committed as sexual psychopaths or sexual sociopaths under prior statutes, now repealed, should forthwith be returned to the District Court which committed them for review and disposition consistent with the terms of the new statutes.

In April 1980 the defendant was returned to the District Court for sentencing in both cases on the sexual offenses underlying his 1976 commitment as a sexual sociopath. On April 24, 1980, the District Court, in case No. 43451, found that the defendant was not a mentally disordered sex offender and sentenced him to imprisonment for not less than 5 years nor more than 10 years on the rape conviction, the sentence to be consecutive to the previous consecutive sentences for robbery and for use of a firearm in commission of a felony. The District Court also sentenced the defendant to imprisonment for not less than 5 years nor more than 10 years on the sodomy charge and provided that that sentence was to be consecutive to the rape sentence pronounced on the same day. The District Court granted no credit for time served as a sexual sociopath against either the rape or the sodomy sentence.

On the same day, in case No. 43452, the District Court sentenced the defendant to imprisonment for not less than 5 years nor more than 10 years for rape and provided that the sentence should be consecutive to the robbery sentence pronounced in 1976 in the same case, and directed that both sentences were to run concurrently with the sentences pronounced in case No. 43451.

In this appeal the defendant contends that he was erroneously denied any credit for the 4 years and 26 days he was confined in the penal complex under commitment as a sexual sociopath without having been sentenced on the underlying sexual crimes. He also contends that the sentences were excessive.

The statutes pertaining to mentally disordered sex offenders under which the defendant was sentenced, as well as our prior decision in *State v. Shaw*, make it clear that upon a delayed sentencing for a sexual offense credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. No problem arises except in cases where consecutive sentences are imposed. Sections 29-2911 to 29-2921 do not restrict the imposition of consecutive sentences nor place any limitations on the designation of the order in which multiple consecutive sentences shall be served.

Where delayed consecutive sentences for sexual offenses are pronounced, as in this case, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence.

The defendant also asserts that the sentences in this case were excessive. The sentences were well within statutory limits and the record establishes that there was no abuse of discretion on the part of the trial court.

That portion of the judgment in case No. 43451 denying credit against the sexual sentences for time spent under commitment as a sexual sociopath is vacated. Credit of 4 years 26 days shall be given on the rape sentence in case No. 43451 to be credited at the time the defendant commences to serve that sentence. As so modified the judgments and sentences are affirmed.

AFFIRMED AS MODIFIED.

KRIVOSHA, C.J., concurs in result.

HASTINGS, J., dissenting.

The effect of the majority opinion is to reduce by 4 years and 26 days the clear and explicit sentences of

the District Court. This was accomplished by a somewhat strained application of the rule laid down in *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979), under similar but significantly distinguishable circumstances.

In *Shaw*, at the time he was returned to the trial court for sentencing pursuant to our order, he was being held in the penitentiary solely because of his commitment as a sexual sociopath. He had no liability to the State of Nebraska for penal servitude other than that for the crime of sexual assault. Therefore, it was entirely proper that he be given credit against his obligation under a sentence for that crime for the time which he had already served.

Here, however, at the time of the court's entry of the order of commitment as a sexual sociopath, the defendant had been sentenced to the penitentiary for crimes other than the sexual crimes and had begun to serve those sentences. Until he had completed those sentences, he was not free to begin any period of confinement for different crimes.

Nevertheless, as a result of our opinion today, it appears that defendant will receive credit against both his sentences for robbery and sexual assault for the same period of time served, contrary to the stated intention of the District Court. I disagree with that result.

BOSLAUGH and CLINTON, JJ., join in this dissent.

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## STATE OF NEBRASKA, APPELLEE, V. ROBERT COUSINS, APPELLANT.

302 N.W.2d 731

Filed March 6, 1981. No. 43483.

1. **Sentences.** A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence, fixing a different term, is a nullity.

2. ____. The general rule applies to valid sentences even where the sentencing judge indicates that the change is intended only to correct an ambiguity or a prior misstatement.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed.

Scott P. Helvie, Sean J. Brennan, and Shelley K. Stall, Public Defenders of Lincoln County, 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.

WHITE, J.

This case involves the single question of whether a District Court is permitted to amend a valid sentence. The defendant was charged with and found guilty of violating Neb. Rev. Stat. § 28-912(1) and (5) (Reissue 1979), escaping while under arrest for a felony.

In passing sentence, the trial judge said as follows: "This sentence then shall be to the Nebraska Penal and Correctional Complex for a period of one year to eighteen months to be served consecutive to the one I sentenced him on this morning [Lincoln County District Court Case No. 77-48] and *concurrently* to the one Judge Stuart sentenced, [Lincoln County District Court Case No. 79-12] with no credit for jail time." (Emphasis supplied.) Approximately 6 minutes later, the court ordered the parties to return to the courtroom. "THE COURT: Let the record show I called the parties back and announced I am not changing any sentence but I am correcting a statement from the Bench. I did not mean this would be concurrent to the sentence imposed by Judge Stuart [Lincoln County District Court Case No. 79-12]. I mean this would be consecutive. I did not want to give this defendant the same amount because of a different history, but it is a second offense. I should have said consecutive to the one imposed by Judge Stuart."

The trial court's attempt to correct the inadvertent use of the word "concurrent," when he meant "consecutive," is ineffective. "The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity." *State v. Snider*, 197 Neb. 317, 319, 248 N.W.2d 342, 343 (1977); *State v. Brewer*, 190 Neb. 667, 212 N.W. 2d 90 (1973). The sentence was valid. The crime of escape while under arrest is a Class III felony, and the following penalties are authorized: maximum 20 years' imprisonment or $25,000 fine, or both; minimum, 1 year's imprisonment. The State argues here that since the pronouncement of the word "concurrent" was inadvertent, the court is permitted to amend this sentence under the authority of *State v. Brewer, supra*, and *State v. Snider, supra*. In *Snider*, the court stated that the attempted change of sentence in that case was not "the clarification of an ambiguity or correction of a prior misstatement" and was, therefore, a nullity. *Id.* at 319, 248 N.W.2d at 343.

However, to begin questioning whether a valid sentence has been pronounced inadvertently would involve this court in a morass. We would be called upon to read the mind of the sentencing judge in any circumstance in which a valid sentence had been pronounced and later amended due to the judge's proclaimed inadvertence. We think that would not be the better rule, nor would it be in keeping with the spirit of our previous cases. Therefore, to the extent that *State v. Snider, supra*, might indicate that the mere inadvertence in pronouncing a valid sentence would justify the court in pronouncing another sentence, it is overruled. The revised judgment of the District Court is reversed.

REVERSED.

# STATE OF NEBRASKA, APPELLEE, V. KEVIN DEAN RANDALL, APPELLANT.

302 N.W.2d 733

Filed March 6, 1981. No. 43532.

**Homicide: Sentences.** Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.

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

Willis G. Yoesel for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

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

KRIVOSHA, C.J.

The appellant, Kevin Dean Randall, was charged with the crime of murder in the first degree. Following plea-bargaining negotiations, the State of Nebraska filed an amended information charging Randall with murder in the second degree, to which he entered a plea of guilty. After receiving a presentence investigation and evaluation, the court sentenced Randall to a term of imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 30 years nor more than his natural life. It is from this sentence which appellant has appealed, maintaining that the trial court erred in imposing an indeterminate sentence of not less than 30 years nor more than life imprisonment, and for the further reason that the trial court abused its discretion by imposing a sentence allegedly in excess of the facts and circumstances of the case.

In view of our decision in the case of *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), we need only consider Randall's first assignment of error. In *Laravie*, *supra* at 628, 223 N.W.2d at 437, we held that: "Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment." The record clearly reflects that the sentence in this case is in conflict with our holding in *Laravie*. Accordingly, we must therefore reverse the instant matter and remand the case back to the District Court with instructions to impose a sentence in accordance with the standards set out in *State v. Laravie, supra.*

Having thus disposed of the matter on this basis, we need not now consider Randall's second assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., concurs in result.

BOSLAUGH, J., dissenting.

In *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), we held that a trial court was not authorized to impose an indeterminate sentence for second degree murder. Upon further consideration of the *Laravie* case, I now believe the decision was in error, and that the judgment in this case should be affirmed.

The decision in the *Laravie* case was based upon our decision in *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973), in which we *affirmed a sentence of 20 to 30 years' imprisonment for second degree murder.* The *Suggett* case held that the limitation in Neb. Rev. Stat. § 83-1,105 (Reissue 1976), that the minimum sentence imposed shall not be more than one-third of the maximum term authorized by law, was not applicable to an offense for which a sentence of life imprisonment was authorized because it was impossible to determine

what would be one-third of a sentence to life imprisonment. The opinion concluded that § 83-1,105 "was not legislatively designed to apply in cases of this type."

*The decision in the Suggett case affirmed an indeterminate sentence of 20 to 30 years' imprisonment for second degree murder.* The opinion in the *Laravie* case simply misconstrued the holding in the *Suggett* case.

The *Laravie* case did not abolish indeterminate sentences in second degree murder cases. To the contrary, it resulted in every sentence in a second degree murder case being effective as an indeterminate sentence with the statutory minimum of imprisonment for 10 years as the minimum term. See, *State v. Thompson*, 189 Neb. 115, 201 N.W.2d 204 (1972); *State v. Hedglin*, 192 Neb. 545, 222 N.W.2d 829 (1974). Upon remand and resentencing in this case, whatever sentence may be imposed, the effect will be an indeterminate sentence for 10 years to whatever term may be imposed, including life imprisonment.

The effect of the *Laravie* case was to prevent the trial court from imposing a sentence which would require the defendant to serve more than at least the statutory minimum of imprisonment for 10 years. The decision in the *Laravie* case was in error and should be overruled. The judgment in this case should be affirmed.

CLINTON and HASTINGS, JJ., join in this dissent.

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## STATE OF NEBRASKA, APPELLEE, V. RICHARD PENA, APPELLANT.

302 N.W.2d 735

Filed March 6, 1981. No. 43618.

1. **Jury Verdicts: Appeal and Error.** The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Criminal Law: Evidence.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
3. **Expert Witnesses: Identification Procedures.** Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification.
4. **Criminal Law: Evidence.** Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence, whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question.

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

Anthony S. Troia and James E. Riha 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.

Richard Pena, defendant below, appeals to this court from his conviction and sentence by the District Court of Douglas County, Nebraska, for the offenses of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1979), and use of a firearm in the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1979). We affirm.

The facts of this case, as revealed in the record, indicate that on January 24, 1980, two black men wearing masks entered the Vess Beverage Company located at 915 North 24th Street in Omaha. The men entered the beverage company through an unlocked door which opened onto the company plant area. They proceeded to the office of Donald Sharp, the corporate secretary of Vess Beverage Company, where they demanded cash from both Sharp and his secretary, Lois Braun. Sharp went to the company safe and removed a cashbox, which

was described as an 8- x 8-inch metal box. The cashbox contained approximately $40 at the time of the robbery. After Sharp placed the cashbox on his desk, one of the masked robbers, who was not wearing gloves, opened the box and took the money. Sharp was then ordered by the men to crawl underneath his secretary's desk, who in turn was directed to lie on the floor while the two men fled. Shortly thereafter, Sharp notified the Omaha Police Department, and the robbery area was dusted for fingerprints by a member of the police identification technician bureau. Two clear, latent prints were taken from the cashbox which had been opened by one of the robbers.

On February 2, 1980, the defendant was booked at the Omaha Central Police Station, during which process he was fingerprinted by the police. A subsequent analysis of the defendant's fingerprints found that they matched the two prints which had been taken from the cashbox at Vess Beverage Company. Pena was thereafter charged with robbery and for the commission of a felony with the use of a firearm. The defendant pled not guilty to both counts. On May 27 and 28, 1980, a jury trial was conducted before the District Court of Douglas County. The State introduced three witnesses, Cleve W. Albaugh, an identification technician with the Omaha Police Department, and Marcellus S. Deats, Jr., and Beverly Mazur, who were both qualified as experts in fingerprint identifications and comparisons. These witnesses each testified that, in their opinion, the fingerprints found on the cashbox matched those of the defendant's. Mr. Sharp and his secretary were called to establish that only they, or the president of Vess Beverage Company, had access to, or the authority to withdraw, items located in the safe.

At the close of the State's case, the defendant moved for dismissal, alleging lack of sufficient evidence to establish that he was the same person who had taken the money from the cashbox at Vess Beverage Company. The motion was overruled, and the defendant called a

witness to testify that the defendant had been at his home at the time of the crime. The defendant did not testify and the jury was instructed that it could draw no conclusions or inferences from his failure to take the stand. On May 28, 1980, the jury returned a verdict of guilty on both counts. On July 24, 1980, the defendant was sentenced by the trial court to a term of 8 to 12 years' imprisonment for the robbery conviction, and a consecutive term of 3 to 5 years' imprisonment for the use of a firearm in the commission of a felony conviction. Defendant was granted credit for the time he had spent in custody since January 28, 1980.

The defendant now appeals to this court, alleging that the trial court erred in overruling his motion to dismiss because, as a matter of law, there was not sufficient evidence to take the matter to the jury. It is the defendant's contention that the evidence presented as to the fingerprints, alone, is insufficient to establish his identity as the person who took the money from the cashbox at Vess Beverage Company.

This court has adopted the rule in criminal cases that the verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Matthews*, 205 Neb. 709, 289 N.W.2d 542 (1980); *State v. Fowler*, 193 Neb. 420, 227 N.W.2d 589 (1975). See, also, *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). We have also held that in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977).

Defendant Pena was connected with the robbery at Vess Beverage Company by expert testimony matching his known fingerprints with the latent, or unidentified, fingerprints taken from the cashbox which the robber

handled with his bare hands. The fingerprint expert who testified stated that although he only required eight points of similarity between the latent fingerprint and the known fingerprint, in this case there were at least twelve points of similarity, and probably more, although he did not deem it necessary to continue with the identification as it would have been redundant.

The process of matching known fingerprints with latent fingerprints for the purpose of identifying a criminal suspect is a procedure which has been approved by this court. In *State v. Riley*, 182 Neb. 300, 303, 154 N.W.2d 741, 743 (1967), this court stated: "Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification." See, also, *Sharp v. State*, 117 Neb. 304, 220 N.W. 292 (1928).

Defendant contends, however, that there was an insufficiency of evidence to show that the fingerprints in question were placed on the metal box at the time of the robbery, and argues that they might well have been innocently placed there at some prior time. The evidence in the record establishes, however, that the area in which the cashbox was kept was generally inaccessible to the public, although it was accessible to the corporate secretary of Vess Beverage Company, his secretary, and the president of the company. A similar situation was presented to the United States Court of Appeals, Eighth Circuit, in *United States v. Scarpellino*, 431 F.2d 475 (8th Cir. 1970), where the court held that the fact that many people may have had access to a stolen car while it was on a used car lot and that the government did not prove the car was generally inaccessible to defendant unless he had possession of it did not render inadmissible the fingerprints taken from the car. In his opinion, Judge Gibson stated as follows: "Fingerprint evidence is of course admissible for the purpose of identifying the accused and of connecting him to the offense. The above sequence of events establishes that the stolen Riviera was used by the robbers in

the Midwest Federal robbery. The fact that many people may have had access to the stolen car while it was on the used car lot and that the Government did not prove the car was generally inaccessible to defendant unless he had possession of it did not render inadmissible fingerprints taken from the car. The evidence had probative value and whether it supported the inference that defendant was in the car at the time it was used to flee the scene of the robbery was for the jury to determine." *Id.* at 478. Also, in *United States v. Roustio*, 455 F.2d 366 (7th Cir. 1972), that court in its opinion, citing *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954), stated: "We hold here that defendant's fingerprints had probative value and that it was for the jury to determine, in light of all the other evidence, drawing upon their own common sense and general experience, whether such evidence permitted an inference to be drawn that beyond a reasonable doubt defendant robbed the bank in question. The jury was convinced beyond a reasonable doubt and 'we can require no more.'" *Id.* at 370. In this connection, see, also, *United States v. Nazarok*, 330 F. Supp. 1054 (E.D. Pa. 1971).

The jury at the trial heard the expert testimony identifying the latent fingerprints from the cashbox as those of the defendant's. It also heard testimony which established that the cashbox was normally kept away from public access and that the defendant had no authorized access to the box. Finally, the jury heard the testimony of the witness called on behalf of the defendant who gave alibi testimony as to the whereabouts of the defendant at the time of the alleged robbery. The jury, having heard all the evidence, found the defendant to be guilty of the crime charged. We determine that the evidence presented at the trial was sufficient to sustain the conviction; and the judgment of the trial court must be, and is, affirmed.

AFFIRMED.

# IN RE INTEREST OF GOODON. STATE OF NEBRASKA, APPELLANT, V. BEN GOODON ET AL., APPELLEES.

303 N.W.2d 278

Filed March 13, 1981. No. 43048.

1. **Parental Rights.** The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in Neb. Rev. Stat. § 43-209 (Reissue 1978) exist.
2. ——. An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
3. **Appeal and Error: Juvenile Courts.** An appeal of a juvenile case is heard by trial de novo upon the record. The findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.

Appeal from the District Court for Harlan County: BERNARD SPRAGUE, Judge. Reversed and remanded.

Thomas P. McNally for appellant.

Stephen A. Scherr for appellee Doris Goodon.

Lloyd W. Kelly of Kelly, Kelly & Kelly for appellee Ben Goodon.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and COLWELL and CANIGLIA, District Judges.

MCCOWN, J.

This is a proceeding to terminate parental rights. The county court of Harlan County, Nebraska, terminated the parental rights of Ben Goodon and Doris Goodon with respect to their five children. On appeal, the District Court vacated the order of the county court terminating parental rights. The State has appealed.

In December 1977 and January 1978 the county

attorney of Harlan County filed petitions alleging that Brenda Goodon, age 14, Colleen Goodon, age 8, Janice Goodon, age 7, Rickie Goodon, age 11, and David Goodon, age 12, children of Ben and Doris Goodon, were neglected or abandoned children within the meaning of Neb. Rev. Stat. § 43-202(2)(a), (b), and (c) (Reissue 1978). The evidence at the adjudicatory hearing established that the parents had substantially and repeatedly neglected the children and failed to provide proper care necessary for the health, morals, and well-being of the children. The evidence also established that Ben Goodon was an alcoholic, had engaged in sexual activities with his daughters, and had physically abused the children. Doris Goodon, who was represented by counsel, stipulated and agreed that the children were abandoned or neglected children under § 43-202(2)(a), (b), and (c). Although Ben Goodon had actual notice of the hearing, he did not appear.

On March 2, 1978, the county court found the children to be children designated under § 43-202(2)(a), (b), and (c) and placed legal custody of the children in the court and granted physical custody to Doris Goodon pursuant to her stipulation and agreement that she would immediately proceed to seek a divorce from Ben Goodon. The court ordered Ben Goodon not to come upon the premises upon which the children were residing at any time and ordered Doris Goodon to notify law enforcement authorities at once if he came upon the premises or attempted to do so.

On May 8, 1978, Ben Goodon was found on the premises where the children were living with Doris Goodon. The children were removed from the home and placed in temporary custody of the welfare department. On May 18, 1978, following a hearing, the court found that the order of March 2, 1978, had been violated in that Ben Goodon was residing with the children and that the violation presented sufficient potential harm to the children to justify taking temporary physical custody of the children pending a final

hearing, and that the best interests of the children would be served by retaining them in the custody of the State. Legal and physical custody of the children has remained with the State since that date.

On July 19, 1978, the county attorney filed a motion to terminate the parental rights of Ben Goodon and Doris Goodon. Hearing was held on the motion to terminate parental rights on October 26 and 27, 1978, at which all parties were represented by counsel.

On February 20, 1979, the county court entered its order and decree specifically finding that Ben Goodon had sexually molested certain of his female children; that he suffers from a severe alcohol addiction; that Doris Goodon had shown an inability to protect her children from Ben Goodon's drinking habits and physical abuse of the children; and that her failure to protect her children from him has irreparably affected the children's health, morals, and well-being. The court also found that there was a history of abuse of the children and an unwillingness to recognize or discharge parental responsibilities for any substantial period of time and that juvenile proceedings involving neglect of children had been filed previously in three other states. The court also found that in various degrees the children are suffering from emotional and psychological illnesses as the result of Ben Goodon's behavior toward them and the home environment in which they have been living. The county court therefore terminated the parental rights of Ben Goodon as to all five children and terminated the parental rights of Doris Goodon as to all the children except Brenda. Custody of the four younger children was placed in the Department of Public Welfare of the State of Nebraska for placement in approved family homes or for adoption. Custody of Brenda was placed in the Department of Public Welfare for placement in an approved family home and Doris Goodon was granted reasonable rights of visitation as to Brenda. It was specifically ordered that Ben Goodon was to

have no visitation rights. Ben and Doris Goodon appealed to the District Court.

The District Court stayed the order of the county court authorizing adoption and granted the parents limited visitation rights pending the appeal.

On July 9, 1979, following the reception into evidence of the record from the county court and arguments of counsel, the District Court took the matter under advisement. On July 24, 1979, the District Court entered its order vacating the ruling of the county court terminating parental rights. The State has appealed.

The juvenile court in each county may terminate parental rights between the parents of a child 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;

. . . .

"(4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child . . . ." See Neb. Rev. Stat. § 43-209 (Reissue 1978).

An order of the juvenile court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1980).

In the present case, the parents contend that the evidence of parental misconduct, particularly sexual misconduct on the part of Ben Goodon, was not clear and convincing. The argument is that the testimony of several State's witnesses as to sexual miscon-

duct was based merely on statements of the children or of the mother made to the witnesses on various occasions, while the children who testified on the witness stand, in the presence of their parents, denied any sexual misconduct. It should be noted that the juvenile judge at the hearing on termination of parental rights had previously conducted the adjudicatory hearing under § 43-202, and specifically took judicial notice of that evidence in this termination proceeding.

An appeal of a juvenile case is heard by trial de novo upon the record. The findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977); *In re Interest of Morford, supra.*

In the case now before us, the District Court made no findings of fact, and the findings of fact of the juvenile court at trial with respect to Ben Goodon are clear and convincingly supported by the evidence. The findings of fact with respect to Doris Goodon are related to her inability to protect her children from her husband and the conclusion that her lack of resolve, courage, or ability to protect her children also irreparably affected the children's health, morals, and well-being. The evidence in this case sustains the action of the juvenile court in terminating parental rights. The decree of the county court was correct and should have been affirmed.

The order of the District Court vacating the decree of the county court is reversed and the decree of the county court of February 20, 1979, is reinstated and affirmed.

REVERSED AND REMANDED.

KRIVOSHA, C.J., dissenting.

I find that I must regrettably dissent from the

majority in this case. I have no quarrel with the majority's view that the best interests of the children demand that their legal and physical custody be placed with the State and not with their parents. My quarrel with the majority is in its affirming the county court in terminating the parental rights of the mother in this case. We are not here dealing with children of tender years but, rather, children today who range in age from 10 to 15. Though their needs are no less than children of tender age, experience has taught us that the likelihood of their being adopted either together as a family or individually at this age is virtually impossible. In effect, then, we are not only terminating the relationship between the parents and their children, but may likewise be terminating the relationship of brother and sister as between each child.

I believe the reality of the matter, as was apparently concluded by the District Court, is that these children are unadoptable. And so we have, by our action herein, made these youngsters "children without parents." I know of no court order which will cause a 15-year-old child to forget his biological parents, nor to forget brothers and sisters of near equal age. It was apparently for that reason that even the county court concluded that the parental rights of the oldest child, Brenda, should not be terminated and, instead, she simply be placed in the custody of the State.

Neb. Rev. Stat. § 43-209 (Reissue 1978) specifically provides, in part, as follows: "The court may terminate all parental rights between the parents . . . when the court finds such action to be in the best interests of the child . . . ." I have difficulty concluding how terminating the parental rights and leaving these children without any parent, or the real prospect of any parent, can be in their own best interests. Courts must address these matters realistically. It is one thing to remove the physical custody of an abused child and place it with the State; it is another thing to attempt to terminate parental rights of children who have reached the

ages of the children involved in this case, particularly where there is no evidence of any interest by anyone to adopt them. The jurisdiction of the juvenile court is a continuing jurisdiction once a child has been adjudged to be neglected. See *State v. Miller*, 189 Neb. 383, 203 N.W.2d 97 (1972). The options available to the juvenile court, short of terminating parental rights for the best interests of the child, are many. See Neb. Rev. Stat. § 43-210 (Reissue 1978). I believe that the action of the District Court was the more appropriate one in this case, in that we would then be granted the option of attempting to find a home or homes for these children before we publicly declared they are without parents. I believe we have, in effect, burned the children's bridges behind them without knowing that there is any road to the future. I would have affirmed the judgment of the District Court.

CANIGLIA, District Judge, joins in this dissent.

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GERALD T. SULLIVAN, APPELLEE, V.
GEO. A. HORMEL AND COMPANY,
A DELAWARE CORPORATION, AND
LUEDER CONSTRUCTION COMPANY,
A DELAWARE CORPORATION, APPELLANTS.

303 N.W.2d 476

Filed March 13, 1981. No. 43158.

1. **Contractors and Subcontractors: Negligence.** With certain exceptions, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants.
2. **Contractors and Subcontractors: Words and Phrases.** The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment.
3. **Contractors and Subcontractors: Contracts.** An employer of an independent contractor may, without changing the status of the parties, exercise such control as is necessary to assure performance of the contract in accordance with its terms.

4. **Contractors and Subcontractors: Negligence: Invitor-Invitee.** The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance.
5. **Contracts: Contractors and Subcontractors: Master and Servant.** Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant.
6. **Negligence: Evidence.** Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury.

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

John A. Rickerson of Rickerson & Welch for appellant Lueder.

Sam R. Brower of Swarr, May, Smith & Andersen for appellant Hormel and Co.

Warren C. Schrempp and John H. Hanley for appellee.

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

CLINTON, J.

This appeal arises from an action in the District Court for Douglas County by Gerald T. Sullivan, plaintiff (hereinafter Sullivan), against Geo. A. Hormel and Company, a corporation (hereafter Hormel or owner), and Lueder Construction Company, a corporation (hereafter Lueder or general contractor), for damages from personal injuries alleged to have been caused by the negligence of the two defendants and which occurred upon the premises where Hormel

was constructing an addition to the Hormel plant. At the close of all the evidence, the court denied the separate motions of Hormel and Lueder for a directed verdict, granted the motion of Sullivan for a directed verdict against both defendants on the issue of liability, and submitted to the jury only the issues of whether the negligence was the proximate cause of the injury and, if so, the amount of damages. The jury returned a verdict for Sullivan against both the owner and the general contractor.

On December 14, 1972, Sullivan was employed as a millwright by Citrus Machinery Company, Inc., which, on that date, was installing a conveyor system in the addition upon which the general contractor was still working. As Sullivan was leaving the building that day, at about 4:20 p.m., his right foot slipped on icy steps, striking the next step with some force and bruising the heel of that foot. This bruise is alleged to have lighted up a latent case of Buerger's disease which later resulted in the amputation of Sullivan's right leg below the knee.

The petition alleged the sole and proximate cause of Sullivan's "fall" was the negligence of the defendant Lueder in one or more of the following particulars:

"A) In failing to keep said construction site premises in a safe manner for workers at said site.

"B) In failing to instruct its employees to keep the steps upon which plaintiff fell, free from debris and ice so as to avoid injuries to workers at said site.

"C) In failing to clear and clean debris and ice from the steps on which plaintiff fell when it knew or should have known that the ice and debris on said steps posed a hazard for workers at said site.

"D) In allowing workers at said site only one means of ingress and egress to and from said plant before and after working hours."

It further alleged the negligence of Lueder was imputable to Hormel under the doctrine of respondeat superior.

Both Hormel and Lueder have appealed and made various assignments of error. As to Hormel, we need take note of only one, namely, it is asserted that the record, as a matter of law, establishes that the relationship of Hormel and Lueder was that of owner and independent contractor and Hormel was not liable under the doctrine of respondeat superior. As to Lueder, we must take note of the following assignments: The court erred in ruling that Lueder was negligent as a matter of law and in not submitting to the jury the issue of Sullivan's contributory negligence.

As to Hormel, we reverse and direct dismissal. As to Lueder, we reverse and remand for a new trial.

With certain exceptions, which it is not necessary to notice here, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Merten v. Pedersen*, 199 Neb. 34, 255 N.W.2d 869 (1977); Restatement (Second) of Torts § 409 (1965). The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment. *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972); Restatement (Second) of Agency, Introductory Note § 218 at 480-81 (1958). An employer of an independent contractor may, without changing the status of the parties, exercise such control as is necessary to assure performance of the contract in accordance with its terms. *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979). A general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. *Hand v. Rorick Constr. Co., supra.*

The contract between Hormel and Lueder called for the construction by Lueder for Hormel for a specified sum a grocery products addition at 900 S. Platte Avenue, Fremont, Nebraska, in accordance with certain drawings and specifications incorporated into the contract by reference. The construction constituted an addition to Hormel's existing plant and the contract provided that the work be done in four phases, the order of construction of the various phases of the addition being specified. The steps where the accident occurred provided ingress and egress for the employees of the contractor or subcontractors and were a portion of the area designated C on the plot plan.

Also incorporated in the contract were certain general conditions. These general conditions were contained in AIA document A201, April 1970 edition. Article 10 of the general conditions made the contractor responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the Work," as well as requiring it to take all reasonable safety precautions for the safety of all employees on the work and all other persons who might be affected thereby. Paragraph 10.2.2 provided: "The Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. He shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations . . . ." Article 4 provided in part:

"4.3 SUPERVISION AND CONSTRUCTION PROCEDURES

"4.3.1 The Contractor shall supervise and direct the Work, using his best skill and attention. He shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for co-

ordinating all portions of the Work under the Contract.
"4.4 LABOR AND MATERIALS
"4.4.1 Unless otherwise specifically noted, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work."

The contract designated Hormel's engineering division as its architect. The general conditions provided that the architect should have access to the "Work"; further providing: "The Architect will make periodic visits to the site to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. On the basis of his on-site observations as an architect, he will keep the Owner informed of the progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor. The Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents." The general conditions also included the following:
"4.16 CLEANING UP
"4.16.1 The Contractor at all times shall keep the premises free from accumulation of waste materials or rubbish caused by his operations. At the completion of the Work he shall remove all his waste materials and rubbish from and about the Project as well as all his tools, construction equipment, machinery and surplus materials, and shall clean all glass surfaces and leave the Work 'broomclean' or its equivalent,

except as otherwise specified.

"4.16.2 If the Contractor fails to clean up, the Owner may do so and the cost thereof shall be charged to the Contractor as provided in Paragraph 3.4." Paragraph 3.4 pertains to the owner's right to carry out the work, and paragraph 3.4.1 states: "If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents or fails to perform any provision of the Contract, the Owner may, after seven days' written notice to the Contractor and without prejudice to any other remedy he may have, make good such deficiencies. In such case an appropriate Change Order shall be issued deducting from the payments then or thereafter due the Contractor the cost of correcting such deficiencies, including the cost of the Architect's additional services made necessary by such default, neglect or failure. The Architect must approve both such action and the amount charged to the Contractor. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner."

The trial judge made a finding that, as a matter of law, the relationship between Hormel and Lueder, at least insofar as safety measures and cleaning up were concerned, was that of master and servant and that the evidence of Lueder's negligence with respect to those matters was imputable to Hormel. In so doing, he seemed to rely upon the fact that the inspecting architect was an employee of Hormel, rather than one retained by Hormel under the terms of a contract for preparation of plans and specifications or other contract, and the provision for cleanup contained in the general conditions of the contract which we have earlier cited. The court did not cite any authority for this construction of the contract, and neither does Sullivan.

Sullivan relies upon our holding in the case of *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). In that case we held: "The duty of an owner

in control of the premises where work performance under a contract with the owner is to be executed is to exercise reasonable care to keep the premises in a safe condition while the contract is in the course of performance . . . . The possessor of land retaining control is subject to liability for personal injuries to business visitors caused by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk of harm to the invitee." (Syllabi of the court.) *Simon v. Omaha P. P. Dist., supra,* is distinguishable under the evidence in the case before us. In *Simon,* the owner was liable because of its own negligence and that of its agent. In that case, O.P.P.D. let no general contract; it maintained control of the premises under construction and controlled and supervised the work of the various contractors through its agent and engineering firm which it had retained for that purpose. In *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973), we had occasion to so distinguish the *Simon* case. We there said at 194-95, 206 N.W.2d at 837: "The plaintiff relies upon, among other cases, our holding in *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157, which was decided after the trial of this case. Our holding there is clearly distinguishable. In that case the instrumentality which caused the injury was a condition of the premises and the failure of the owner, who was its own general contractor and was in absolute control of the premises through its retained engineer (to whom it had entrusted implementation of safety measures), to cover or barricade an opening as required by the safety code. The condition had existed for many months. The owner and its agent, who had complete control of all safety on the premises, had the right, opportunity, and duty to cover or barricade the opening. This was not the subcontractor's obligation."

In the case at hand, the evidence shows that Hormel did not retain control of the premises, nor assume responsibility for safety measures. The evidence is that, although on December 14, 1972, the "area C" was entirely enclosed, the general contractor was in possession of the premises; that some minor items remained to be finished; and that the final cleanup of that area was in progress. The "work" on the general contract was not completed until August 10, 1973, and possession delivered to the owner sometime after that date.

We have made an extensive search for precedent holding that under the contract provisions relied upon by the trial court in this case the relationship between the owner and the independent contractor created the relationship of master and servant even for the limited purpose of cleanup or safety. We have found none, and none of the parties cite any authority on point. The fact that the inspecting architect was an employee of the owner rather than one otherwise retained is not significant. The architect is the agent of the owner in either case. The question is, what is his authority. Where the inference is clear that there is or is not a master and servant relationship, the determination should be made by the court as a matter of law. *Peetz v. Masek Auto Supply Co.*, 161 Neb. 588, 74 N.W.2d 474 (1956); *Vontress v. Ready Mixed Concrete Co.*, 170 Neb. 789, 104 N.W.2d 331 (1960); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979).

We hold that under the contract before us, and in particular the contract provisions we have cited, especially those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. The emphasis is on the term "independent," not the term "contractor." See Restatement (Second) of Agency, Introductory Note § 218 at 480-81 (1958), which we cited earlier. The negligence of Lueder was, therefore, not imputable to Hormel.

We now turn to the question of whether the court was correct in directing a verdict for Sullivan on the issue of liability, rather than submitting the issues of Lueder's negligence and Sullivan's possible contributory negligence to the jury.

Sullivan was employed at the Hormel plant addition from sometime in September 1972 until late January 1973. It is undisputed that the means of ingress and egress for the workmen of all trades employed in the constructing and equipping of the addition was through the door, landing, and stairs where the accident occurred. Sometime in November 1972 there had been a snowstorm, apparently followed by other storms. Witnesses, whose testimony was not contradicted, stated that on December 14 the landing was snow covered and the steps were covered with ice. According to some of the testimony, including Sullivan's, the icy conditions had existed continuously from the time of the November 1972 storm until the date of the accident. The steps had never been cleaned during that period. According to one of the witnesses, the conditions existed off and on during that period. Complaints had been made about the condition of the steps to Lueder's superintendent by Sullivan and others. Sullivan was the millwright foreman for Citrus and some of Sullivan's men had complained to him. The Lueder superintendent, however, denied receiving such complaints or that he had any responsibility with reference to keeping them in safe condition for use. He felt this way because, in his judgment, they were finished on that part of the building. There was some testimony that on one occasion sand had been spread in the area following an ice storm which occurred sometime prior to December 14. At the time of that storm, one workman had slipped and fallen on the ice after descending the stairway and stepping on the ground. The sanding apparently occurred after that incident. There was also testimony that salt and sand were available in containers at the doorway on

December 14, but no evidence that the stairway had been sanded or salted on December 14 or on any date other than as above mentioned. One witness described the ice on the steps on the date of the accident as being "mounded" from repeated thawing and freezing.

Approximately 25 or 30 workmen were on the job on December 14 and the inference is that all were using the same means of ingress and egress.

The exit in question was located on the east side of the addition and consisted of a metal door of ordinary width at floor level. The door opened onto an exterior platform which was connected with six steps located adjacent to and parallel to the building and descending to a concrete slab at ground level. The outer edges of the landing and steps were guarded by a handrail constructed of 1½- to 2-inch welded pipe, consisting of posts and a double rail.

Sullivan and three other workmen who left with him at the same time that day were all aware of the icy condition of the steps.

Sullivan testified that when he went to work on the morning of December 14, he entered through the designated entry. The steps were icy and there was debris on them. "There was always paper, plastic, nuts or bolts or something like that." Immediately adjacent to the landing (i.e., within about 2 feet) to the south of the door assigned to the workmen was an overhead loading door. Sullivan testified that Lueder's cleanup people would pile debris of various kinds, to wit, lumber, plastic, paper, nuts and bolts, in the building next to the door until there was an accumulation big enough to load. Then a truck would be backed to the doorway and Leuder's laborers would scoop the debris into the truck. Sometimes they were careless and missed the truck and some of it would get on the stairway.

At this point we describe the accident by summarizing and quoting Sullivan's testimony. He and three other workmen left at the same time at about 4:20

p.m. He took hold of the railing with his right hand and began to descend the stairs. He stated: "I just stepped down on a step and there was a bolt there and it rolled with me and I just hit my heel on the next step down. I didn't fall down; I just hit my foot. Q. Did the bolt move? A. Yes. It rolled down to the next step and then when my heel fell on it, well, it was there, so I stopped Richard and Hugh and Floyd and I picked the bolt up and threw it over on the railroad tracks." The heel of his right foot hit the bolt. The bolt was in the ice "halfway frozen," i.e., half of it in the ice. He had not seen the bolt before he stepped on it. It was a bolt about ⅜ x 3 inches in size. He had no idea how long the bolt had been there. Another witness also testified that at various times there was debris of various types on the steps.

Sullivan testified that he was the first of the workmen to descend the steps.

We have frequently held: "Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury." *Maxwell v. Lewis*, 186 Neb. 722, 726, 186 N.W.2d 119, 122 (1971). See, also, *Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226 N.W.2d 346 (1975); *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d 697 (1979); *Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 203 N.W.2d 494 (1973).

As to the negligence of Lueder, it is clear that Lueder had a duty, not only under the terms of the contract but also at common law, as the independent contractor in possession and control of the premises to keep those premises in such condition that they afforded a reasonably safe place to work for persons working on or otherwise rightfully on the premises. *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183,

202 N.W.2d 157 (1972). The facts showing that Lueder violated that duty are not in dispute. The evidence shows that the workmen were restricted to the use of the one entryway. The icy condition of the entryway steps had existed for a prolonged period of time. The general contractor had, or ought to have had, notice of the condition and did nothing at all to remedy an easily correctable unsafe condition. It is undisputed that at least frequently, if not always, debris, which made footing even more hazardous, was present on the steps. It is clear, therefore, that Lueder did not fulfill its obligation of keeping that part of the premises under its control under a reasonably safe condition. The court was, therefore, correct in directing a verdict against Lueder on the issue of that defendant's negligence.

As to Sullivan's negligence and its degree as compared with that of Lueder's, there are matters on which minds might reasonably differ. It is a reasonable inference from the evidence, including Sullivan's own testimony, that the ice alone would not have caused the accident, but that the presence of the bolt was necessary for the slip to have occurred. It is clear from Sullivan's testimony that he not only knew of the icy condition but also that debris was, at least frequently, on the exit way. According to his own words, there was "always" debris on the steps. Many persons were using the steps on that same day, as the evidence indicates that 25 or 30 workmen were on the job, and it may be inferred that they negotiated the steps safely. Sullivan acknowledged that he did not see the bolt before he stepped on it. It appears that reasonable minds could arrive at the conclusion that he did not see the bolt because he was not maintaining a reasonable lookout for debris which he should have known was very likely to be there, and that the slip could have been avoided by a more careful lookout and placement of his feet as he descended the stairs. The trial court should, therefore, have submitted to the jury the question of Sullivan's contributory negligence

in the above respect and given the usual comparative negligence instruction.

We direct that the judgment be reversed as to the defendant Hormel and the cause dismissed; and that as to defendant Lueder, the judgment be reversed and the cause remanded for a new trial with appropriate instructions to the jury in accordance with this opinion.

REVERSED AND REMANDED.

WHITE, J., dissenting.

I dissent from that portion of the majority opinion reversing the District Court's directed verdict in favor of the plaintiff on the issue of his contributory negligence.

The majority feels that reasonable minds could differ as to whether Mr. Sullivan was negligent in descending the steps, since he did not see the bolt before he stepped on it. However, even as the majority notes, "25 or 30 workmen were on the job, and it may be inferred that they negotiated the steps safely." The fact that there were no falls on these steps on December 14, 1972, prior to plaintiff's fall would lead him to assume, and reasonably so, that no greater amount of care was necessary in his descent of the icy steps than the precautions which he did take, i.e., a slow descent and gripping the handrail tightly, as the District Court noted; that even though he slipped, he did not fall but maintained his balance when his foot hit the next step. While the previous 25 or 30 descents may have loosened the bolt sufficiently to cause it to break free during Mr. Sullivan's descent, this does not suggest Sullivan's negligence but relates to the undisputed negligence of defendant Lueder in allowing the bolt to be on the steps in the first place. Therefore, I would affirm the District Court on the issue of the plaintiff's contributory negligence.

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

# EMPLOYERS INSURANCE OF WAUSAU, APPELLEE, V. GREATER OMAHA TRANSPORTATION COMPANY, A CORPORATION, APPELLANT, AND DANIEL J. PECORARO, APPELLEE.

303 N.W.2d 282

Filed March 13, 1981. No. 43238.

1. **Workmen's Compensation: Employer and Employee.** A Workmen's Compensation Court determination of employee status, not independent contractor, is affirmed where substantial evidence supports the conclusion and it is not clearly wrong.
2. _____:_____. Under the facts of the case, an injured cabdriver is an employee of the cab company and entitled to workmen's compensation benefits even though written arrangement is denominated a lease of the cab rather than an employment contract.

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

Frost & Meyers for appellant.

John R. Timmermier of Schmid, Ford, Mooney & Frederick for appellee Employers Ins.

Mary Cannon Veed and Stephen L. Gerdes of Matthews & Cannon, P.C., for appellee Pecoraro.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

HIPPE, District Judge.

The question in this case is whether a cabdriver, operating under a lease, is entitled to workmen's compensation benefits. The Nebraska Workmen's Compensation Court held that he was, and we affirm.

Employers Insurance of Wausau brought this action. They had written a policy of workmen's compensation insurance to Greater Omaha Transportation Company. On January 1, 1979, Daniel J. Pecoraro was injured while driving a leased cab. The insurance company took the position that Pecoraro was entitled to benefits as an employee; the transportation company claimed that the lease arrangement established

independent contractor status and Pecoraro was not entitled to benefits. Pecoraro cross-claimed as a defendant, claiming benefits.

The transportation company's affiliates held two certificates of public convenience and necessity from the Nebraska Public Service Commission. Both authorized the operations of taxicabs in Omaha, Nebraska, and vicinity. One was in the name of Yellow Cab Company — the other was Checker Cab Company. Both were issued on April 10, 1978. To provide that service, Greater Omaha had about 40 employees for clerical, dispatching, and maintenance functions. They owned, maintained, and insured a number of taxicabs. To secure drivers, Greater Omaha prepared a "menu of leases." This offered leases of cabs on a variety of bases, ranging from 8 hours to 1 week.

The defendant Dan Pecoraro, along with Nellie Burris, had a 1-week lease. Each would pay one-half on 12-hour shifts. The lease would be paid at the end of a shift from fares received, or from personal funds if fares were insufficient. The excess or deficiency of fares over the set lease charge, plus cost of gas, would be the driver's profit or loss. The lease could be terminated or renewed by either party at the end of a week.

A system of radio communications was established so that calls for cabs would come to Greater Omaha's central office. The fare would be offered to all cabs and they would bid for it. The dispatcher decided who would make the pickup. There were also central stands at different locations where the drivers could wait in line to pick up fares. If he had enough of his own business, a driver could theoretically function without bidding or using the stands, but no examples of any drivers like that were pointed out.

The lease itself asserted that Greater Omaha exercised no control over drivers and that drivers were independent contractors, not employees. The totality of the circumstances between the company and Pecoraro was a subject of disagreement in the testi-

mony. Jerry C. Wilson, the company's president, described the company's control as nonexistent. Daniel Pecoraro, on the other hand, testified to experience over many years with various employee arrangements and the lease involved here. He described the difference between the various arrangements as nonexistent.

Upon our review of the record, there are some aspects of the arrangement which preponderate toward either conclusion. The determination of status as an employee, on the one hand, or as independent contractor, on the other, is a fact question for the trier of fact. The review is to see if sufficient competent evidence warrants the factfinder's conclusion. Such a conclusion will not be set aside unless clearly wrong. *Williams v. Williams Janitorial Service*, 207 Neb. 344, 299 N.W.2d 160 (1980).

The compensation court found that the company exercised control over its lessee-drivers. There was substantial evidence tending to show that an operations guide and memoranda to drivers regulated their operations. The guide is 40 pages of comprehensive instructions about procedures covering every aspect of the driver's job. A separate communications guidebook contains a map of city areas showing cab stand locations and two-way radio procedures for pickups at those locations. A new driver rode with an experienced one at the beginning of his period to learn company procedures. The teacher got a discount on his lease for teaching. A driver also got a lease adjustment if he did not take his cab out because of an excused absence. Although the evidence does not show examples of anyone being discharged for violating any rules, the inference can be made that the lessee-drivers conformed their operations to the guidebook-memoranda rules.

The materials, or tools of the trade, were furnished by the company. The lease required the personal service of the lessee; he could not sublease. The ar-

rangement was terminable by either party each week similar to an employer-employee arrangement. The worker is not in a distinct occupation, because the company held the certificate of public convenience to provide cab services, and the lessee did that work. The type of work is usually done without supervision whether the arrangement was lessee or employee, and the skill required on the job is such that it can be done by employees rather than specially skilled independent workmen.

All the above factors, along with the critical factor of control, tend to establish an employee status. The only factors supporting an independent contractor status are that no withholdings are made from pay and the method of payment, which places the gross income with the driver and a fixed lease payment to the company.

*Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979), is relied upon by Greater Omaha as controlling. That case involved an interstate freight carrier lease with an owner of a truck-tractor. The written contract denominated an independent contractor status, all of its terms indicated such a relationship, and the way the agreement was carried out did not indicate an employee relationship. Under such facts, the owner was held to be an independent contractor as a matter of law, and an employee holding by the Workmen's Compensation Court was reversed. That case is different from this one because, here, the total arrangement indicates an employee status, not an independent contractor. In the *Stephens* case, the owner was undertaking work with control asserted only over the result of the work and with no control over the method or means to be used. Here, the evidence can be read otherwise; thus, this case should not be decided as a matter of law.

The factors we have outlined in analyzing the total arrangement are taken from *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976). That opinion

comprehensively outlines the analysis and questions to ask in making an employee-independent contractor determination. The Workmen's Compensation Court used the same analysis. We conclude there was substantial evidence to support its finding, and that it was correct in its conclusion. The decision is accordingly affirmed.

The employee, Pecoraro, is awarded an additional $500 attorney fee for this appeal, to be paid by the employer since no reduction in the award was made.

AFFIRMED.

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REGINA A. BELITZ, APPELLEE, V. MARVIN G. SUHR, APPELLANT.

WILLIAM L. BELITZ, APPELLEE, V. MARVIN G. SUHR, APPELLANT.

303 N.W.2d 284

Filed March 13, 1981. Nos. 43250, 43251.

1. **Motions for New Trial: Appeal and Error.** Where a trial court judge sustains a motion for a new trial without specifying his reasons therefor, the appellant fulfills his burden by submitting the records to the Supreme Court and contending there is no prejudicial error. The burden shifts to the appellee to identify any prejudicial error in the record justifying a new trial.
2. **Motor Vehicles: Expert Witnesses: Evidence.** An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident. However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred.
3. **Witnesses: Evidence.** The function of the lay witness is to describe what he has observed and the trier of fact will draw the conclusion from the facts observed and reproduced by the witness.
4. **Jury Instructions.** A party may not complain that a court erroneously rejected his requested instructions when the substance of the instructions requested is contained in other instructions given by the court.

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

Hansen & Engles, P.C., for appellant.

James R. Welsh of Welsh, Sibbernsen & Bowen for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and RONIN, Retired District Judge.

WHITE, J.

This is an appeal from the District Court from an order granting a motion for new trial after trial to a jury and verdict for the defendant in each of the two cases. The causes of action arose as the result of a collision which occurred on West Maple Road approximately 2½ miles west of Omaha, Douglas County, Nebraska, on February 20, 1978.

The undisputed facts in the case appear to be these: The plaintiff husband was traveling east in his own lane on West Maple Road and had passed the Douglas County Hospital Annex driveway. The day was windy and, while most of the road was not snow covered, there were areas where the wind was blowing snow across the highway, causing drifting. Such an area occurred immediately east of the driveway where it appears that the snow had started to drift across the road, blocking the westbound lane of West Maple Road. According to plaintiff's version, he approached the area and had visibility of approximately 50 feet. He did not see the defendant's automobile. The plaintiff's vehicle was struck on the left side while the plaintiff's vehicle was entirely in its own lane of traffic. The defendant testified that as he approached the area, he slowed his vehicle, that there was blowing snow across the highway, and that he did not see the plaintiff's vehicle prior to the collision.

At the conclusion of all the evidence, the matter was submitted to the jury and the verdict was for the defendant, finding that the plaintiff husband's cause of action for personal injuries, as well as the

plaintiff wife's cause of action for loss of consortium, should be dismissed. The defendant had received the favorable verdicts in the District Court and appeals from the order granting the motion for new trial.

Defendant points out that the trial court in its order sustaining the motion for new trial did not set forth the reasons for its decision. He calls our attention to the line of cases which indicate that when the trial court grants a motion for new trial without stating its reasons, the appellant fulfills his burden by submitting the records to the Supreme Court with the contention that there is no prejudicial error; the burden then shifts to the appellee to identify any prejudicial error in the record which justified the trial court's decision in sustaining the motion for new trial, citing *Greenberg v. Fireman's Fund Ins. Co.*, 150 Neb. 695, 35 N.W.2d 772 (1949).

The plaintiff, in response, suggests three errors committed by the trial court which establish that the trial court did not abuse its discretion in the order granting the new trial. *County of Hall ex rel. Wisely v. McDermott*, 204 Neb. 589, 284 N.W.2d 287 (1979). (1) The trial court erred in permitting the safety patrol officer to testify from his accident report concerning statements favorable to the defendant made by the defendant at the accident scene; (2) The trial court erred in permitting the officer to give his opinion with respect to the "contributing circumstances" of the accident and, in response thereto, to testify that both vehicles were traveling at an unsafe speed under the circumstances; and (3) The trial court erred in failing to properly instruct the jury on the plaintiff's theory of the case.

The safety patrol officer, Curtis Nielsen, was called as plaintiff's witness. On cross-examination he was asked the following question: "Would you read from your report what you wrote down that these individuals told you as to this occurrence, and bearing in mind that Number One is Mr. Belitz, Number Two is Mr. Suhr.

"MR. WELSH: I am going to object, Your Honor, as being hearsay as to Mr. Suhr, and also it is not the best evidence. He is here to testify. He is trying to get in a police report in a roundabout way.

"MR. ENGLES: No, I am not. He can testify as to what the man told him. If that refreshes the man's recollection, that is part of it.

"THE COURT: Objection is overruled."

The officer thereupon responded: "And Driver Number Two stated - -

"Q. That is Mr. Suhr?

"A. Yes, Mr. Suhr. Driver Number Two stated that he was westbound on Highway 64 when he came upon a section of the road which was badly drifted and had snow blowing across it. Mr. Suhr stated that he slowed up and that he could not see the oncoming vehicle, Mr. Belitz, through the blowing snow, and he then collided with the Belitz vehicle." The statement was offered by the defendant apparently for the purpose of proving the truth of the out-of-court assertion. To that extent it falls clearly within the definition of hearsay and under none of the exceptions. It is true that a certain portion of the statement may be damaging to Mr. Suhr, but a portion of it is also helpful to him, tending to establish or prove that he slowed down before entering the drifted area and, as such, is barred by Neb. Rev. Stat. § 27-801 (Reissue 1978). The defendant suggested that the rule allowing extended cross-examination is here involved or that the fact that the hearsay was written down and later used to refresh the witness' recollection renders the hearsay statement somehow admissible. It does not. The admission of the testimony of Officer Nielsen as to the defendant's conversation was erroneous.

The next assigned error relates to: "Q. And in preparing your official report and forming your conclusions in this particular accident, is there a portion of the formal report entitled contributing circumstances?

"A. Yes, there is.

"Q. And would you refer to that in your report, please. Did you note what, in your opinion, the contributing factors or circumstances were in this accident?

. . . .

"A. Yes.

"Q. (by Mr. Engles) Okay, and based upon your experience and training, what are, in your opinion, the contributing circumstances in the accident that we are describing in this lawsuit?

"MR. WELSH: I am going to object, Your Honor, as no proper and sufficient foundation. I feel that it is invading the Court's prerogative. Also the foundation has been shown through testimony that this officer and investigator didn't arrive until at least an hour afterwards, and that this would be sheer speculation on the part of this witness.

"MR. ENGLES: Your Honor, our rules of evidence permit me to question the officer not necessarily as a, quote, expert witness, but rather I can ask him opinions as a layman, and the rules specifically provide that, based on his perceptions, he may give an opinion.

"THE COURT: Objection is overruled.

"Q. (by Mr. Engles) You may refer to your report if you would like to, sir.

"A. I have got down contributing circumstances as exceeding safe speed. This is a little bit misleading, however.

"Q. Go ahead and lead us, then.

"A. It should probably read exceeding speed that is safe for the road conditions."

The testimony was offered as that of a lay witness, presumably under Rule 701 of the Rules of Evidence, Neb. Rev. Stat. § 27-701 (Reissue 1979): "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a

fact in issue." The question, then, is whether the testimony that both drivers were exceeding a safe speed was rationally based on the perception of the witness. The evidence discloses that the surface of the roadway was snow covered probably at the time of the accident and the north lane was drifted closed, making traffic difficult if not impossible; that the officer arrived at the scene of the accident; and that there was no testimony as to marks on the surface or that any marks were discernible. There is only the evidence of the photograph of the automobiles themselves showing damage to them and the testimony of the two occupants to the officer that neither saw the other prior to the collision. There is no question that an expert, properly qualified, may give an opinion as to the speed of the vehicles involved in an automobile accident, but we are unable to find any case in which, based solely on the fact of a collision, we have permitted anyone, expert or nonexpert, to testify as to speed. No attempt was made to suggest that the damage to the automobiles was indicative of a rapid rate of speed when the automobiles met. The subject was not even discussed in the examination. Under the Comment to the Proposed Nebraska Rules of Evidence, Rule 701 (1973), the commentary states at 107: "The present rule reflects the existing law of Nebraska. Limitation (a) has previously been a familiar requirement in Nebraska. It is based on the premise that the lay witness' function is to describe what he has observed and that the trier of fact will draw the conclusion from the facts observed and reproduced by the witness. *Benson v. Peters*, 87 Neb. 263, 126 N.W. 1003 (1910); *Riggs Optical Co. v. Riggs*, 132 Neb. 26, 270 N.W. 667 (1937)." In other words, as observed further in the Comment, "Limitation (a) is the familiar requirement of first-hand knowledge or observation." *Id.* at 107. The officer did not observe the collision and his basis of testifying as to unsafe speed cannot be said to be based on any rational perception of the

facts. To allow this testimony by a lay witness would make a mockery of our cases involving the foundational requirements that must, on attack, support the conclusion of an expert as to speed. The admission of the officer's testimony was clearly erroneous.

The third assignment of error discusses the requested instructions. The substance of all the requested instructions was given in the court's own instructions and a party may not be heard to complain when the substance of the instructions requested is contained in other instructions by the court.

We conclude that errors occurred in the admission of evidence sufficient to justify the District Court in the exercise of its discretion to grant a motion for new trial. The exercise of that discretion was not abused and the judgment of the trial court is affirmed.

AFFIRMED.

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## SUSAN GRACE BANKS SWEET AND EDDIE SWEET, WIFE AND HUSBAND, APPELLEES, V. MARGARET ANN BANKS FAIRBAIRN AND HOWARD FAIRBAIRN, HER HUSBAND, APPELLANTS.

303 N.W.2d 288

Filed March 13, 1981. No. 43262.

1. **Partition: Warranty Deeds.** The restrictive provisions of a warranty deed from a father to his children which provided that none of the grantees could mortgage any part of said lands except to one of the other grantees and giving each grantee the option to purchase a part of the land in the event one of the grantees should desire to sell his share, it being the intention of the grantor that said property remain within the family, are satisfied by the voluntary execution of warranty deeds by all the grantees to the grandchildren of the original grantor. Thus, there is no bar to an action in partition between the two grandchildren of the original grantor.
2. **Partition: Attorney Fees.** If the shares confirmed by the judgment in partition and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original

petition of the plaintiff, attorney fees shall be awarded entirely to the attorney for the plaintiff. This amount as well as a reasonable fee for the referee shall be taxed as costs in the proceedings.

3. **Partition: Fees: Appeal and Error.** The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.

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

Philip T. Morgan of Morgan & Morgan for appellants.

Leo F. Clinch and Van Steenberg, Myers & Burke for appellees.

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

MURPHY, District Judge.

This is an appeal by the defendants from a judgment of the District Court of Kimball County, by which the trial court ordered partition of real estate in kind and awarded attorney fees to the plaintiffs' attorney in the sum of $4,200 and a referee fee in the sum of $1,800, both taxable as costs to be paid one-half by the plaintiff Susan Grace Banks Sweet and one-half by the defendant Margaret Ann Banks Fairbairn.

The subject of this controversy is 160 acres of land in Kimball County with an approximate value of $60,000. The plaintiff Susan Grace and the defendant Margaret Ann are sisters, and each were owners of an undivided one-half interest in the 160 acres in question. The ownership and the value of the land are not in dispute.

The land in question was part of a conveyance from Henry C. Furst to his children in 1946. One of these children was the mother of the two sisters who are parties to this action. This deed contained the following restrictive language: "This conveyance is made with the understanding that none of the grantees herein

may mortgage any part of said lands except to one of the other grantees herein or to Henry M. Furst, a son of the grantor, and that, in the event of the sale of the portion of the grantees or any of them, the remaining grantees, or any of them, or Henry M. Furst, a son of the grantor, shall have the option to purchase the share of the grantee selling, at the reasonable or going value of said share at the time of sale. The intention being to retain said property within the family."

In March 1961 the children of Henry C. Furst executed a warranty deed to the real estate in question to the parties to this action as tenants in common, in equal shares, reserving a life estate in the mother of the parties, Marie Furst Banks. Marie Furst Banks died prior to the filing of this action in partition.

This action arose when the plaintiff Susan Grace filed a petition and amended petition alleging a 50 percent ownership in the property and a like interest in her sister, the defendant Margaret Ann, and prayed for "judgment confirming the shares of the parties . . . and for a partition of said real estate according to the respective rights of the parties interested therein, or if the same cannot be equitably divided, that said premises may be sold and the proceeds thereof be divided between the parties according to their respective rights and for such other and further relief as equity may require."

After special appearances were overruled the defendants filed an answer, alleging that the plaintiff Susan Grace was not entitled to partition because of the restrictive covenant in the deed of 1946. In her answer the defendant Margaret Ann prayed that the petition be dismissed and that, if partition were ordered, it be in kind.

On plaintiffs' motion for judgment on the pleadings and for summary judgment, the trial court found that the restrictive language in the deed had been satisfied and in the alternative was void. The court further found that there was no genuine issue as to any material

fact and that the plaintiffs were entitled to judgment as a matter of law. A referee was appointed and filed a report recommending partition in kind. The court approved the report and directed partition in kind. Thereafter, the trial court held a hearing in regard to attorney fees, referee fees, and taxing of costs. The plaintiffs' attorney was awarded a fee of $4,200 and the referee a fee of $1,800, and the fees were taxed one-half to the plaintiff Susan Grace and one-half to the defendant Margaret Ann.

The judgment of the trial court is affirmed.

The appellants assert that the court erred in allowing partition. The trial court correctly ruled that the 1961 conveyance of the 160 acres in question by the children of Henry C. Furst to the parties to this action as tenants in common satisfied the restrictive language in the 1946 deed of Henry C. Furst. Therefore, the question of whether that restriction is void by reason of public policy is not at issue and need not be decided.

The appellants assert that the trial court erred in awarding a fee of $4,200 to plaintiffs' attorney and a referee fee of $1,800, and in ordering both fees taxed one-half to the plaintiff Susan Grace and one-half to the defendant Margaret Ann.

In making a determination in regard to attorney fees and fees for the referee, the trial court correctly construed the provisions of Neb. Rev. Stat. § 25-21,108 (Reissue 1979): "If, in the proceedings in partition, judgment shall be entered directing partition, as provided in section 25-2179, the court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of fees to be awarded to the attorneys of record in the proceedings, which amount shall be taxed as costs in the proceedings. *If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, such fees for the attorney shall be awarded entirely to*

*the attorney for the plaintiff;* otherwise, the court shall order such fees for the attorneys to be divided among such of the attorneys of record in the proceedings as shall have filed pleadings upon which any of the findings in the judgment of partition are based. The court shall also determine and tax as costs a reasonable fee for the referee." (Emphasis supplied.)

In this case the shares confirmed by the judgment of the trial court were correctly pleaded in the original and amended petitions. Thus, the award of attorney fees for the plaintiffs' attorney was proper, having been mandated by the provisions of § 25-21,108.

The determination of the amount of the fee awarded to the plaintiffs' attorney and the amount of the referee fee rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *Snook v. Snook*, 184 Neb. 798, 172 N.W.2d 85 (1969); *Junker v. Junker*, 188 Neb. 555, 198 N.W.2d 189 (1972).

The plaintiffs' request for an additional fee to be allowed by the Supreme Court is denied, and the judgment of the District Court is affirmed.

AFFIRMED.

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## LARRY D. MILLER AND SHIRLEEN D. MILLER, APPELLEES, V. SCHOOL DISTRICT NO. 69 OF PAWNEE COUNTY, NEBRASKA, ET AL., APPELLANTS.

303 N.W.2d 483

Filed March 13, 1981. No. 43292.

1. **Schools and School Districts: Courts: Appeal and Error.** The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action.

2. **Equity: Jurisdiction.** It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
3. ____: ____. It is a common principle of equity that equity delights to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief.
4. **Equity.** Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities.
5. ____. Technicalities are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice.
6. ____. Equity looks through forms to substance, or as stated in similar language, a court of equity goes to the root of a matter and is not deterred by forms.
7. **Words and Phrases.** The word "void" means null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended.
8. ____. The word "voidable" means that which may be avoided, or declared void; not absolutely void, or void in itself; that which operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared. It imports a valid act which may be avoided rather than an invalid act which may be confirmed.
9. ____. There is this difference between the two words "void" and "voidable": void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; voidable exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it.
10. **Schools and School Districts: Accreditation.** Where all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer, and in fact the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation.

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

Everson, Noble, Wullschleger, Sutter & Sharp for appellants.

Dalke & Smith for appellees.

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

KRIVOSHA, C.J.

The appellants, School District No. 69 of Pawnee County, Nebraska, and certain of its patrons, individually and as taxpayers, residents, and electors of said district (hereinafter jointly referred to as the Lewiston District), appeal from a judgment entered by the District Court for Gage County, Nebraska, upholding the decision of the statutory board consisting of the county superintendents, clerks, and treasurers of Gage County and Pawnee County, Nebraska, (Neb. Rev. Stat. § 79-403 (Reissue 1976)) approving and granting the transfer of certain real estate owned by appellees, Larry D. Miller and Shirleen D. Miller (Millers), from the Lewiston District to School District No. 166 of Gage County, Nebraska (Filley District). For reasons more particularly set out hereinafter, we affirm the judgment of the trial court.

The evidence discloses that the Millers own 160 acres of land in Gage County, Nebraska, where they, together with their two children, have resided for more than 6 years. The children, Nichole and Aaron, both attend school in the Filley District and during the 1979-80 school year were in second grade and kindergarten, respectively.

The Millers' residence is 5½ miles from the Filley school and 11 miles from the Lewiston school. The Millers' land was within the boundaries of the Lewiston District for at least 2 years prior to the commencement of this action, and the Millers therefore paid tuition to the Filley District during the 1977-78 and 1978-79 school years to allow Nichole to attend the Filley school. Both children attended the Filley school during the 1979-80 school year. The Lewiston District adjoins the Filley District, and prior to its transfer the Millers' land was within 1 mile from the

boundary of the Filley District. Each district is an accredited Class II school district (Neb. Rev. Stat. § 79-102(2) (Reissue 1976)), although at the time the statutory board authorized the transfer on March 2, 1979, the Filley District was not then an accredited school district.

The record further establishes that the Filley District had made application for accreditation prior to March 2, 1979, the date of the transfer by the statutory board, and had completed all requirements for accreditation, though in fact the accreditation had not yet been granted. On March 8, 1979, the accreditation committee of the State Department of Education evaluated the Filley District and ascertained that there was compliance with the accreditation requirements. By reason of statute (Neb. Rev. Stat. § 79-403.01 (Reissue 1976)) the order of the statutory board transferring the Millers' land to the Filley District was to be effective June 1, 1979. On June 8, 1979, the State Department of Education, upon receipt of the accreditation committee's certification that the Filley District had fulfilled all requirements and should be accredited, formally granted the Filley District accreditation status effective July 1, 1979.

On June 22, 1979, a petition was filed in the District Court for Gage County, Nebraska. In late August of 1979, when classes resumed for the 1979-80 school year, the Millers' children continued to attend school in the Filley District. Trial was had in this matter on November 13, 1979, and judgment entered by the District Court on January 14, 1980.

The record further establishes certain differences between the Lewiston District and the Filley District, including the fact that for the 1979-80 school year the Filley and Lewiston District enrollments were 151 students and 209 students, respectively. The Filley District had 16 teachers and the Lewiston District had 17 teachers. The Lewiston District maintains that, in fact, they had an additional kindergarten teacher

whose name was not listed on an exhibit submitted at the trial. It appears from the record, however, that the additional teacher whose employment is disputed was approved by the Lewiston District on the night prior to the trial in the District Court and was not to begin work until January of 1980. Likewise, the evidence discloses that the teaching faculty of the Filley District has more teachers than the Lewiston District who have earned post-graduate credits at each of several levels, including the obtaining of a master's degree.

In examining the role of the principals of the two districts, it appears that the principal of the Filley District spends over 70 percent of his time in performing his duties as principal, while the principal of the Lewiston District devotes two of seven periods each day teaching class, one period preparing to teach class, and four periods as librarian. It would appear that the Lewiston principal's administrative duties are incidental to her primary function as a classroom teacher and librarian.

The evidence further discloses that the Millers' son, Aaron, was enrolled in the Filley District's kindergarten program during the 1979-80 school year. The Filley District kindergarten program is conducted for one-half day during the entire school year, while the Lewiston kindergarten program is conducted on a full-day basis during just the spring semester. Further, Aaron has been diagnosed as having a speech problem and was receiving continuing speech therapy in the Filley District.

The Lewiston District maintains that the trial court erred in upholding the action of the statutory board for two specific reasons. The first reason was that the Millers failed to sustain their burden of proving that it was in their children's best educative interests to transfer their land from the Lewiston District to the Filley District. The second reason given by the Lewiston District is that the transfer was void because at the time the transfer was author-

ized on March 2, 1979, the Filley District was not then accredited, contrary to the provisions of Neb. Rev. Stat. § 79-1108 (Reissue 1976), which requires in part: "No transfer of property from an accredited school district to a nonaccredited school district of any class shall be permitted."

We shall examine the assignments of error raised by the Lewiston District in reverse order, looking first at Lewiston's contention that the transfer was invalid because of § 79-1108 which prohibits the transfer of land to a nonaccredited school district.

In analyzing this problem and arriving at an appropriate determination, we must first examine various rules and principles by which this appeal must be considered. "We have held that the action of the [statutory] board under section 79-403, R. R. S. 1943, is an exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action." *Klecan v. Schmal*, 196 Neb. 100, 108, 241 N.W.2d 529, 534 (1976). See, also, *Friesen v. Clark*, 192 Neb. 227, 220 N.W.2d 12 (1974). This, therefore, being an equitable action, we must likewise keep in mind the equitable principles under which such an action must be reviewed.

In particular, we note the following principles of equity which control our decision in this case. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. See, *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978); *Sechovec v. Harms*, 187 Neb. 70, 187 N.W.2d 296 (1971). Moreover, it is a common principle of equity that equity delights

to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief. See *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942). Further, "'[e]quity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities.'" *National Mortgage Loan Co. v. Hurst*, 120 Neb. 37, 39, 231 N.W. 519, 520 (1930). See, also, *Empson v. Deuel County State Bank*, 134 Neb. 597, 279 N.W. 293 (1938).

"Technicalities are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice." *Northwest Ready Roofing Co. v. Antes*, 117 Neb. 121, 219 N.W. 848 (1928) (syllabus of the court). See, also, *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, 220 N.W. 285 (1928). In *Darnell v. City of Broken Bow*, 139 Neb. 844, 854, 299 N.W. 274, 281 (1941), we said: "'Equity looks through forms to substance,' or as stated in similar language, 'A court of equity goes to the root of a matter and is not deterred by forms.'"

With these principles in mind, therefore, we now examine the applicable statutes to determine whether the fact that the Filley District was not formally accredited on March 2, 1979, but was fully accredited prior to the time the children started school in August of 1979 and prior to trial in this matter and prior to the time the court entered its judgment, nevertheless, precludes the transfer of the Millers' property from the Lewiston District to the Filley District. We must, of course, examine the applicable statutes involved because, while equity does indeed seek to do equity, nevertheless, equity follows the law. As we noted in *In re Petition of Ritchie*, 155 Neb. 824, 828, 53 N.W.2d 753, 756 (1952): "'A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of

equity is as much bound by it as would be a court of law.'"

The transfer of the Millers' land from the Lewiston District to the Filley District was made pursuant to the provisions of § 79-403, which we have previously held applies. Nothing found within that section requires that the district to which the land is attached must be accredited prior to the transfer. The parties appear to concede that but for the matter of accreditation all of the other formal requirements of the statute were fully met by the Millers at the time the application was filed. If, then, the absence of a formal certificate of accreditation voids the transfer, it must be found elsewhere. The only other applicable statute is § 79-1108, which we have previously held applies to all school districts. *Pribil v. French*, 179 Neb. 602, 139 N.W.2d 356 (1966). A reading of § 79-1108, however, makes it clear that the absence of accreditation does not make the transfer "void," but only "voidable."

Section 79-1108 provides in full as follows: "No transfer of property from an accredited school district to a nonaccredited school district of any class shall be permitted. Any action to set aside the transfer of property from an accredited school district to a nonaccredited school district shall be commenced within four years from the date of the transfer, *otherwise the transfer shall be valid as of the original date of the transfer.* This provision shall apply to all transfers made prior as well as subsequent to February 20, 1974." (Emphasis supplied.) According to Black's Law Dictionary 1411 (5th ed. 1979), the word "void" means: "Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended." "Voidable," on the other hand, means: "That which may be avoided, or declared void; not absolutely void, or void in itself. That which operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.

Slaughter v. Qualls, 139 Tex. 340, 162 S.W.2d 671, 674. It imports a valid act which may be avoided rather than an invalid act which may be confirmed. Paulson v. McMillan, 8 Wash.2d 295, 111 P.2d 983, 985." *Id.* at 1411. As further noted in Black's at 1411: "There is this difference between the two words 'void' and 'voidable': *void* in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; *voidable* exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it." (Emphasis in original.)

The specific provisions of § 79-1108 must of necessity be considered to be "voidable" and not "void." That which is void could not become valid by the passage of time. Yet, here, we have a statute which provides that even if property is transferred from an accredited school district to a nonaccredited school district, it may be valid if no action is brought within 4 years from the date of the transfer. That clearly describes a voidable transaction rather than a void transaction. While it is true that in the case at bar the action was brought within the 4 years, it is likewise clear that all the steps necessary to satisfy accreditation had been met prior to the date of transfer on March 2, 1979, and, in fact, had been formally acknowledged prior to the time the children commenced school in August of 1979 and well in advance of the time that the District Court was called upon to enter judgment. Appellants conceded at the time of argument to this court that if this court were to hold that the transfer was ineffectual because the district was not formally accredited on March 2, 1979, the most that could be accomplished would be a delay of 1 year in waiving the tuition paid by the Millers to the Filley District. That is to say, if we were to hold that the transfer was invalid for the year 1979-80 as contended by the Lewiston District, the Millers would simply pay tuition to the Filley District for

their children, file another action to transfer their land, and succeed insofar as the question of the accreditation of the Filley District was concerned. Such a situation must of necessity be of the type contemplated by the courts in developing the equitable principles heretofore announced. It would serve virtually no purpose, other than to impose upon the Millers the payment of tuition to the Filley District, for us to strictly enforce the provisions of § 79-1108 because the formal document was not issued until several days after the transfer became effective. We believe that a more practical and reasonable interpretation must be to the effect that where, as here, all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer and, in fact, the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation.

Having so disposed of that matter, we then turn to the second issue raised by appellants. Appellants maintain that the Millers have failed to sustain their burden of proof in establishing that it is in the best "educative" interests of their children to permit such transfer. While the statute in question, § 79-403, uses the phrase, "the best interest of the petitioner or petitioners," we have heretofore interpreted that to mean the "best educative interest of petitioner or petitioner or petitioners." See *Friesen v. Clark*, 192 Neb. 227, 229, 220 N.W.2d 12, 14 (1974). Our inquiry, therefore, is whether there is sufficient evidence from which we may reasonably conclude that the transfer in this case is indeed in the best educative interests of the petitioners. As we observed in *Klecan v. Schmal*, 196 Neb. 100, 241 N.W.2d 529 (1976), the distinctions

in these cases are rarely, if ever, wide and clear and may not be fully examined and understood except by reviewing the totality of the matter.

Likewise, in the *Klecan* case we noted that while the statute prescribes certain elements which "must" be shown to be of significant difference, the word "must" used in this statute indeed means "may." We said in *Klecan*, *supra* at 104-05, 241 N.W.2d at 532: "We do not agree with objectors' contention; nor do we believe it is necessary that the court, in making its final determination, afford equal weight and significance to each of the listed items. Significantly, the court also stated that other factors may properly be considered in ruling on such a petition, but are not *alone* enough to justify a transfer of land under that statute." (Emphasis in original.)

Our examination of the record satisfies us that there is a sufficient educative difference to justify the transfer. The relatively short distance between the Millers' home and the Filley District enables the Millers to more easily participate in their children's school activities, certainly in the best educative interests of the children. Likewise, the teacher-student ratio in the Filley District is lower, thereby enabling its teachers to provide a greater amount of individual attention to each student and facilitating the teacher's ability to evaluate and administer each child's education.

The fact that the Filley principal is able to devote the greatest portion of his time to the administration of the school is likewise of some significance. Such attention ensures that the administrative needs of the school and the students are the prime concern of the principal and not merely incidental to other duties. Such concern should provide greater supervision of the teachers, which in turn should provide better educational benefits to the student.

We are further impressed by the fact that the Filley kindergarten program is conducted for one-half day

during the entire school year while the Lewiston kindergarten program is conducted on a full-day basis during just the spring semester. In this particular case, the evidence discloses that the Filley District's kindergarten program is more conducive to the attention span of children of kindergarten age, all in the best educative interests of the student.

Likewise, while not in itself controlling, the fact does remain that Nichole was already enrolled at Filley and had made associations in the Filley District. Having both children in the same school is a factor to be considered by both the statutory board in the first instance and the court on review. Should the transfer be denied, it is possible Nichole would have to leave the Filley District and return to the Lewiston District. Social and school adjustments made by Nichole during attendance in the Filley District should not be disregarded. As we indicated at the outset, no one factor standing alone may be sufficient to establish "best educative interests of petitioners." The "best educative interests" of the children can only be determined by taking all the relevant factors into account and viewing them as a whole. When all the factors involved in this case are considered as a whole, we are compelled to reach the conclusion that indeed the best educative interests of the children would be served by permitting them to attend the Filley District. That being the case, we believe the trial court correctly concluded that the transfer of the Miller land from the Lewiston District to the Filley District was in the best educative interests of the children. The second assignment of error raised by appellants must also, therefore, be rejected.

For the foregoing reasons, then, we affirm the judgment of the District Court.

AFFIRMED.

# ERNEST MEYER, APPELLANT, V. BOARD OF EDUCATION, SCHOOL DISTRICT NO. 68, ET AL., APPELLEES.

303 N.W.2d 291

Filed March 13, 1981. No. 43303.

**Schools and School Districts: Contracts: Tenure.** Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them.

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

Koenig & Murray for appellant.

Timothy S. Schmidt for appellees.

Theodore L. Kessner and Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester for Nebraska State Education Assn. as amicus curiae.

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

WHITE, J.

Appellant, Ernest Meyer, was employed as a probationary teacher for the school year 1978-79 by the appellee School District No. 68, Thayer County, Nebraska. On April 27, 1979, the Board of Education, by unanimous vote, agreed not to offer a contract to the appellant for the 1979-80 school year. Appellant was notified of this action by the school board on April 30, 1979. Meyer filed a petition in the District Court for Thayer County alleging various procedural errors and requested that the action of the school board be declared ineffective in determining not to offer him a contract for the 1979-80 school year. The District Court affirmed the action of the school board. Meyer appeals. We affirm.

This is one of a series of cases that have been decided under Neb. Rev. Stat. § 79-1254 as it has been amended

over the years. In 1971, § 79-1254, as amended, provided that all administrators and teachers holding a certificate valid for more than 1 year were entitled to a continuing contract not to be terminated without a majority vote of the board, timely notice, and a hearing if requested. The bases for the board's vote to terminate under this section were "unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers *may be cause* to either terminate . . . ." (Emphasis supplied.)

In 1975, in response to *Schultz v. School Dist. of Dorchester*, 192 Neb. 492, 222 N.W.2d 578 (1974), § 79-1254 was again amended. In *Schultz*, this court held that under the 1971 version of § 79-1254, school boards could terminate any teacher for "any cause whatsoever, or for no cause at all." *Id.* at 500, 222 N.W.2d at 583. The 1975 Legislature repealed the existing sections of § 79-1254 and enacted the following: "The original contract of employment with an administrator or a teacher and a board of education of a Class I, II, III, or VI district shall require the sanction of a majority of the members of the board. ~~Any~~ Except for the first two years of employment under any contract entered into after the effective date of this act, any contract of employment between an administrator or a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period. The first two years of the contract shall be a probationary period during which it may be terminated without just cause. Any superintendent or associate superintendent may have his contract of employment terminated without just cause at the close of the contract period. ; ~~Provided, that the~~ The secretary of the board shall, not later than April 15, notify each admin-

istrator or teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers may be just cause to either terminate or amend the contract for the ensuing school year. Any teacher or administrator so notified shall have the right to file within five days of receipt of such notice a written request with the board of education for a hearing before the board. Upon receipt of such request the board shall order the hearing to be held within ten days, and shall give written notice of the time and place of the hearing to the teacher or administrator. At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing."

In *Wang v. Board of Education*, 199 Neb. 564, 566, 260 N.W.2d 475, 477 (1977), the majority observed that: "[1975 Neb. Laws, L.B. 82] (1) required and defined just cause for dismissal; (2) separated the statutory provisions applicable to teachers and superintendents; and (3) created a 2-year probationary period during which newly hired teachers could be dismissed without a showing of just cause."

Originally the bill proposed to affect the same class of people affected by § 79-1254 (Reissue 1971), all teachers and administrators with a valid certificate for more than 1 year. Opposition to the bill, however, argued that making the just cause requirement applicable to all teachers would essentially create a system of automatic tenure in teachers and take from the school boards the opportunity to view teachers on a probationary basis. See, Senator Lewis, Floor Debate at 385, January 31, 1975. An amendment to the bill removed from the just cause provisions teachers in their first 2 years of employment with the district. Dworak-Mills Amend-

ment, Legislative Journal (1975) at 456.

Appellant argues, however, that probationary teachers are still entitled to notice and a hearing if requested. This contention is without merit. Probationary teachers are exempted from every provision outlined in § 79-1254 (Reissue 1976): "Except for the first two years of employment . . . any contract of employment . . . shall be deemed renewed and shall remain in full force . . . ." and "[t]he first two years of the contract shall be a probationary period during which it may be terminated without just cause." Although § 79-1254 is somewhat confusingly arranged, the following interpretation is the one supported by both the rules of sentence construction and legislative intent.

The statute requires that permanent teachers' contracts continue from year to year except until just cause is shown for termination. Probationary teachers' contracts do not continue and they may be terminated for any reason or no reason. Notice of conditions constituting just cause for termination must be served on teachers prior to termination; probationary teachers are excluded from this requirement because their contracts are not continuing and no cause need be shown to terminate them.

"A fundamental principal of statutory construction is to ascertain the legislative intent and give effect to it, if it is a lawful one." *Schultz v. School Dist. of Dorchester*, 192 Neb. 492, 496, 222 N.W.2d 578, 581 (1974). The intent of the Legislature in amending the bill to exempt probationary teachers from the notice and hearing requirements is expressed in the senators' comments relating to the tenure system in District IV (Lincoln) and District V (Omaha). "It is not that major a change and it only does for these Class districts what the Omaha and Lincoln school districts and their employees seem to be well satisfied with, and it seems completely reasonable." Senator Dickinson, Floor Debate, January 31, 1975, at 387. Speaking to the

need for the amendment, Senator Clark stated at 386: "I would assume that anyone having tenure in Class IV or V schools doesn't automatically have tenure. I think there's probably a probationary period." Compare § 79-1254 with Neb. Rev. Stat. §§ 79-1256 and 79-1259 (Reissue 1976).

Neb. Rev. Stat. § 79-1254 (Reissue 1971) was amended by 1975 Neb. Laws, L.B. 82, and the original sections were repealed. Legislative Journal (1975) at 599. As set out above, probationary teachers were excluded from the protection established by L.B. 82 and they are not included in the class of teachers entitled to notice, a hearing, and just cause shown for termination of their contracts. The judgment of the District Court is affirmed.

AFFIRMED.

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## ALBERT G. TIBBS, DOING BUSINESS AS TIBBS CONSTRUCTION COMPANY, APPELLANT, V. STAN FISHER, DOING BUSINESS AS FISHER LAND COMPANY, LTD., APPELLEE.

303 N.W.2d 293

Filed March 13, 1981. No. 43313.

1. **Judgments: Appeal and Error.** The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
2. **Appeal and Error: Evidence.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
3. ____: ____. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.
4. **Contracts.** Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.

5. ____. There is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner.
6. ____. Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract.
7. **Libel and Slander.** Notice consisting solely of a statement of the termination of a prior business or professional relationship is not by itself libelous or slanderous.

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

Ivory Griggs and Wilbur C. Smith of Smith & Hansen for appellant.

H. Daniel Smith of Daub, Stehlik & Smith for appellee.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, BARTU, and KELLY, District Judges.

KELLY, District Judge.

Defendant-appellee was in the business of buying and renovating apartment buildings and had five adjacent apartment buildings in North Omaha that were in very poor condition and had been vandalized. Appellee looked for and found contractors and sought bids for the renovation of these buildings. The appellee employed the plaintiff-appellant, by contract, to renovate these buildings; no plans were submitted and no architect was employed.

The appellant began work on the project on July 20, 1978, and continued until September 16, 1978, when the appellee ordered appellant off the job because of problems with workmanship and diligence in completing the work.

It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner. See 17 Am. Jur. 2d *Contracts* § 371 (1964). The record discloses

many areas of unacceptable workmanship and delays due to poor quality work. We will not recite all of the examples here. Suffice it to say that it appears from the record that the termination of the contract by the appellee was justified by the breach of contract by the appellant. Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party. *Bodtke v. Bratten*, 166 Neb. 36, 88 N.W.2d 159 (1958).

Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742 (1961). The record in this case discloses that the appellant failed to substantially perform his contract inasmuch as the work contracted for was not performed in a workmanlike manner. In cases of this sort, the builder must be understood to have agreed to use the diligence and attention and skill adequate to the completion of his bargained-for performance. See 17 Am. Jur. 2d *Contracts* § 371 (1964). See, also, *Credit Bureau Services, Inc. v. Moylan*, 195 Neb. 197, 237 N.W.2d 151 (1976). The evidence shows that the appellant failed to perform his contract, with reference to supervision and workmanlike production.

In addition to his contract claim, the appellant's second cause of action asserted that his business reputation had been slandered by virtue of letters the appellee sent to the appellant's building materials suppliers. The gist of the letter was that the appellee had terminated his relationship with the appellant and that no more materials should be charged against the appellee's property. The appellant's slander claim must, likewise, fail. The general rule in this regard is: "The publication

of a notice consisting solely of a statement of the cessation of a prior business or professional relationship between the parties is generally held not to be libelous or slanderous." 50 Am. Jur. 2d *Libel and Slander* § 117 at 617 (1970). The appellee's letter was a straightforward notification to suppliers who were his potential creditors that the appellee would not honor any further charges for materials for the project involved in this case. As such, the letter was not actionable.

This case was tried to the court below without a jury. The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. Furthermore, in determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. *H. D. Fager Oil Co., Inc. v. Vanice*, 192 Neb. 789, 224 N.W.2d 372 (1974). When viewed under the standards just enunciated, there can be no doubt that the judgment of the trial court was correct on both the facts and the law, and must be affirmed.

AFFIRMED.

BARTU, District Judge, concurs in result.

# CELESTE JEAN PICKETT, APPELLEE, V. VINCENT K. PARKS, APPELLANT.

303 N.W.2d 296

Filed March 13, 1981. No. 43321.

1. **Motor Vehicles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
2. ____: ____. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
3. ____:____. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger.
4. **Motor Vehicles: Negligence.** If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.
5. **Highways.** A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption.

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

Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellant.

Thomas R. Wolff for appellee.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, KELLY, and BARTU, District Judges.

KELLY, District Judge.

This is an appeal from the District Court for Douglas County and involves an automobile accident that occurred at the intersection of Lafayette Avenue and 69th Street in Omaha, Nebraska. Trial was to a jury; and at the close of appellant's evidence, the trial court directed a verdict in favor of appellee on the negligence and contributory negligence issues.

The appellant was traveling west on Lafayette Avenue. This street has a stop sign protecting 69th Street; the appellee was proceeding north on 69th Street. Sixty-ninth Street is a two-lane street, one lane north and one south.

The appellant claims he came to a complete stop and then looked both to the right and the left before proceeding into the intersection where the appellee struck the left side of his automobile at the rear door. A disinterested eyewitness testified that appellee was 20 feet from the intersection when the appellant came through without stopping at the stop sign, and the appellee was going about 20 miles per hour.

This case is governed by several oft-stated rules of law. A motorist approaching a roadway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the roadway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978); *Nistor v. Therkildsen*, 181 Neb. 817, 151 N.W.2d 443 (1967). Furthermore, the duty of a motorist to look for vehicles approaching on a roadway protected by stop signs implies the obligation to see what is in plain view. *Nistor v. Therkildsen, supra; Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960). Similarly, a motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. *Nistor v. Therkildsen, supra; Nichols v. McArdle, supra.* Finally, a motorist who is entering an intersection and looks for approaching vehicles but fails to see one which is favored over him under the rules of the road is guilty of negligence as a matter of law. *Nistor v. Therkildsen, supra; Nichols v. McArdle, supra; Cappel v. Riener*, 167 Neb. 375, 93 N.W.2d 36 (1958).

Since this case comes to us after a directed verdict for

the appellee, the evidence must be considered in the light most favorable to the appellant. Every controverted fact must be resolved in favor of the appellant and he is entitled to the benefit of every reasonable inference that may be drawn from the evidence. *Treffer v. Seevers*, 195 Neb. 114, 237 N.W.2d 114 (1975); *Melia v. Svoboda*, 191 Neb. 150, 214 N.W.2d 476 (1974). Be that as it may, the principles of law cited above applied to the facts taken most favorably to the appellant result in the conclusion that the appellant was guilty of negligence as a matter of law.

The burden to establish contributory negligence is on the defendant. *Nistor v. Therkildsen, supra; Coltan v. Benes*, 176 Neb. 483, 126 N.W.2d 652 (1964); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979). The damage to both vehicles involved in this case was minimal, and that fact, in itself, rules out the possibility of excess speed on behalf of the appellee. In addition, the appellee is entitled to the benefit of the rule that a traveler on the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption. *Nistor v. Therkildsen, supra; Nichols v. McArdle, supra; Paddack v. Patrick*, 163 Neb. 355, 79 N.W.2d 701 (1956). In this case, the evidence shows that it was too late to avoid the accident after the appellant's sudden or unexpected entry into the intersection.

The trial court was correct in directing the verdict on the negligence and contributory negligence issues and its judgment is affirmed.

AFFIRMED.

BARTU, District Judge, concurs in result.

STATE OF NEBRASKA, APPELLEE, V.
RALPH E. ANDERSEN, APPELLANT.

303 N.W.2d 298

Filed March 13, 1981. No. 43396.

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

William M. Berlowitz of Friedman Law Offices for appellant.

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

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

MCCOWN, J.

The defendant pleaded guilty to a charge of theft by receiving stolen property of a value of over $1,000. The District Court, after a presentence investigation, sentenced the defendant to 3 to 5 years' imprisonment.

On November 29, 1979, the defendant was charged with theft by receiving stolen property over $1,000 in value. Two other similar charges were pending against the defendant, one in the District Court and one in the county court of Douglas County. On February 5, 1980, pursuant to a plea bargain, the other two charges were dismissed and the defendant pleaded guilty to the charge involved in this case. A presentence investigation was ordered and on March 13, 1980, the defendant appeared before the District Court for sentencing. Meanwhile, on March 5, 1980, the defendant was arrested and charged in the county court of Sarpy County with the offense of theft by deception.

The presentence investigation report in the present case had been completed before the March 5 charge. The record shows that defendant's counsel submitted the March 5 police record and reports to the court prior to the sentencing hearing and they were made a part of

the presentence report in this case. The record also establishes that at the sentencing hearing defendant's counsel commented on the police reports and summarized his conclusions as to the facts reflected in the reports. He also stated that the defendant had cooperated with the police by showing them where various items of stolen merchandise were located. Counsel also argued that defendant's family had been threatened because of that cooperation.

The District Court stated that it was not basing its sentence in the present case on the Sarpy County charge, but expressed its belief that the defendant was extensively involved in the business of dealing in stolen property and pronounced the sentence of 3 to 5 years' imprisonment and gave the defendant credit for 1 week in custody prior to sentencing.

The defendant now contends on appeal that the court took into consideration, in sentencing, information or reports which were not made available to the defendant to which the defendant had no opportunity to respond, and, therefore, defendant was denied due process of law. He also contends the sentence was excessive. The record demolishes defendant's contentions.

A sentencing judge has broad discretion as to the source and type of evidence or information which may be used in determining the kind and extent of the punishment to be imposed, and the judge may consider probation reports, police reports, affidavits, and other information, including his own personal observations. See *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979).

The defendant's prior criminal record was extensive. The sentence of 3 to 5 years was well within the statutory limits of 1 to 20 years and was not excessive. The conviction and sentence are affirmed.

AFFIRMED.

# SELDIN DEVELOPMENT & MANAGEMENT COMPANY, A CORPORATION, APPELLANT, V. GERALD E. CHIZEK, COMMISSIONER OF LABOR, STATE OF NEBRASKA, ET AL., APPELLEES.

303 N.W.2d 300

Filed March 13, 1981. No. 43562.

1. **Employment Security Law: Words and Phrases.** The exemption from the term "employment" in Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978) includes participation in a voluntary work-study program as long as grades and credits received are applied toward the high school degree and it is a part of an approved course of study.
2. **Employment Security Law.** When a school has certified to an employer that work-study is an integral part of its educational program, the employer should be allowed to rely on that assurance, particularly when such conclusion is adequately supported by the record.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed.

C. Robert Vote and Malcolm D. Young of Young & White for appellant.

Pamela A. Mattson for appellee Chizek.

William E. Pfeiffer of Spielhagen, Pfeiffer & Miller, Associates, for appellee Benson.

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

HASTINGS, J.

Seldin Development & Management Company (Seldin) appealed from an order of the District Court affirming an award of unemployment compensation benefits to Steve Benson, a high school student. Seldin assigns as error the finding that Steve's job was not an integral part of his academic training which would exempt his services from unemployment benefits according to Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978). Further assigned as error is the court's failure to treat Steve's admission in his answer of portions of Seldin's petition as a judicial admission and waiver of

controversy against himself and the codefendant, the Commissioner of Labor. For the reasons to follow, we reverse the order of the District Court.

Generally speaking, unemployed individuals are entitled to benefits under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978). However, two exceptions must be noted for the purpose of this appeal. Section 48-604 provides in part as follows: "(6) The term employment shall not include: . . . (o) service performed by an individual under the age of twenty-two who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer . . . ." Neb. Rev. Stat. § 48-627 (Reissue 1978) provides in part that "[a]n unemployed individual shall be eligible to receive benefits with respect to any week, only if the Commissioner of Labor finds: . . . (e) For any benefit year, he has, within his base period, been paid a total sum of wages for employment by employers equal to not less than six hundred dollars, of which sum at least two hundred dollars shall have been paid in each of two quarters in his base period."

There is no dispute as to the underlying facts. Steve was a 17-year-old junior at Millard High School, enrolled in the special education program. He voluntarily took part in the supervised occupational skills program, the purpose of which was to give students an opportunity to learn how to interview for jobs and work in the community. Students were taught proper work habits and the importance of getting to work on time, as well as how to deal with employers. The program consists of a formal one-semester class in which all of

the classwork pertains to actual work experience or job-related experiences. Students take tests and receive grades. The second part of the program is voluntary and requires the student to go out and work in the community. The employer must be certified by the school, an interview is arranged for the student, and the instructors work closely with the student's employer when problems arise on the job. The students are graded on their work and receive credits toward graduation.

As part of this program Steve was employed by Seldin to do general maintenance work at an apartment complex. Steve worked for Seldin for two semesters of his junior year, commencing in September of 1977. After the end of the second semester on June 2, 1978, Steve stayed on as an employee for the summer; however, his employment was terminated 6 days after school was dismissed for the semester.

Steve sought unemployment compensation benefits after he was terminated, and requested that he be credited as having worked for a period including the previous two semesters as well as for the 6 days after school was dismissed. The Commissioner of Labor allowed the claim. Seldin filed an appeal from the allowance of that claim to the Nebraska Appeal Tribunal, which affirmed the Commissioner's decision. Seldin then filed a petition for review in the District Court for Douglas County, which denied the appeal.

Seldin assigns as error the determination that Steve's job was not an integral part of his academic training. Seldin asserts that the two semesters of employment that involved the work-study were exempted by § 48-604(6)(o).

It is apparent, and the parties agree, that if the two semesters of employment fall within the exception provided for by § 48-604(6)(o) Steve would not be entitled to benefits for the 6 days of covered employment because he would not have been paid total wages of $600 for that benefit year, as required by § 48-627(e).

It would seem that the exclusion of § 48-604(6)(o) is intended to encourage employers to participate in cooperative educational plans. The view is that schools might have more success in persuading employers to participate if the wages paid to the students were not taxable. [1977] 1B Unempl. Ins. Rep. (CCH) ¶ 1362.

The Commissioner of Labor argues that the work done by Steve was not an integral part of his academic program because Steve was not required to work outside of the school to complete requirements for the special education program or to fulfill requirements for graduation from high school. The Commissioner further argues that the job of maintenance man was not combined with academic instruction, and there was no showing that Steve could gain anything from a manual labor job.

We first note that the program in which Steve was involved was a Level II special education program. To qualify for this program, a student must be verified as learning disabled, emotionally disturbed, or educably mentally handicapped. Steve had a learning disability. In Level II are those students who primarily cannot get along in the regular mainstream class. The occupational skills program is not intended to teach a student a skill such as woodworking or carpentry; rather, it is intended to teach students how to interview for a job and how to work in the community, as previously set forth. Students are not allowed to receive credit for an outside job unless they have first taken the classroom semester, and the employer has been certified by the school.

We agree with Seldin that the program in which Steve was involved was a full-time program, taken for credit at Millard High School; was combined with academic instruction; is an integral part of the program, and the school so certified the above to the employer. Merely because the actual work done by Steve was manual labor does not mean that he cannot learn a valuable lesson from it, particularly since the pur-

pose of the program is to teach Level II students how to participate in the working community and not necessarily how to be a maintenance person. Neither are we convinced by the argument that a voluntary program cannot come within the meaning of "integral part of the program." To come within the statute, work-study need not be required for graduation, as long as the students receive grades and credits that are applied toward their high school degree, and it is a part of an approved course of study, as it was in this case.

Seldin was recruited by Millard High School to participate in the program and was assured that instructors would work closely with the employer in helping the student have a successful work experience. The school had certified to the employer that such work was an integral part of its educational program and the employer should be allowed to rely on that assurance, particularly when, as here, such conclusion was adequately supported by the record.

The fundamental principle of statutory construction is to ascertain the legislative intent and to give it effect. The reasons for the enactment and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. The court must look to the object to be accomplished or the purpose to be subserved and place such construction on the statute that will best effect that purpose, rather than one that will defeat it. *School District of Murray v. Lancaster*, 203 Neb. 109, 277 N.W.2d 558 (1979). We believe that our determination made here, de novo on the record, that Steve's job was an integral part of his educational program and therefore comes within the statutory exception, is consistent with that principle of statutory construction.

Having made that determination, we need not consider appellant's second assignment of error. The judgment of the District Court is reversed, and the claim of the appellee, Steve Benson, is ordered dismissed.

REVERSED.

# STATE OF NEBRASKA, APPELLEE, V. JOHN EDWARD RUST, ALSO KNOWN AS JOHN DEWITT, APPELLANT.

303 N.W.2d 490

Filed March 20, 1981. No. 43019.

1. **Post Conviction: Motion to Vacate.** 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.
2. **Criminal Law: Statutes.** The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence.
3. **Criminal Law: Effectiveness of Counsel.** Our standard for determining whether or not counsel for a criminal defendant has provided adequate representation is that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.
4. **Post Conviction: Proof: Appeal and Error.** The defendant has the burden of establishing a basis for relief in a post conviction proceeding and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous.
5. **Criminal Law: Effectiveness of Counsel.** The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we will not require defense counsel to develop ridiculous trial tactics because they are suggested by the defendant.
6. **Criminal Law: Aggravating and Mitigating Circumstances.** In order for something to be considered a mitigating factor it must be probative of any aspect of the defendant's character or record or any of the circumstances of the offense that could be proffered as a basis for a sentence less than death.
7. **Criminal Law: Appeal and Error.** 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 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.

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

Paul E. Watts and Gerald E. Moran 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.

WHITE, J.

This case is now before this court appealing the denial of a motion for post conviction relief. On February 2, 1977, this court affirmed the jury verdict convicting the defendant, John E. Rust, of felony murder and the decision of a three-judge panel sentencing him to death for that murder. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). Defendant cited as the basis for vacating and setting aside his conviction and sentence that he had had prejudicially ineffective assistance of trial counsel; that he was entitled to the benefits of Neb. Rev. Stat. § 29-2522 (Reissue 1979), as amended by 1978 Neb. Laws, L.B. 711, adopted subsequent to his sentencing; that the provisions of Nebraska's death penalty law violate the eighth and fourteenth amendments of the U.S. Constitution. The District Court denied defendant's motion and defendant appeals. We affirm the decision of the District Court.

Defendant assigns as error the following: (1) The finding of the trial court that the Nebraska death penalty law does not violate the eighth and fourteenth amendments prohibition against cruel and unusual punishment; (2) The finding that defendant was not denied effective assistance of trial counsel; (3) The District Court's failure to apply the provisions of L.B. 711; and (4) The District Court's failure to hold that Nebraska's death penalty is unconstitutional as applied to defendant.

"[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. Holtan*, 205 Neb. 314, 317, 287 N.W.2d 671, 674 (1980). In his direct appeal to this court, defendant raised the constitutional issues he now combines into assignment of error (4) and they will not be reconsidered.

Defendant argues under assignment of error (1) that his sentence is cruel and unusual punishment

in light of the confession of a codefendant, Ronald Ell, that Ell, not Rust, actually shot and killed the victim. This is apparently based on our discussion in *State v. Rust, supra* at 540-41, 250 N.W.2d at 875, regarding the propriety of sentencing one codefendant to life imprisonment and the other to death. In his direct appeal, defendant argued that his death sentence was arbitrary and discriminatory because Ell received a life sentence. We held that as a participant in the felony, Ell "was guilty of the murder of Kellogg only as an aider and abettor. He did not actually kill anyone. Although he was equally guilty with Rust in the robbery, his participation in the actual killing was relatively minor. See mitigating factor (e), § 29-2523, R.R.S. 1943." *State v. Rust, supra* at 541, 250 N.W.2d at 875.

Subsequent to Ell's sentencing, Ell appeared at defendant's post conviction relief hearing and testified that he had shot the victim. When defendant and Ell were arrested, the gun that was used to shoot the victim was found lying near the defendant. At defendant's post conviction relief hearing, Ell testified that during the shoot-out between the police and defendant and himself, Ell shot and killed the victim, then gave defendant his gun and took defendant's gun because defendant's gun had jammed. At no time during defendant's trial nor during Ell's trial did either defendant suggest this version of the crime to their attorneys or to the court. Ell's testimony was uncorroborated and the District Court judge at defendant's post conviction relief hearing found it unbelievable. A prison guard at the penal complex testified at the hearing that defendant admitted shooting the victim and the police officer again identified the defendant as the person who shot the victim. The record supports that finding. Defendant's contention in this regard is without merit.

Defendant's third assignment of error is likewise without merit. "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." *State v. Holtan, supra* at 316, 287 N.W.2d at 673. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. *United States v. Rojas-Colombo*, 462 F.2d 1091 (5th Cir. 1972), *cert. denied*, 410 U.S. 990, 93 S. Ct. 1507, 36 L. Ed. 2d 188.

In his second assignment of error, defendant argues his trial counsel was prejudicially ineffective. Specifically, defendant alleges that his trial attorney failed to make an opening statement; failed to impeach witnesses on inconsistencies; failed to take defendant to the scene of the shooting; failed to depose witnesses after the court ruled, permitting depositions to be taken; untimely filed his pretrial motions; failed to discuss trial strategy with defendant; failed to argue that the felony robbery had terminated before the shooting; failed to notify the court that defendant was dissatisfied with trial counsel; failed to move for a mistrial on voir dire of jurors; failure to review police reports; failed to prepare for trial; failure to renew motion to sever after opening statements; failed to move for a mistrial after evidence of defendant's use of an alias was introduced, after evidence that weapon used in the robbery was stolen was introduced; failed to determine whether an insanity defense existed; failed to poll the jury; failure to prepare his own motion for new trial; failed to attend the hearing regarding sentencing ground rules; failed to discuss sentencing strategy with defendant; failed to introduce mitigating factors at the sentencing hearing other than those enumerated in the statutes; failed to review

presentence investigation report; failed to inform sentencing court that State had discussed possibility of a plea bargain; failed to call to the court's attention that the prosecution had proven only two aggravating circumstances when, in its sentencing order, the court found there were four aggravating circumstances; failure to offer evidence in the form of a letter from a South Dakota state's attorney concerning codefendant Ell's violent tendencies; failed to point out to sentencing court that its fact interpretation of the shooting incident was incorrect; and failed to prepare and argue effectively at the sentencing hearing.

Our standard for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is "'that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.'" *State v. Fowler*, 201 Neb. 647, 655, 271 N.W.2d 341, 347 (1978).

The burden of proof is on the defendant and he must establish by a preponderance of the evidence the incompetency of counsel. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). In his order denying defendant post conviction relief, the District Court judge found generally that defendant had not met his burden of proof and did not establish that he had been prejudiced by the action or inaction of his counsel.

Specifically, the District Court ruled that defendant's contentions concerning his counsel's failure to argue that the felony had ended, to make evidentiary objections, to properly cross-examine witnesses, and to present evidence that codefendant Ell, not defendant Rust, had killed the victim were without merit. The District Court likewise found that defendant, at the post conviction hearing, did not show the existence of mitigating factors in addition to those counsel raised at the sentencing hearing and that contention, therefore, was without merit. "The defendant has the burden

of establishing a basis for relief in a post conviction proceeding, and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous." *State v. Bishop, Davis, and Yates*, 207 Neb. 10, 19, 295 N.W.2d 698, 704 (1980). The record in this case supports the findings of the trial court.

The determination of sufficiency of counsel must, of course, be made within the context of the facts of a particular case. In this case defendant's trial counsel had the following to deal with: (1) The testimony of an eyewitness that defendant shot Kellogg; (2) The testimony of a police officer involved in the shoot-out that he had followed defendant from the time he left the parking lot of the store through the time the defendant was apprehended; and (3) The testimony of an officer who stated he was shot by the defendant and the fact that the gun that wounded that officer and killed Kellogg was found near defendant after he was shot and apprehended. Defendant's counsel testified that when he confronted defendant with these facts, defendant offered no practical suggestions concerning how they should proceed with his defense. Defendant's only contribution to his own defense was that his attorney offer to the court the story that defendant was shot at as he was walking past the area of the shoot-out and returned the fire.

Trial counsel for defendant testified at defendant's post conviction hearing. Concerning his failure to make certain evidentiary objections, cross-examine witnesses, and make an opening statement, he stated that his actions were the result of tactical decisions. "'[W]e grant due deference to the discretion of defense counsel to formulate trial tactics.'" *State v. Fowler, supra* at 656, 271 N.W.2d at 347.

We will not require defense counsel to develop ridiculous trial tactics such as defendant's counsel would have been required to do had he chosen to present defendant's tale that defendant was shot when he

inadvertently passed by the shoot-out. Furthermore, the record supports the District Court's finding that defendant demonstrated no prejudice due to any of his counsel's tactics.

The mitigating factor defendant brought to the court's attention was a letter sent by a South Dakota state's attorney to the chief of detectives of the Omaha Police Department. The letter expressed the attorney's opinion that Ell was a highly criminal and dangerous person. At the post conviction trial, the District Court judge stated that the evidence was not relevant and could not be considered a mitigating factor. We agree. Because the facts establish that Rust murdered the victim, the criminal nature of his codefendant is not probative of "any aspect of a defendant's character or record [or] any of the circumstances of the offense that [could be proffered] as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

Finally, the District Court's determination that Ell's testimony was unbelievable is supported by the evidence and, as a result, defendant's related arguments concerning ineffective assistance of trial counsel are immaterial. "It is the general rule that 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 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. Fowler*, 201 Neb. 647, 658, 271 N.W.2d 341, 348 (1978).

For the reasons set out above, we find that the decision of the trial court denying defendant post conviction relief is supported by the evidence and is affirmed.

AFFIRMED.

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

I concur in the majority's opinion in this case in all respects save with regard to the majority's conclusion that the imposition of the death penalty in this case is constitutionally permissible. In that regard, I dissent.

Even if I disregard the provisions of 1978 Neb. Laws, L.B. 711, now Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), adopted subsequent to the sentencing in this case, I must of necessity still conclude that the imposition of the death penalty in this case is in violation of the appellant's constitutional rights which existed prior to the adoption of L.B. 711.

A reading of the various opinions rendered in the case of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), makes it manifestly clear that the adoption of statutes such as Neb. Rev. Stat. § 29-2522 (Reissue 1979), and the provisions of L.B. 711, are simply a response to the U.S. Supreme Court's recognition that it is a violation of an individual's constitutional rights when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, we nevertheless continue to impose the penalty in an arbitrary and capricious manner.

As noted by Mr. Justice Douglas in *Furman, supra* at 242: "The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

"It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."

And, further, in the same *Furman* decision we find the words of Mr. Justice Stewart, wherein he says at 390-91: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. [Citation omitted.] But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

An examination of but a few cases within this jurisdiction makes it clear that the imposition of the death penalty in the instant case is, indeed, arbitrary and capricious.

In *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978), the defendant was charged with murder in the perpetration of or in an attempt to perpetrate a robbery. The evidence disclosed that the defendant entered the home of William and Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued, 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 was 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 (1978), the defendant was charged with first degree murder, having shot and killed the defenseless operator of a gas station during the commission of a rob-

bery. He was sentenced to life imprisonment.

In *State v. Hatcher*, unappealed to this court, 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*, unappealed to this court, the defendant killed his victim during a robbery. He was sentenced to life imprisonment.

In *State v. Jimmie Ray Anderson*, unappealed to this court, a 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. Floyd*, unappealed to this court, 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.

Each of those killings was senseless and unforgiving. Yet we, as courts, are required to be sure that the Constitution of both this state and the United States is always followed, regardless of other factors. Where the U.S. Supreme Court has declared that the arbitrary imposition of the death penalty violates the Constitution, we have no choice and may not approve the imposition of the death penalty when, as here, it appears to be arbitrarily imposed.

The words of Mr. Justice Marshall, joined by Mr. Justice Brennan, in *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), appear each day to be more applicable. Marshall said in *Godfrey v. Georgia, supra* at 438-39: "I believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an evenhanded manner. But events since *Gregg* make that possibility seem increasingly remote. Nearly every week of every year, this Court is presented with at least one peti-

tion for certiorari raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny. On numerous occasions since *Gregg*, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment, frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers of arbitrariness in violation of *Gregg* and its companion cases. These developments, coupled with other persuasive evidence, strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*."

I would affirm the action of the trial court in denying post conviction relief except with regard to the matter of the death penalty. In that regard, I would order the appellant be incarcerated for the balance of his natural life.

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ROBERT K. BENSON ET AL., APPELLEES, V.
LESLIE RUGGLES ET AL., APPELLANTS.
CLARENCE D. BURTCH, APPELLANT, V.
ROBERT K. BENSON ET AL., APPELLEES.
LESLIE RUGGLES, APPELLANT, V.
ROBERT K. BENSON ET AL., APPELLEES.

303 N.W.2d 496

Filed March 20, 1981. Nos. 43053, 43054, 43055.

1. **Auctions: Statute of Frauds.** An auction of real estate without reserve is within the statute of frauds. Neb. Rev. Stat. § 36-105 (Reissue 1978).
2. **Estoppel.** In order to create an equitable estoppel, the party pleading it must have suffered a loss of a substantial character or been induced to alter his position for the worse in some material respect.

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

Mousel & Burger, P.C., for appellants.

Carlton E. Clark for appellees.

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

MORAN, District Judge.

This is an appeal from a decree quieting title to real estate, and denying specific performance of contracts for its sale alleged to have resulted from an auction without reserve. We affirm.

James Hinn (Hinn) and his wife, Judy, were the buyers of a ranch in Blaine, Logan, and Thomas counties, under an installment sale contract with Theodore and Robert Hanich, as sellers. The Hinns listed the ranch for sale with Stockmen's Realty, Inc., of North Platte (Stockmen's), a firm licensed to sell real estate in this state. Brokers or sales representatives for Stockmen's were Gary Coble and Al Cheatle. Robert K. Benson (Benson) learned that the ranch was for sale and contacted Cheatle. Benson and his wife, Dolores, (Bensons) owned two adjoining tracts of farm and pastureland in Frontier County. Negotiations progressed to the point that an exchange agreement was executed by the Hinns and the Bensons. The agreement, as received in evidence, was dated May 21, 1975. It provided for placing the exchange deeds in escrow for delivery upon the negotiation of a new installment sale contract by the Bensons with the Haniches. This was done. The deeds were never delivered. Possession of the real estate was to be given on or before June 2, 1975. The Bensons vacated the Frontier County land about June 1, 1975, and moved to the ranch. Hinn never moved onto the Frontier County land or leased it. The exchange agreement provided for the payment of money by the Bensons to the Hinns in the form of a promissory note, payable in installments over a period of 10 years. The amount

of money to be paid was left blank. Both the Hinns and the Bensons were represented by counsel. The exchange agreement was never recorded at the Register of Deed's office in Frontier County. Arrangements were made for the sale of the Bensons' Frontier County land at auction. Benson sold farm equipment he would not need on the ranch at the auction. The sale was advertised for a date prior to June 17, 1975, but the date was changed at Benson's request because of insufficient advertising time and failure to reserve the growing wheat crop to him. This was not reserved in the exchange agreement.

Stockmen's advertised the auction sale for June 17, 1975, in newspapers in the area. Advertisements for the first sale date are not in evidence. The advertisements of the June 17, 1975, auction stated that Jim Hinn was the owner of the land, and that it would be sold to the highest bidder on the date of the sale without minimum or reservation. Farm machinery was also advertised. It was to be sold to the highest bidder on the date of the sale. Near the bottom of the two advertisements received in evidence the words "Formerly: Bob Benson Property" appeared in large type. One advertisement stated "Immediate possession." Stockmen's was identified as the agent for the seller.

At the auction on June 17, 1975, Benson was present; Hinn was not. Gary Coble was the auctioneer of the land. Al Cheatle assisted. Benson testified that the morning of the auction, his attorney called him and told him that Stockmen's had changed the sale advertising from what he had approved; that they had not reserved the wheat; and that the land would be sold to the highest bidder, and "he didn't think it should be. It has to be accepted by James Hinn." Benson testified he spoke to Cheatle before the sale about what his attorney had told him. There is a conflict in the evidence whether at the opening of the land auction, or at any time thereafter, there was an announcement to the bidders that the sale was subject to the approval

of Jim Hinn or any other person. The trial court made no finding in this respect. The auction was held separately on the two tracts. There was testimony, denied by Benson, that he told the bidders that the fences were good, and that all that was needed was to turn the cattle in and turn on the windmills. Leslie Ruggles was the high bidder on one tract, and Clarence D. Burtch on the other. After offering both tracts together and receiving no bids, Coble announced that Tract 1 was sold to Ruggles and Tract 2 was sold to Burtch. Here, too, there is a conflict in the evidence. Coble testified he said "sold subject to the approval of James Hinn," and other witnesses testified he simply stated "Sold." Ruggles and Burtch testified the price they bid was a fair price, and that there was no change in market value from the date of the auction to the date of Hinn's refusal. Immediately after, Al Cheatle secured checks from Ruggles and Burtch for 15 percent of the bids. These checks have never been presented for payment or returned. Each also signed a document entitled "Purchase Offer, Acceptance and Receipt" offering to purchase the real estate from the Hinns for the amount of the bid. It provided for acceptance by the seller on or before June 18, 1975, and if not accepted by then, it was to terminate. These documents were not signed by Stockmen's or its agents.

Following the auction, later in the afternoon, Benson and another employee of Stockmen's contacted Hinn at the North Platte airport and told him what the land had brought. Cheatle, Ruggles, and Burtch drove to North Platte after the auction. Cheatle said they went to get Hinn's signature on the purchase offers. Hinn did not appear at Stockmen's office, and Burtch and Ruggles left late that evening. Within a few days Cheatle told Ruggles and Burtch that Hinn would not sign the agreements. At one time, there was a suggestion that their bids could be raised, but they refused.

On June 21, 1975, an attorney acting on behalf of Ruggles and Burtch filed a document for recording in the Frontier County Register of Deed's office. It was captioned "Caveat Emptor" and addressed to all persons interested in the Frontier County real estate. It stated in substance that Ruggles and Burtch had purchased the real estate at public auction which was sold by the Hinns pursuant to newspaper advertising; that they were ready to comply with the terms of sale, but the sellers have stated they would not sell the real estate. The document also recited that all persons interested were on notice of the claim, and that the purchasers intended to resort to litigation to enforce their rights.

Neither Ruggles nor Burtch ever spoke to Benson about the sale, before, during, or after it. Benson, Hinn, and representatives of Stockmen's continued fruitless negotiations for about a year with a view to completing the exchange agreement. Ruggles and Burtch also negotiated with Hinn and Stockmen's during that time.

On July 30, 1975, the Hinns brought an action in Logan County to eject the Bensons from the ranch. On February 5, 1976, a judgment evicting the Bensons was entered. That judgment has not been appealed. The Bensons returned to the Frontier County land in May 1976. Except for Ruggles' pasturing of cattle on Tract 1 for a month or two after the auction, the land had been vacant. Benson did harvest and retain the wheat in the summer of 1975. In 1976, Benson applied for a loan and the caveat emptor was discovered on the real estate records. He requested Ruggles and Burtch to release it. They refused, and he brought the action now before this court to quiet title to the real estate on May 18, 1978. Ruggles and Burtch answered and counterclaimed for specific performance and for damages. On April 6, 1979, Ruggles and Burtch brought separate lawsuits against the Bensons, the Hinns, Coble, and Stockmen's. De-

murrers on the grounds of misjoinder filed by Hinn, Coble, and Stockmen's were sustained, and leave was given to separately file and docket separate petitions against them. This case is apparently still pending.

The cases of Ruggles and Burtch against Benson were for specific performance and for damages. The petitions are identical as to the facts alleged except for the real estate involved. So far as is material here, they allege the exchange agreement; that pursuant to it the Bensons caused Hinn, Stockmen's, and Coble to place the real estate up for public auction, to the highest bidder, without reservation on June 17, 1975; that the auction was advertised accordingly; that at all times Coble and Stockmen's were the agents of the Hinns and the Bensons; the auction was conducted by Coble and Stockmen's and with the knowledge, consent, and direction of the Hinns and the Bensons; that the property was sold to Ruggles and Burtch at the auction; and that they are entitled to specific performance. The Bensons' quiet title action was tried to the court on the issue of title to real estate only. The cases of Ruggles and Burtch against the Bensons were tried to the court on the record in the quiet title action on the issue of title to real estate only.

All damage issues were reserved for future trial pending the final determination of title to the real estate.

The trial court quieted title to the Frontier County real estate in the Bensons against Ruggles and Burtch, and entered judgment against them on their specific performance claim against the Bensons. Ruggles and Burtch have appealed.

Ruggles and Burtch contend that (1) they are entitled to specific performance of the agreement to sell the real estate, the terms of which are the advertisement that the auction would be without reserve; (2) they were the high bidders at the auction; (3) the auctioneer announced that the property was sold to them; and (4) they made the downpayment required

in the advertisement. They also argue that Benson is equitably estopped from claiming title to the real estate as against them.

We assume for the purpose of this opinion only that Stockmen's, Coble, and Cheatle were agents of Benson authorized to auction the real estate without reserve.

There is no written contract, note, or memorandum signed by or on behalf of the seller sufficient to satisfy the statute of frauds, Neb. Rev. Stat. § 36-105 (Reissue 1978). In substance, we are asked to amend it to make it inapplicable to real estate. The only authority cited in support of appellants' position is *Zuhak v. Rose*, 264 Wis. 286, 58 N.W.2d 693 (1953). In that case, specific performance was decreed for the high bidder at a public auction of real estate advertised as being without reserve. The court stated that under the circumstances the owner could not complain that the buyer had no memorandum of sale sufficient under the statute of frauds. It cited no authority in support of that holding, but did construct an analogy between sales of real estate and personalty at auction without reserve. Sales of goods at public auction with and without reserve are governed by Neb. U.C.C. § 2-328(3) (Reissue 1971). If the Legislature wishes to make similar provision for auctions of real estate, it may do so.

We decline to follow *Zuhak*. It has been criticized in *Del Rio Land, Inc. v. Haumont*, 118 Ariz. 1, 574 P.2d 469 (1977). Furthermore, conflicting testimony in this case over what was said by the auctioneer is a good illustration of the necessity for the statute of frauds. We judicially notice that auctions are generally not quiet affairs. They carry with them the potential for misunderstandings. Statements made are not recorded.

In a proper case one may be equitably estopped from asserting title to real estate. See *Gillespie v. Sawyer*, 15 Neb. 536, 19 N.W. 449 (1884). However, the doctrine does not apply in this case because Ruggles and Burtch did not suffer injury, detriment, or prejudice to a sufficient degree. *Shelby v. Platte Valley*

*Public Power and Irrigation District*, 134 Neb. 354, 278 N.W. 568 (1938). Their checks were not presented for payment. They did not improve the real estate. Except for Ruggles pasturing cattle for a short time (a benefit to him), neither took possession of the real estate. Neither really changed his position in reliance upon the acts of Benson, Coble, or Cheatle.

AFFIRMED.

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# IN RE INTEREST OF JOSHUA AND PINE TERACE MOEN, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TIMOTHY MOEN ET AL., APPELLANTS, AND DOROTHY MOEN, APPELLEE.

303 N.W.2d 303

Filed March 20, 1981. No. 43124.

1. **Juvenile Courts: Appeal and Error.** An appeal from the separate juvenile court involving termination of parental rights is determined de novo upon the record by this court.
2. **Parental Rights.** Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children.
3. **Juvenile Courts: Parental Rights.** Where a court order pursuant to Neb. Rev. Stat. § 43-209(6) (Reissue 1978) requires presence of a parent within the jurisdiction of the court for its compliance, a parent who voluntarily leaves the state, making compliance impossible, cannot avail himself of his absence as a basis for setting aside the termination order.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Richard J. Gilloon of Cullan, Cullan & Morrison for appellants.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee.

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

MORAN, District Judge.

This is an appeal by Timothy Moen, father of Joshua and Pine Terace, from an order of the separate juvenile court of Douglas County terminating parental rights. The mother, Dorothy Moen, has not appealed.

Errors assigned are that the order is not supported by clear and convincing evidence and not in the best interests of the children. We affirm.

At the adjudicative hearing on June 1, 1977, the children were determined to be within the provisions of Neb. Rev. Stat. § 43-202(1) (Reissue 1978). Timothy Moen was then in jail, charged with assault and battery upon Joshua. At the dispositional hearing on July 27, 1977, the court considered psychiatric and psychological evaluations and ordered the parents to participate in counseling and therapy sessions at specific times. Throughout the period of court involvement, however, both parents failed to keep many of the counseling and therapy appointments scheduled by court order.

Review hearings were held on September 19, 1977, March 13, 1978, September 18, 1978, and January 2, 1979. Only the March 13, 1978, hearing disclosed any basis for a belief that the situation was improving. At that time Timothy Moen had been with his family for approximately 6 months after completing his sentence on September 27, 1977. However, within 10 days following the March 13, 1978, hearing, the children were removed from the home by Child Protective Services after Timothy allegedly assaulted Dorothy and refused to permit Dorothy to leave the family home with the children. The children have not been in the custody of either parent since.

At the review hearing on January 2, 1979, the court ordered the parents to obtain suitable housing and

furniture for themselves and the children, secure full-time employment or become involved in a job training program, become involved in a parenting education program on a regular basis, and undergo complete psychiatric evaluation and treatment. They were also ordered to resolve their marital situation by divorce or regular marriage counseling. Timothy Moen was ordered to pay $100 for the support of the children, commencing February 1, 1979.

On June 8, 1979, a motion to terminate parental rights was filed. The hearing, set for August 14, 1979, was continued at the request of Timothy's attorney. It was held on October 24, 1979, immediately after a decree was entered dissolving the marriage of the parents. Timothy Moen appeared by counsel but made no evidentiary showing of any kind. After finding that the children were "within Section 43-209(6) R.S. Nebraska Supp., 1978" and that reasonable efforts under the direction of the court had "failed to correct the conditions leading to the determination previously made in this matter," and that it was in the best interests of the children that the parental rights of the parents be terminated, the court terminated the parental rights.

Timothy Moen left Omaha on September 4, 1978, for California after having enlisted in the armed forces. He has never returned, and he has paid nothing for the support of his wife or children since then. He was discharged from the service in December 1978. He then began living with his mother in Yakima, Washington. In March 1979 he was sentenced to an extended term of imprisonment in Washington for offenses apparently committed before these proceedings began. At all hearings in these proceedings he was present or appeared by his attorney who participated in them on his behalf.

The rules applicable to review of parental rights termination cases in this court are: Trial de novo upon the record; giving findings of fact by the trial court great

weight because it heard and observed the witnesses; affirming those findings unless they are against the weight of the evidence or there is a clear abuse of discretion; and requiring proof by clear and convincing evidence. *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

Applying these rules, we adopt the findings of the juvenile court as our own and determine from the record as a whole that it is in the best interests of the children that parental rights be terminated.

The primary thrust of Timothy Moen's argument is that he was unable to comply with the order of January 2, 1979, while he was incarcerated. That is at least partially true. However, it is because he voluntarily left the state in September of 1978 that it became impossible for him to comply with the court orders which were designed to correct the situation. This amounted to a substantial abandonment of the children. He is in no position now to take advantage of a condition he brought about by himself.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

# GENE MORRIS, APPELLANT, V. CHRYSLER CORPORATION, APPELLEE.

303 N.W.2d 500

Filed March 20, 1981. No. 43202.

1. **Product Liability.** The theory of strict liability in tort should be distinguished from the theories of liability based on negligence or on breach of warranty, express or implied, in a product liability action.
2. **Product Liability: Negligence.** In a product liability action under a negligence theory, a plaintiff must establish a duty, a breach, causation, and damages.
3. ____:____. When dealing with the liability of a manufacturer of a finished product who puts it on the market to be used without inspection by his customers, if he is negligent, where danger is to be foreseen, there is liability.
4. ____:____. The manufacturer's liability extends to the vendee, to all persons whose right or privilege to use the article is derived from him, to any person to whom the vendee sells or gives the chattel or to whom such subvendee or donee sells or gives the chattel, to damage to property caused by the manufacturer's negligence, and also to damage sustained by the negligently manufactured chattel itself.
5. ____:____. Proof that the chattel left the manufacturer in a defective state, though not conclusive, is evidence of negligence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed with directions.

Michael J. Dugan and Terry Anderson for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

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

WHITE, J.

This case is on appeal from a judgment of the District Court for Douglas County, Nebraska, in favor of defendant, Chrysler Corporation (hereafter Chrysler), and dismissing the petition of the appellant, Gene Morris. On May 3, 1977, appellant filed suit in municipal court for the city of Omaha, Douglas County, Nebraska. After trial on the merits, the municipal court

judge found in favor of appellant and awarded him damages in the amount of $865. Chrysler appealed to the District Court and the District Court reversed the judgment of the municipal court, finding that appellant had failed to prove that Chrysler was negligent. Appellant assigns as error the findings of the District Court that appellant failed to prove Chrysler had not used ordinary care required of it and that methods of inspection were available to Chrysler, which it failed to employ. The assignments are well taken and the judgment of the District Court is reversed.

Appellant is the owner of a 1968 Chrysler automobile which he purchased secondhand in October 1975. In the late fall 1976, appellant was driving the automobile on the interstate when the engine stopped working. The record shows that after inspection of the automobile by a qualified auto mechanic, it was discovered that the engine had failed because the crankshaft was broken. The mechanic later discovered that the crankshaft had broken because the lower one-half of the number four main bearing was missing. It was the conclusion of the witness that the bearing had not been installed at the factory. Appellant had the engine repaired at a cost of $850. The municipal court and the District Court both found there was a defect in the Chrysler engine; that the defect had caused the damage to appellant's automobile in the normal use of the engine; and that the defect existed when the engine left the manufacturer. The record supports these findings.

This is a product liability action. "Products liability is the name currently given to the area of case law involving the liability of sellers of chattels to third persons with whom they are not in privity of contract. It may, infrequently, rest upon intent; but except in rare instances, it is a matter of negligence, or of strict liability." Prosser, Law of Torts, *Products Liability* 641 (4th ed. 1971). Appellant's original

petition sought damages based on strict liability in tort and breach of warranty. He amended his petition and sued under a breach of warranty theory and a negligence theory. The warranty action was dismissed at the pretrial conference, and appellant proceeded under a cause of action for negligent manufacture of the engine.

In *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), we held that a plaintiff could not recover from a manufacturer under a strict liability in tort theory for damages to plaintiff's property. That decision was vigorously criticized in the dissent, however, and the holding in that case is particularly limited to its facts and has no bearing on this case. The theory of strict liability in tort should be distinguished from the theories of liability based on negligence or on breach of warranty, express or implied. Prosser, Law of Torts, *Strict Liability in Tort* 656 et seq. (4th ed. 1971); 1 Hursh, American Law of Products Liability § 4:1 (2d ed. 1974).

Appellant in this case is proceeding under a negligence theory only. In order for appellant to recover under a negligence theory, he must establish a duty, a breach, causation, and damages. *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960). Concerning the existence of a duty of reasonable care owed to appellant by Chrysler, "'[w]e are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.'" *Rose v. Buffalo Air Service, supra* at 831, 104 N.W.2d at 446.

"A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should

expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied." Restatement (Second) of Torts § 395 at 325 (1965). See, *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Rose v. Buffalo Air Service*, *supra*.

Liability extends "not only [to] the vendee but also all persons whose right or privilege to use the article is derived from him, unless the nature of the article or the conditions of the sale make it improbable that the article will be resold by the vendee or that he will permit others to use it or to share in its use. Unless the article is made to special order for the peculiar use of a particular person, the manufacturer must realize the chance that it may be sold. . . . [The manufacturer is liable to] any person to whom the vendee sells or gives the chattel, or to whom such subvendee or donee sells or gives the chattel ad infinitum, and also all persons whom such subvendee or subdonee permits to use the chattel or to share in its use." Restatement, *supra* at Comment h at 329-30.

This same liability extends to a person whose property has been damaged, and that person "may . . . recover from such manufacturer for damages to his property caused by [the manufacturer's] negligence in the same manner that such a remote vendee or other third person may recover for personal injuries." *Rose v. Buffalo Air Service*, *supra* at 828-29.

The Restatement, *supra* at Comment n at 332, specifically states that the manufacturer's liability extends also where "the only harm which results from the manufacturer's failure to exercise reasonable care is to the manufactured chattel itself." See illustration 5.

Appellant established Chrysler's breach of its duty by proving that the engine had left the manufacturer in a defective state. Chrysler moved for a directed verdict after appellant's presentation of his case and presented no evidence on its own behalf. Chrysler

argued, and the District Court held, that appellant's proof of a defect was not proof of negligence or lack of ordinary care in manufacturing and inspecting the engine. We disagree. "[O]f course, negligence is never presumed. The burden of proving negligence is on the party alleging it . . . ." *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980). However, negligence is a question of fact and it may be proved by circumstantial evidence. The only thing the law requires is that the facts and circumstances proved, along with the inferences that can be drawn from them, indicate with reasonable certainty the negligence of the defendant. *Porter v. Black, supra.*

We have not yet dealt with this specific question in Nebraska; however, the weight of authority holds that although proof of product defectiveness is not conclusive as to negligence, it is evidence of negligence on the part of the manufacturer of the product. *Beals v. Heckendorn Manufacturing Co., Inc.*, 212 Kan. 407, 510 P.2d 1326 (1973); *Maryland Casualty Company v. DeVilbiss Company*, 323 So. 2d 871 (La. App. 1975); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. 1976); 1 Hursh, American Law of Products Liability § 2:78 (2d ed. 1974).

The appellant presented competent evidence in support of all the necessary elements of his negligence action. He established that Chrysler had manufactured the engine; that he was a foreseeable plaintiff in a products liability action under a negligence theory; that the engine was defectively manufactured and placed on the market; and that, as a direct result of the defect, he incurred damages. Chrysler then had the opportunity to rebut any of the evidence and to establish that it had acted with reasonable prudence. It did not. Appellant has carried his burden and is entitled to recover damages prayed for.

In its answer, Chrysler alleged as an affirmative defense that the statute of limitations had run. The municipal court correctly held that the appellant had

4 years from the date of the damage to file his action. Neb. Rev. Stat. § 25-207 (Reissue 1975). It should be noted, however, that subsequent to the filing of this action, a new statute of limitations for products liability actions was enacted. Neb. Rev. Stat. § 25-224 (Reissue 1979) reads as follows: "Product liability actions; statute of limitations. (1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

"(2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

"(3) The limitations contained in subsection (1) or (2) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

"(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978 may be brought not later than two years following such date."

For the reasons set out above, the decision of the District Court is reversed and the order of the municipal court reinstated.

REVERSED WITH DIRECTIONS.

# SOUTHWEST BANK OF OMAHA, A NEBRASKA BANKING CORPORATION, APPELLEE, V. BARBARA A. HERTING, APPELLANT.

303 N.W.2d 504

Filed March 20, 1981. No. 43207.

1. **Negligence.** An action for negligence is based on a legal duty owed by the plaintiff to the defendant which has been breached by the plaintiff.
2. **Contracts: Guaranty: Subrogation.** A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, the guarantor is generally released by an act of the creditor which deprives the guarantor of such right.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded.

George A. Thompson of Robinson, Thompson & Hovey for appellant.

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick for appellee.

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

COADY, District Judge.

The corporate plaintiff, Southwest Bank of Omaha, filed a petition alleging that the defendant, Barbara Herting, made and delivered to the bank a written loan guaranty whereby she promised to pay part of a loan made by plaintiff to another corporation, Mid-Con, Inc., in the event that Mid-Con, Inc., failed to pay. In answer thereto, the defendant denied some of the plaintiff's allegations and alleged that she had two negligence actions in defense. In substance, she pointed out that a security interest in certain property worth $22,000 had been given the plaintiff by Mid-Con; that the assets were then listed in an action in the U. S. District Court by Mid-Con, Inc., which had filed bankruptcy proceedings; and that the assets were sold, with the negligent consent of plaintiff, for

$4,000 rather than for their full value and to her detriment. The defendant's second defense, in substance, was that the bankruptcy court assigned certain accounts receivable of Mid-Con to plaintiff and that plaintiff has failed and refused to collect them.

In response thereto, the plaintiff filed a demurrer under Neb. Rev. Stat. § 25-820 (Reissue 1979) to the pleading of negligent consent. The plaintiff also filed a motion to strike the pleading of the alleged failure to collect accounts receivable. After a hearing thereon, the trial court granted both the demurrer and the motion to strike. Thereafter, defendant elected to stand upon the pleadings, the plaintiff filed a motion for summary judgment, a hearing was had, and the trial court granted summary judgment against the defendant. The defendant appealed, and we reverse.

It is fundamental that for the purpose of determining the sufficiency of the facts alleged in the answer for damages or setoff for negligence to which a demurrer is interposed, the demurrer admit all facts well pleaded, but not those not well pleaded or conclusions of law. An action for negligence is based on a legal duty owed by the plaintiff herein to the defendant which has been breached by the plaintiff. *Root v. School Dist. No. 25*, 184 Neb. 570, 169 N.W.2d 464 (1969).

It is difficult to make liability arise from tortious acts if the liability really and originally arises from contract. The duty of plaintiff is not discussed in plaintiff's brief, but the defendant, in her brief, relies on the case of *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb. 292, 298, 237 N.W.2d 645, 649 (1976), wherein it is stated: "The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control and . . . the [guarantor's] obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) wilfully or negligently harms it, or (c) fails to take reasonable

action to preserve its value at a time when the [guarantor] does not have an opportunity to take such action." Assuming that case sets forth the duties of a creditor to his guarantor, an inspection of the amended answer discloses no facts or inferences from well-pleaded facts which state a cause of action. The natural inferences from her pleading indicate that the bankruptcy court had control of the security rather than plaintiff. But the deciding thing is that the pleading merely relates to a consent to a court sale rather than (a) surrender or release of the security and (c) avoids any inference whatsoever that plaintiff failed to take reasonable action to preserve its value at a time when the guarantor did not have an opportunity to protect her right of subrogation. Because the defendant had neither pleaded an action in accordance with her own proffered legal authority nor pleaded any duty contained in the terms of the written guaranty itself, we decline to now overrule plaintiff's demurrer.

In pleading her second defense of negligence, the defendant set out five specific accounts receivable, together with the following words: "That the Plaintiff was assigned the accounts receivable of the Principal Debtor [Mid-Con, Inc.] above listed and has failed and refused to take timely action to collect the same and to reduce the debt of the Principal Debtor all to the detriment of the Defendant." These allegations were not demurred to, but were attacked by a motion to strike under Neb. Rev. Stat. § 25-833 (Reissue 1979), and plaintiff asks that these words be declared scandalous. True or not, the words are relevant, not scandalous, and the reader should note, at this point, that it is never wise to ask for something without being fully aware that you may just get what you ask for. *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956).

We have examined the bill of exceptions made up as a result of the hearing on the motion for summary

judgment. While it might be strongly argued that the bill shows that there is no genuine issue of fact or law between the parties as to the defense of negligence by consent, we need not decide that because of our ruling sustaining the demurrer. On the other hand, said bill of exceptions contains no evidence in regard to the defense of negligent collections which was never properly stricken or demurred to.

Therefore, the judgment is reversed and the cause remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

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## JAMES HOLLINGSWORTH, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF ALLIANCE, APPELLEE.

303 N.W.2d 506

Filed March 20, 1981. No. 43210.

1. **Appeal and Error.** An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law.
2. **Teacher Contracts: Tenure.** There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts.
3. **Teacher Contracts: Words and Phrases.** As used in Neb. Rev. Stat. § 79-1254 (Reissue 1976), the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty.
4. **Teacher Contracts.** Incompetency or neglect of duty is not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.

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

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellant.

Reddish, Curtiss, Moravek & Danehey for appellee.

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

MURPHY, District Judge.

This is an error proceeding to challenge the action of the defendant, Board of Education of the School District of Alliance, Nebraska, terminating the plaintiff's teaching contract. The District Court affirmed the action of the Board of Education, finding that there was sufficient evidence to justify termination for just cause insofar as the plaintiff was unable to control his classroom and to handle student misbehavior and the plaintiff's personal hygiene adversely affected his performance as a teacher. From this decision of the District Court the plaintiff has appealed.

The plaintiff, James Hollingsworth, was employed by the school board for the school years 1976-77 and 1977-78 as a Life Science teacher for the seventh grade in the Alliance Middle School. On April 28, 1978, the plaintiff entered into a contract with the school board as a tenured teacher for the 1978-79 school year. As a tenured teacher, Mr. Hollingsworth continued to teach Life Science to 110 seventh-grade students in the Middle School until May of 1979.

An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. *Dovel v. School Dist. No. 23*, 166 Neb. 548, 90 N.W.2d 58 (1958); *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978). Therefore, the District Court and this court, on appeal, must determine if the evidence presented at the hearing before the school board on May 1, 1979, is sufficient, as a matter of law, to support the determination of the school board.

As stated in *Sanders v. Board of Education, supra* at 289, 263 N.W.2d at 465: "There are few, if any, objective criteria for evaluating teacher performance or for

determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts."

It follows that, in order to resolve the crucial issue as to whether there was sufficient evidence, as a matter of law, to constitute just cause for the termination of Mr. Hollingsworth's contract, a detailed review of the record before the school board is essential.

That record demonstrates Mr. Hollingsworth's academic background. He received a bachelor of science in education degree from Marion College and a master's in education degree from Ball State University. His academic qualifications are not in dispute.

At the school board hearing of May 1, 1979, testimony was adduced from seven witnesses, including Mr. Hollingsworth. Fifty-three exhibits were offered and received in evidence.

The first witness, Larry Grosshans, testified that he was principal of Alliance Middle School consisting of grades six, seven, and eight. As principal he was responsible for evaluating all teachers in the Middle School. On April 3, 1979, Mr. Grosshans recommended that Mr. Hollingsworth's teaching contract not be renewed because his performance was unsatisfactory in the following respects: "1. He has left his classroom unattended while students were present; 2. He has been unable to handle student misbehavior; 3. He has been unable to control his classroom; 4. He lacks rapport with students; 5. He lacks rapport with parents; 6. He does not have a good relationship with fellow staff members; 8. [sic] His personal appearance, mouth and body odor, has [sic] interfered with his performance; 9. He has not been punctual for classes." Mr. Grosshans recommended the termination of Mr. Hollingsworth's contract because of "(1) incompetency; (2) neglect of duty; (3) unprofessional conduct and (4) other conduct which interferes substantially with the continued performance of duties."

Mr. Grosshans stated that he based his conclusion

that Mr. Hollingsworth failed to maintain control of his classes on reports from students and parents in regard to discipline problems, personal observation in visiting the classroom, and a survey of 50 students.

Each of Mr. Grosshans' visits to the classroom were verified by a written visitation and observation report of Mr. Grosshans. These records show that Mr. Grosshans first visited Mr. Hollingsworth's classroom on September 20, 1976, when Mr. Hollingsworth first commenced his teaching career at the Alliance Middle School. Mr. Grosshans reported the following: "The lesson was considered meaningful and relevant. The arrangement and organization of the room was good considering its limitations. Collection of materials for student use was excellent. Student comments included, 'fun class,' 'interesting,' 'knowledgeable teacher,' 'easy,' etc. Overall, it was a good class but suggest you note the following. Several students were wasting time on occasion and 'messing around.' Suggest you 'clamp' down on these students and maybe talk to entire class about their *talking.* Too many were talking when you did." Classroom visits were made on October 21, 1976, and November 22, 1976. Written reports of these visits show no criticism by Mr. Grosshans.

On January 7, 1977, Mr. Grosshans compiled a "Teacher Appraisal Instrument" in regard to Mr. Hollingsworth. Out of 37 qualities listed, Mr. Hollingsworth received 36 plus ratings and one minus rating. This report contains the only mention of Mr. Hollingsworth's having an odor problem. In the same report Mr. Grosshans recommends renewal of his contract for the 1977-78 school year.

The next classroom visit by Mr. Grosshans took place on September 16, 1977, the beginning of Mr. Hollingsworth's second year as a teacher at Alliance. Mr. Grosshans commended Mr. Hollingsworth for good classroom control and management, and concluded by stating: "Jim — this was one of the better examples of teaching I have seen."

Visitations to the Hollingsworth classroom on October 21, 1977; November 30, 1977; January 13, 1978; February 6, 1978; February 10, 1978; and February 16, 1978, were uniformly praiseworthy of Mr. Hollingsworth's teaching ability and classroom control.

Mr. Hollingsworth's first year as a tenured teacher commenced in September 1978. Classroom visits were made by Mr. Grosshans on September 15, 1978, and October 24, 1978. His written reports of these visits contained no criticism.

On November 15, 1978, 2½ months before asking for his resignation, Mr. Grosshans made another visit to Mr. Hollingsworth's classroom and wrote in his report: "Mr. Hollingsworth exhibited good poise and confidence through today's lesson. Planning and organization were good. Mr. Hollingsworth also maintained good control of the class. When he asked for attention, he got it — when he asked for quiet, he got it, etc."

The final visitation report which was received in evidence pertains to a visit on December 20, 1978. Again, the report was generally praiseworthy, but a suggestion was made that students sharpen pencils before class begins.

On January 31, 1979, Mr. Grosshans asked for Mr. Hollingsworth's resignation. The record is silent as to any events occurring between the last classroom visit on December 20, 1978, which was satisfactory, and the request for resignation 40 days later.

On February 12, 1979, Mr. Grosshans met with the school board in executive session, at which time the school board was informed of the request for Mr. Hollingsworth's resignation and his failure to comply with that request.

Mr. Grosshans testified that school records demonstrate that Mr. Hollingsworth's student referrals to the assistant principal for disciplinary reasons were excessive when compared to referrals by other teachers. According to Derald Morgan, the assistant

principal who compiled these records, they show 27 student referrals by Mr. Hollingsworth. However, he admitted on cross-examination that 22 of the total referrals came after February 6, 1979. In other words, before he was asked to resign, Mr. Hollingsworth had a total 5 referrals for discipline.

On March 26, 1979, 1 week before he recommended the termination of the Hollingsworth contract to the school board, Mr. Grosshans conducted a survey of 50 students in regard to their relationship with Mr. Hollingsworth. On cross-examination Mr. Grosshans admitted that, despite his efforts to conceal the purpose of his survey, the students could have been aware of its purpose. It was on the basis of this survey and his class visitations that Mr. Grosshans concluded that Mr. Hollingsworth lacked rapport with the students. None of the students testified.

Mr. Grosshans testified that on one occasion he discovered Mr. Hollingsworth's class unattended. Again, on cross-examination he admitted that he later learned that Mr. Hollingsworth had received a severe shock from electrical machinery and was recovering in the faculty lounge.

Mr. Grosshans admitted that Mr. Hollingsworth put in longer hours than any other teacher and often volunteered for additional work, such as the compilation of the school yearbook.

The basis of Mr. Grosshans' evaluation of Mr. Hollingsworth is illustrated by a consideration of his answer to the following question by the school board's attorney: "Q. In making your evaluation, Mr. Grosshans, did you consider Mr. Hollingsworth's performance in a vacuum or did you take into consideration what the other teachers are accomplishing in the same school with the same teachers or the same students? A. I took into consideration the performance level criteria which was established in the Teacher Manual and the areas of teacher performance which are expected. My evaluation is not based on a

comparison of Mr. Hollingsworth's performance with other staff members' performance."

The staff manual referred to in Mr. Grosshans' above answer was received in evidence. This manual contains the rules and regulations for the orderly and efficient operation of the school on an everyday basis. There are no standards or criteria by which to measure or gauge the performance of an individual teacher.

Mr. Derald Morgan was the next witness called. He testified that the present year was his first as assistant principal of the Alliance Middle School. One of his duties as assistant principal was student control and discipline. Mr. Morgan related that he had no basis for comparing this year's discipline referrals with previous years. He stated that he did not know the total number of referrals for the present year. On cross-examination he admitted that 81 percent of all Mr. Hollingsworth's discipline referrals came after February 6, 1979. He also admitted that the events which occurred about that time (the request for Mr. Hollingsworth's resignation on January 31, 1979) "may have some bearing on what's happened in the classroom."

The athletic director, Robert L. Morris, next took the stand. Mr. Morris gave his opinion that Mr. Hollingsworth lacked rapport with his fellow coaches and the student athletes. In the fall of 1978 Mr. Hollingsworth coached cross-country for the boys and girls. To illustrate his point, Mr. Morris reported that two girls on Mr. Hollingsworth's team put sugar in Mr. Hollingsworth's gas tank, and on another occasion the windows of his car were soaped.

On cross-examination Mr. Morris admitted that, in his evaluation report of Mr. Hollingsworth as a coach, he rated Hollingsworth average or above average in 13 categories and below average in only two. In this report dated October 30, 1978, Mr. Morris had the following comments: "Coach Hollingsworth is a good

organizer. He also pursues different avenues in an attempt to motivate athletes. His work is well done."

William E. Stout, a teacher of Earth Science at the Middle School, testified that he was the coach of cross-country prior to Mr. Hollingsworth's appointment to that position. He stated that his relationship with Mr. Hollingsworth deteriorated when Mr. Hollingsworth wrote a letter to Mr. Grosshans complaining about Mr. Stout's interference with his duties as coach. He also testified that he noticed a problem about breath and body odors with respect to Mr. Hollingsworth. The record is silent as to when, how often, or whether he noticed a worsening or improvement of this situation. Other than Mr. Grosshans, Mr. Stout is the only witness who testified from personal observation as to this problem.

Shirley Mae Schlenker, a physical education teacher, testified that her office was next door to Mr. Hollingsworth's classroom, and on many occasions she had observed students in the hallways. However, she admitted that this was not unusual for any teacher. She reported a locker room comment about Mr. Hollingsworth's personal hygiene by an unnamed female student. She also observed that many of her fellow coaches considered Mr. Hollingsworth to be distant.

The final witness for the school board was Leonard R. Hartman, an eighth-grade mathematics teacher. Mr. Hartman stated that Mr. Hollingsworth's relationship to other faculty members was distant but that in the last year Mr. Hollingsworth had "put more effort into being accepted by the staff." Mr. Hartman had no personal knowledge of any hygiene problems but noted that students had complained. He was unaware of any discipline problems encountered by Mr. Hollingsworth.

At this point the attorney for the school board rested, and Mr. Hollingsworth testified in his own behalf. He described his brief but successful career as a cross-

country coach. Complimentary letters from students were offered and received in evidence. Mr. Hollingsworth described the dental problems which he had when he first came to Alliance. To correct this problem he incurred dental expenses in the amount of $1,500. He stated that perhaps complaints about body odor were because the temperature in his classroom was often 80 degrees and the nature of his subject required him to move around frequently. He explained that the coaches who are also teachers held Wednesday night poker parties at which he consistently lost because he did not play cards in college. He stated that he "didn't fit in with the drinking, either." Therefore, he no longer attended the poker parties. He stated that he had made an effort to be accepted by the faculty. He further testified that he had worked the entire summer of 1978 in an effort to devise a teaching program that would accommodate the varying learning abilities of his students. Finally, he indicated that he would be happy to give up his cross-country coaching position and devote his every effort to his Life Science teaching if the school board would permit him. On cross-examination Mr. Hollingsworth testified that, when he was having a successful cross-country season, he was full of confidence in the classroom. He admitted that his confidence was "dented" when the principal asked him to resign.

On May 7, 1979, the school board voted to terminate Mr. Hollingsworth's teaching contract for just cause. The school board made the following findings of fact: "1) You frequently left your classroom unattended while students were present. 2) You have been unable to control your classroom. 3) You have been unable to handle student misbehavior. 4) You lack rapport with students. 5) You do not have a good relationship with fellow staff members. 6) Your personal appearance (odor) has interfered with your performance." The school board then found there existed just cause to terminate the contract on the following grounds:

"1) incompetence; 2) neglect of duty; 3) unprofessional conduct; and 4) other conduct which interferes substantially with the continued performance of duties."

In an error proceeding the evidence at the school board hearing was reviewed by the District Court where the action of the school board was affirmed.

Neb. Rev. Stat. § 79-1254 (Reissue 1976) provides that the contract of a tenured teacher cannot be terminated except for just cause. As used in this section, the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of his duties.

The District Court, in its journal entry of October 5, 1979, concluded that the school board's finding of incompetence and other conduct which interfered substantially with Mr. Hollingsworth's continued performance of duties was warranted because: (a) Plaintiff was unable to control his classroom and to handle student misbehavior; and (b) Plaintiff's personal hygiene adversely affected his performance as a teacher.

The question before this court is whether the record is sufficient, as a matter of law, to establish just cause. We find that it is not.

In building its case against Mr. Hollingsworth, the school board has fashioned a house of straw which cannot stand in the fresh breeze of careful analysis. Again and again the testimony of Mr. Grosshans is contradicted by his written observations in regard to Mr. Hollingsworth's ability as a teacher, his classroom control, and his discipline for a period extending over 2½ years. Mr. Hollingsworth's referrals to the assistant principal for disciplinary reasons were few in number until the request for his resignation and the transmittal of that information to the school board immediately thereafter. Although the record is silent as to whether the student body gained knowledge of

this request for his resignation, their behavior would indicate that many students were aware that their teacher's position with the administration was not what it was when he was granted tenure. It was not until a week before his recommendation of termination to the school board that Mr. Grosshans undertook his survey of 50 students. Knowledge of Mr. Hollingsworth's status with the administration and peer pressure are factors to be considered in their responses. Although strict adherence to the rules of evidence cannot be demanded or even expected at a hearing before a school board, when a teacher's career hangs in the balance, the basic principles of due process demand that hearsay statements of students be given little, if any, weight. Certainly this is true with respect to the hearsay comment of an unidentified female student to her physical education teacher.

Only two witnesses testified that they personally detected body or breath odors when coming in contact with Mr. Hollingsworth. Again, the record is silent as to when, where, and for how long these odors were detected. The written evidence of this problem is in a reference on January 7, 1977, during a classroom visit by Mr. Grosshans. On his many visits after that date, there is no further mention of an odor problem. Mr. Hollingsworth testified that he believed the problem to be solved after extensive dental work, which was performed shortly after his arrival in Alliance. In any event, a man's profession and his status as a tenured teacher should not depend on the olfactory sensitivity of only two members of a teaching staff. At the very least he should be given an opportunity to take whatever action is necessary to avoid giving offense in the future.

Furthermore, it would appear that Mr. Grosshans' evaluation of Mr. Hollingsworth is suspect because, in his own words, he failed to compare Mr. Hollingsworth's performance with other staff members' performance. Incompetency or neglect of duty are not

measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978).

Finally, a careful review of the entire record would indicate that for 2½ years Mr. Hollingsworth was a competent and industrious teacher. There is nothing in the record to reveal what prompted the decision to ask for his resignation on January 31, 1979. It does appear that, from that date forward, the administration commenced a systematic and diligent search for evidence which would justify the decision which had already been reached. That search has failed.

The judgment of the District Court in affirming the action of the school board is in error and is therefore reversed, with directions that the school board's action be vacated and Mr. Hollingsworth restored to his status as a tenured teacher with full compensation from the date of his termination.

REVERSED WITH DIRECTIONS.

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## WALTER E. BUMGARNER ET AL., APPELLEES AND CROSS-APPELLANTS, V. COUNTY OF VALLEY ET AL., APPELLANTS AND CROSS-APPELLEES.

303 N.W.2d 307

Filed March 20, 1981. No. 43239.

1. **Taxation: Valuation.** The classification of land as to kind or character of use does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value.
2. **Taxation: Valuation: Appeal and Error.** In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the

action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low.

3. ____:____:____ In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment.

4. **Taxation: Valuation.** A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Reversed and remanded with directions.

Gregory G. Jensen, Valley County Attorney, for appellants.

L. W. Cronk of Weems & Sikyta, P.C., for appellees.

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

MCCOWN, J.

The plaintiffs appealed to the District Court from the 1979 tax assessment made by the Valley County Board of Equalization on a certain tract of real property owned by the plaintiffs. The District Court found that the value of the land for tax purposes, exclusive of the value of buildings and improvements, was $4,500 rather than $8,640 and directed the county officers to correct their records and the total tax assessment accordingly. The County of Valley has appealed and the plaintiffs have cross-appealed.

The plaintiffs are owners of a 3-acre tract of real property located in Arcadia, Valley County, Nebraska.

1.79 acres of the tract is in alfalfa and the remainder of the tract contains a warehouse, a garden, a fruit orchard, and a residence. The plaintiffs are bee-keepers and honey farmers. The tract is not subdivided or platted.

In 1978 plaintiffs' property and the other properties in the village of Arcadia were reappraised as part of a countywide reappraisal. Midwest Appraisal Company used an appraisal form which listed and valued the land and the buildings and improvements on the land separately and combined those valuations to compute the total appraised value of the real estate for tax purposes.

The initial appraisal valued the land portion of plaintiffs' 3-acre tract at $2,220 and the buildings and improvements at $26,625. Complaints were made by neighboring property owners that the valuation of plaintiffs' land was too low in comparison to theirs. The president of the appraisal company, who was a licensed real estate appraiser, inspected the plaintiffs' property and several other properties in the village of Arcadia, reviewed the appraisals, and determined that the portion of plaintiffs' property value attributable to land should be raised to $11,500. The plaintiffs protested. Upon review the appraisal company determined that the undeveloped portion of plaintiffs' property, which was in alfalfa, should be valued on a per-acre basis, and the developed portion should be valued on a front-foot basis. By applying the two different methods the value of plaintiffs' property attributable to land was reduced from $11,500 to $9,285. The value attributable to land and buildings remained unchanged. The plaintiffs then filed a protest with the county board of equalization.

Several members of the board of equalization personally examined plaintiffs' property and other comparable properties. The county assessor also examined and reevaluated plaintiffs' property and recommended to the board a reduction in the appraisal

values of the land portion of plaintiffs' property to $8,640, using a similar two-formula classification and computation basis. At the hearing, the board accepted the assessor's recommendation and lowered the valuation of the land portion of plaintiffs' real estate to $8,640. The valuation of $26,625 for buildings and improvements remained unchanged and the total valuation of plaintiffs' property for tax purposes was set at $35,265. The assessed value of plaintiffs' property was fixed at 35 percent of that value as provided by law. The plaintiffs appealed the assessment to the District Court, alleging it to be excessive and arbitrary.

Plaintiffs' evidence was that certain other lands in Arcadia, which a real estate appraiser believed to be comparable, were used for agricultural purposes and were valued for tax purposes at an average value of about $700 per acre. The county, on the other hand, introduced evidence of several properties which it deemed comparable in which the land portion of the tax valuation ranged from $3,982 to $6,796 per acre in comparison with a value of $2,880 per acre for plaintiffs' tract. The plaintiffs produced no evidence as to the actual value of plaintiffs' property, nor of any of the allegedly comparable properties. Neither did the plaintiff produce any evidence as to the actual value of the land, without buildings and improvements, on either plaintiffs' property or any allegedly comparable property.

The District Court found that there was no logical reason for valuing a portion of plaintiffs' land on a front-foot basis and the balance on an acreage basis. The court then determined that the taxable value of plaintiffs' land, without buildings or improvements, should be $1,500 an acre, or $4,500, rather than $8,640, and directed the county officers to correct their records and the assessment accordingly. The county has appealed and the plaintiffs have cross-appealed.

Plaintiffs do not contend that the valuation of their property for tax purposes exceeds the actual value of the property nor do they contend that their property was assessed for tax purposes at more than 35 percent of its actual value. They contend instead that plaintiffs' property was used for agricultural purposes and that all of the land should, therefore, be classified as agricultural land and valued and taxed at the same valuation per acre as other agricultural lands which plaintiffs' witness deemed to be comparable.

This court has very recently answered plaintiffs' contention that classification of land as to kind or character of use does not alone establish the actual value of land, and that classification is only one of many factors to be considered in determining the actual value of land. See *Otradovsky v. Board of Equalization*, 206 Neb. 559, 294 N.W.2d 334 (1980). In *Otradovsky* we reaffirmed the principles set out in *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 750-51, 178 N.W.2d 759, 761 (1970): "The Constitution requires that such a property tax be '* * * levied by valuation uniformly and proportionately upon all tangible property * * *.' Examination of the record discloses extensive divergence among witnesses of all categories in their understanding of the meaning of uniform values in the constitutional tax context. Many witnesses seem to assume that real property taxes may be equalized if property is classified, and the same values applied to the same classifications of property in all counties. The Constitution itself flatly contradicts such a conclusion. Art. VIII, § 1, Constitution of Nebraska."

While an appeal from a county board of equalization is heard as in equity and is tried de novo, Neb. Rev. Stat. § 77-1511 (Reissue 1976) requires that: "The court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low."

In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973).

This court has consistently reaffirmed the principles set out in *Newman v. County of Dawson*, 167 Neb. 666, 672, 94 N.W.2d 47, 50 (1959), where we said: "It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious, or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity." See, also, *Nash Finch Co. v. County Board of Equalization*, 191 Neb. 645, 217 N.W.2d 170 (1974).

In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual

value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. In the present case the plaintiffs' evidence wholly fails to establish the actual value of plaintiffs' property or of any properties claimed to be comparable. There is no evidence that the plaintiffs' property was assessed at a higher proportion of its actual value than other allegedly comparable property. The evidence establishes only that plaintiffs' land, without improvements, was valued at a different price per acre than some other lands allegedly comparable.

The evidence in this case totally failed to establish that the valuation established by the county board of equalization was excessive, unreasonable, or arbitrary. The judgment of the District Court is, therefore, reversed with directions to affirm the valuation and assessment established by the Valley County Board of Equalization on May 14, 1979.

REVERSED AND REMANDED WITH DIRECTIONS.

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## TILLIE KRUG, MOTHER AND NEXT FRIEND OF JESSIE FRANK KRUG, A MINOR, AND TILLIE KRUG, INDIVIDUALLY, APPELLEES, V. DALE THURSTON LAUGHLIN, APPELLANT.

303 N.W.2d 311

Filed March 20, 1981. No. 43322.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. ——. To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented.
3. **Directed Verdict: Negligence: Juries.** In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979).

4. **Jury Verdicts: Appeal and Error.** A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence.

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

Jeffrey A. Silver for appellant.

David L. Herzog and George W. Rubagumya for appellees.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, KELLY, and BARTU, District Judges.

BARTU, District Judge.

This appeal is taken from jury verdicts and judgments thereon in a negligence action resulting from an automobile-motorcycle accident at the intersection of 36th and Q Streets in Omaha, Nebraska, on June 16, 1979. Jessie Frank Krug was awarded judgment of $12,866.20 and Tillie Krug, his mother, was awarded judgment of $7,133.80 against Dale Thurston Laughlin. The issues of negligence, contributory negligence, and damages were tried to the jury.

Appellant makes two assignments of error: (1) The verdicts and judgments are not supported by the evidence; and (2) The trial court erred by overruling defendant's motions for directed verdicts upon prima facie negligence and/or plaintiff's contributory negligence at the close of plaintiffs' case and again at the close of defendant's case.

The collision occurred on the 16th day of June 1979 at the intersection of 36th and Q Streets in Omaha, Nebraska. Jessie Krug and a fellow employee, Wilbur Driscoll, had just left work and were riding their motorcycles eastbound on Q Street. They rode side by side most of the way until they came close to the intersection when Driscoll fell in behind Krug in the curb lane.

The intersection has no special turning lanes for either of the streets. A vehicle intending to turn through

the intersection must use the lane closest to the centerline. As they approached the intersection at 30 to 35 miles per hour, Driscoll saw that the traffic light was green. The speed limit on Q Street is 35 miles per hour. At the time Krug was about 3 or 4 feet from the intersection, Driscoll saw a 1973 Chevrolet vehicle driven by the defendant start to turn left to go south on 36th Street from a westbound direction on Q Street. Driscoll saw Krug react to Laughlin's turn by attempting to turn his motorcycle to the left so as to avoid the collision. Driscoll was following close enough behind Krug that the immediacy of the accident caused him to ride over Krug's motorcycle tire after its collision with Laughlin's vehicle.

Krug testified that the only things he remembers prior to and after the accident are that he knew the traffic light was green and that he was traveling at about 34 miles per hour immediately prior to the collision.

As Laughlin approached the intersection, the light was red and he stopped, intending to make a left turn when the light turned green. As the light changed he observed two vehicles traveling east on Q Street in the curb lane. He allowed the eastbound vehicles to go through and then proceeded into the intersection commencing his left-hand turn. As he started to turn left he noticed the motorcycles approaching at a distance he estimated to be a block. He only looked at the motorcycles once as he began his turning maneuver. He made his turn at a speed of about 3 to 4 miles per hour and there were no pedestrians in the intersection to whom he had to yield the right-of-way. From the time he started to turn left to the time of impact took about 4 seconds.

At the time of the accident, Laughlin suffered with binocularity eyesight disability.

Laughlin's wife, a passenger in the vehicle driven by her husband, saw the motorcycles at about a block's distance side by side as they approached the intersec-

tion. She did not warn her husband about the rapid approach of the motorcycles, and she testified that the plaintiff and Driscoll were riding side by side at impact.

After the collision Laughlin's vehicle was facing southwest and had little or no movement after impact.

Gregory Hoffman, an Omaha police officer, observed the defendant's 1973 Chevrolet facing a southwesterly direction in the intersection with the plaintiff's motorcycle resting up against its right rear quarter panel as he arrived at the accident scene. The defendant advised Hoffman that he was westbound on Q Street, stopped at the intersection of 36th and Q Streets until the light turned green, let several vehicles go by, observed a motorcycle about a block away, activated his turn signal, and was making his turn when struck in the rear by plaintiff. Hoffman's investigation determined that the left-turn signal on the defendant's vehicle was operational.

Robert Scott, an accident reconstruction expert, testified that in his opinion plaintiff's motorcycle was traveling 52.8 miles per hour immediately prior to impact.

As a result of the accident, plaintiff Jessie Krug suffered bodily injury for which he was hospitalized, reasonably requiring medical expense of more than $7,000. He was permanently scarred and disabled, has undergone a personality change, and is presently unable to hold a steady job because of lack of concentration and drive.

It is obvious from the testimony that the accident was perceived differently by Krug, Driscoll, Laughlin, Laughlin's wife, and by Scott, all of whom were reasonable people drawing different conclusions.

At plaintiffs' rest and at the close of the case, defendant, in substance, moved alternative motions for directed verdicts — one, a motion for a directed verdict of dismissal of plaintiffs' causes of action for failure to prove a prima facie negligence; and two, for a directed verdict against the plaintiff Jessie Krug because of

negligence greater than slight by him when compared to the negligence by the defendant. The trial court overruled and denied both motions.

We affirm the verdicts and judgments thereon on the following principles.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980); *Stevens v. Kasik*, 201 Neb. 338, 267 N.W.2d 533 (1978); *Garcia v. Howard*, 200 Neb. 57, 262 N.W.2d 190 (1978); *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented. *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc., supra; Woodsmall v. Marijo, Inc., supra; Simet v. Sage, ante* p. 13, 301 N.W.2d 600 (1981).

Granting the plaintiffs every reasonable inference which can reasonably be drawn from the evidence presented above and resolving every controverted fact presented by the evidence in plaintiffs' favor, it is readily apparent that the plaintiffs established prima facie cases of negligence on the part of the defendant by showing that the defendant failed to yield the right-of-way to the motorcycle being driven by Jessie Krug, making a left-hand turn at the intersection when Krug's motorcycle was 3 or 4 feet from the intersection, in violation of Neb. Rev. Stat. § 39-636 (Reissue 1978), and by failing to keep a proper lookout by failing to see what he should have seen, to wit, the motorcycle 3 or 4 feet from the intersection at the time he executed his left-hand turning maneuver.

For purposes of a motion for a directed verdict, plaintiffs established prima facie cases of negligence against the defendant.

Using the same standards to test the evidence with regard to defendant's alternative motion, reasonable persons could differ as to whether plaintiff's negligence was greater than slight when compared with that of the defendant. The trial court was correct in overruling the alternative motion to direct the verdict and by submitting the matter to the jury pursuant to Neb. Rev. Stat. § 25-1151 (Reissue 1979), which provides in part: "In all actions brought to recover damages for injuries to a person or to his property . . . all questions of negligence . . . and contributory negligence shall be for the jury." Appellant makes no written or oral argument that the jury verdicts were excessive, but there is ample evidence in the record to support the award. A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence. *Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d 477 (1971); *Lintner v. Roos*, 202 Neb. 476, 276 N.W.2d 93 (1979); *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978).

Appellant complains in his brief that plaintiffs failed to establish prima facie proximate cause. No such issue was raised at trial or by the motion for new trial. We do not consider it here.

The jury verdicts and judgments thereon should be and are affirmed.

AFFIRMED.

KELLY, District Judge, concurs in result.

# KNOELL CONSTRUCTION CO., INC., APPELLANT, V. JAMES A. HANSON ET AL., APPELLEES.

303 N.W.2d 314

Filed March 20, 1981. No. 43438.

1. **Judgments: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
2. **Pleadings: Appeal and Error.** An order overruling a motion for leave to amend pleadings is interlocutory and not appealable.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Dismissed without prejudice.

Steven O. Stumpff of Stumpff & Washburn for appellant.

Carlos E. Schaper and John O. Sennett for appellees.

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

MCCOWN, J.

This is the second appearance of this case in this court. In *Knoell Constr. Co., Inc. v. Hanson*, 205 Neb. 311, 287 N.W.2d 439 (1980), this court reversed a judgment for $11,267.50 in favor of the plaintiff and remanded the cause to the District Court for a new trial. The action was to foreclose a mechanic's lien grounded on land leveling work done on defendants' property. Plaintiff alleged an express contract as the basis for recovery. At the conclusion of plaintiff's evidence plaintiff requested leave to amend the petition to allege quantum meruit as the basis for recovery. Leave was granted over defendants' objection. Verdict and judgment for plaintiff followed. On appeal this court held that granting leave to amend the petition in that fashion at that stage of trial was erroneous and prejudicial and reversed the judgment and remanded the case for a new trial.

Upon return of the case to the District Court the

amendment of plaintiff's petition permitted at the former trial was stricken by the court. The plaintiff then orally moved for permission to amend its petition to allege quantum meruit as the basis for recovery rather than express contract. The District Court, apparently relying on *Hensley v. Chicago, St. P., M. & O. R. Co.*, 126 Neb. 579, 254 N.W. 426 (1934), rather than *Abbott v. Abbott*, 185 Neb. 177, 174 N.W.2d 335 (1970), determined that the tendered amendment would be barred by the statute of limitations and overruled plaintiff's motion. The court thereafter overruled plaintiff's motion for new trial and this appeal followed.

Neb. Rev. Stat § 25-1911 (Reissue 1979) provides for appeal only from "a judgment rendered or final order made." In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972).

An order overruling a motion for leave to amend pleadings is interlocutory and not appealable. *Troup v. Horbach*, 57 Neb. 644, 78 N.W. 286 (1899). See, also, *Wulf v. Farm Bureau Ins. Co., supra.*

The plaintiff's appeal is premature and is dismissed without prejudice.

DISMISSED WITHOUT PREJUDICE.

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## IN RE INTEREST OF TREMAYNE AND TERRELL CAMPBELL AND ALLEN REED, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ELLA LOUISE CAMPBELL, APPELLANT.

303 N.W.2d 513

Filed March 20, 1981. No. 43479.

1. **Parental Rights: Appeal and Error.** Proceedings involving the termination of parental rights are reviewed de novo in this court.

2. **Parental Rights.** Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Spencer W. Dillon for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee.

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

BOSLAUGH, J.

This is an appeal from an order of the separate juvenile court of Douglas County, Nebraska, terminating the parental rights of Ella Louise Campbell in Tremayne Campbell, born November 21, 1971; Terrell Campbell, born November 12, 1972; and Allen Reed, born April 22, 1975.

A petition alleging that the children were without proper support and care and that the defendant, Mrs. Campbell, was unable to provide support, care, and supervision was filed on July 25, 1979. On August 10, 1979, the juvenile court placed the children in foster care. An adjudication hearing was held on December 4, 1979, and parental rights were terminated on February 19, 1980. The defendant was present at the hearings and was represented by counsel. The children were represented by a guardian ad litem. Only the defendant has appealed.

Proceedings involving the termination of parental rights are reviewed de novo in this court. Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children. *In re Interest of Moen, ante* p. 337, 303 N.W.2d 303 (1981).

The evidence shows that the defendant is now 25 years of age. She suffers from paranoid schizophrenia characterized by auditory and visual hallucinations for which she has been hospitalized on occasion. She also suffers from "blackouts" which are unrelated to her paranoid schizophrenia. She has a history of drug abuse but refused to cooperate when her physician sought to determine the presence of drugs. A psychiatrist testified that she had been uncooperative with any level of treatment and he refused to express an opinion as to whether she could properly care for her children if she received treatment for schizophrenia.

The children suffered from poor hygiene and were not properly fed or clothed. They frequently suffered from colds, were physically dirty and unkempt, exuded body odors, and often smelled of urine. The youngest child frequented the residence of a neighbor who stated that the child was often hungry and dirty. Mrs. Campbell was absent from the home for extended periods, leaving the children totally unsupervised. She and the children moved frequently, causing the children to be absent from school most of the time.

The record shows by clear and convincing evidence that the children suffered from a lack of parental care, support, and supervision and the defendant was unable to provide proper care, support, and supervision for them. The order terminating the parental rights of the defendant is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. TONY PANKEY, APPELLANT.

303 N.W.2d 305

Filed March 20, 1981. No. 43597.

1. **Criminal Law: Effectiveness of Counsel.** Error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony.
2. **Post Conviction: Proof.** In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required.
3. **Criminal Law: Effectiveness of Counsel.** Where one maintains that counsel was inadequate, one must show how or in what manner the alleged inadequacy prejudiced him.

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

Bruce G. Mason of Ross & Mason 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.

KRIVOSHA, C.J.

The appellant, Tony Pankey (Pankey), appeals from an order entered by the District Court for Douglas County, Nebraska, denying Pankey's request for post conviction relief. We affirm.

This is the second appearance for this case. Originally this case was before us by reason of Pankey appealing his having been convicted by a jury of three counts of first degree sexual assault and one count of kidnapping. For the specific details of the case, see *State v. Pankey*, 202 Neb. 595, 276 N.W.2d 233 (1979).

Pankey now maintains that he is entitled to post conviction relief due to inadequate counsel. In particular, he maintains that his trial counsel inadequately represented him in that the trial counsel failed

to take the deposition of the two prosecutrixes prior to trial. The difficulty with the argument is that Pankey does not provide us with any evidence as to what the prosecutrixes would have testified to had their depositions been taken that would, in any manner, have been of benefit to Pankey and would have established how or in what manner he was denied adequate counsel. We have previously held that error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony. See *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980). In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977). Where one maintains that counsel was inadequate, one must show how or in what manner the alleged inadequacy prejudiced him. *State v. Colgrove*, 207 Neb. 496, 299 N.W.2d 753 (1980); *State v. Harlan*, 205 Neb. 676, 289 N.W.2d 531 (1980). The record in this case discloses that there was more than sufficient evidence upon which the jury could determine, as it did, that the attacks were without consent and in violation of law. Absent any showing by Pankey as to what the testimony of the prosecutrixes would have been had their depositions been taken and how that testimony would have affected the outcome of the trial or established that Pankey was inadequately represented, he has simply failed to meet his burden. The judgment of the trial court must, therefore, be affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. JOHN R. ELLIS, APPELLANT.

303 N.W.2d 741

Filed March 27, 1981. No. 42954.

1. **Venue.** Questions of venue may be established by circumstantial evidence as well as direct evidence.
2. **Homicide: Circumstantial Evidence: Jury Instructions.** Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter.
3. **Criminal Law: Rules of Evidence.** The "other-crimes" rule, Neb. Rev. Stat. § 27-404(2) (Reissue 1979), is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of a specific crime.
4. **Criminal Law: Evidence: Proof.** It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
5. **Criminal Law: Pleas: Evidence.** A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant.
6. **Criminal Law: Evidence.** A purported showing of a paucity of evidence does not prove that a trial court abused its discretion in balancing the probative value against the prejudicial effect of a particular item of disputed evidence. In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available.
7. ____: ____. The admissibility of evidence of other crimes lies largely within the discretion of the trial court.
8. ____: ____. Evidence of other crimes, if relevant to the issue, is not made inadmissible simply because they occurred at a time after that of the principal charge.
9. **Juror Qualifications.** Qualified jurors need not be totally ignorant of the facts and issues involved. It is sufficient as to competency to serve if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
10. **Witnesses: Self-Incrimination.** It is not error for a trial court to limit cross-examination of a witness concerning a subject wherein the witness has claimed the privilege against self-incrimination.

11. **Petit Larceny: Impeachment.** The crime of petit larceny without proof that the manner in which it was accomplished involved deceit or deception so as to be classified as "crimen falsi" is not such a crime as may be used to impeach a witness' veracity under Neb. Rev. Stat. § 27-609 (Reissue 1979).
12. **Prosecutorial Misconduct.** Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case.
13. **Indictments and Informations: Jury 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.

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

Robert B. Creager of Berry, Anderson & Creager 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.

PER CURIAM.

John R. Ellis appeals to this court from his conviction by the jury of the manslaughter of Deborah A. Forycki. He alleges as principal grounds for reversal: (1) That the Lancaster County District Court lacked jurisdiction to try the action because of improper venue; (2) That the court erred in submitting the case to the jury on the charges of first and second degree murder; (3) That the trial court erred in admitting evidence of other crimes, wrongs, or bad acts committed by him; (4) That the court erred in failing to strike a prospective juror for cause; (5) That it was error to limit his cross-examination of certain witnesses; (6) That error was committed by the admission of purported hearsay testimony; (7) That the trial court erred in failing to grant a mistrial based on the claim of prosecutorial

misconduct; and, finally, (8) That the court erred in overruling defendant's motions to dismiss and for a directed verdict. We affirm the District Court.

We first review the facts of this case as revealed by the record, recognizing that most of the evidence adduced was circumstantial in nature. The record is undisputed that Forycki was last seen on October 3, 1974, in Lancaster County, Nebraska, and that her skeletal remains were found in Cass County, Nebraska, on September 13, 1978. At the time of her disappearance, Forycki was a senior at the University of Nebraska-Lincoln, who worked part time at a downtown Lincoln store. On the date of her disappearance, Forycki was to meet a friend for lunch around 11:30 and then be at her place of employment at around 1 o'clock. She was observed leaving her apartment around 11 o'clock that morning, walking toward the downtown area as was her custom, because she did not own or have access to an automobile. She failed to keep her luncheon engagement that day and was never seen or heard from again.

As was previously mentioned, her remains were discovered in Cass County, Nebraska, on September 13, 1978. The skeleton was found inside an antique water wagon which was being prepared for restoration. The water tank atop the wagon's running gear was approximately 10 feet long by 3 feet wide, having a covered top, the opening therein being roughly 2 feet by 2½ feet. The skeleton was found beneath three logs, 5 feet long and 4 inches in diameter, which were apparently sawed at the ends. Atop these logs were two to three sticks, 4 inches in diameter, and an undetermined number of other sticks 2 inches in diameter. Wedged tightly in the opening of the water tank was a roll of woven wire fencing. The water tank had several holes in its sides which were identified as bullet holes, although the date of the making of such holes and the caliber of weapons involved were not definitely determined.

The skeleton was removed from the water tank by an anthropologist using standard techniques. Before

removal, the skeleton was observed to be in roughly anatomical position, lying on its back; the feet extended and together; left arm along the left side, with the left hand where the hip would be; right arm pulled up, with the right hand, facing palm up, where the right ear would be; head slightly turned to the right. The skull was located approximately 1½ feet from the end of the water tank, the abdominal section of the skeleton being located beneath the opening in the top of the water tank. The skeleton showed no signs of trauma or force applied to fracture the bones, with the following exception: The right thumb bone and the right radius at the wrist end had apparent defects.

The cause of the defects was undetermined. A forensic scientist who examined the bones believed the defects were consistent with having been formed by a bullet. The anthropologist was of the opinion that the defects were not caused by a bullet. Notwithstanding the dispute as to the cause of defects, the county coroner's physician testified that a wound to the wrist or finger was usually not mortal.

No jewelry, fasteners, zippers, clasps, buckles, or shoes were found in the water tank. A lead object, which exhibited characteristics of a .22-caliber bullet from a rimfire cartridge, was found beneath the skeleton in the abdominal area where the left kidney would have been had the body not been decomposed. While no cause of death could specifically be established by any witness, the county coroner's physician was allowed to testify, over objection, that the skeleton did not show any evidence of fractures, tumors, or healed fractures; of death from natural disease processes; or of death from an accident caused by force applied to bones to fracture them. However, he could not make a determination of the specific and immediate cause of death from an examination of the skeleton.

Evidence with regard to whether Forycki might have committed suicide was also introduced. Following a description of the observable characteristics which a

person with suicidal intent or tendencies exhibits, a psychiatrist, whose specialty was in the area of depression and manic-depressive illnesses, testified that he did not believe Forycki was suicidal at the time of her disappearance. This opinion was in answer to a hypothetical question which ostensibly included the observations of her roommate, friends, family, and acquaintances with regard to Forycki's demeanor prior to her disappearance. He further examined a writing made by Forycki on October 2, 1974, from which he said "describes the young lady who although is having transient problems is functioning in my estimation normally."

A second psychiatrist disagreed with the abovementioned witness in certain respects. He acknowledged, after reading a transcript of the first psychiatrist's testimony, that the characteristics described by the latter were classical symptoms of a *type* of depression. However, he testified such characteristics were not commonly found in younger people, and, further, there are other types of depression. Moreover, he was of the opinion that Forycki *could* have committed suicide, noting that a person would not write a note similar to that written by Forycki on October 2, 1974, unless the person was upset. He further stated that Forycki was certainly depressed.

In addition to the foregoing, the State presented evidence to establish a connection between Ellis and Forycki. Business records with regard to the class schedules of Ellis and Forycki at the University of Nebraska-Lincoln were introduced. The records revealed that Ellis and Forycki had classes which apparently met the same 3 days a week on the same floor of the same building at the same time of day in the spring of 1974. Testimony from a police officer who investigated the building in 1978 indicated that the numbered classrooms which corresponded to those wherein Ellis and Forycki had classes in 1974 were 60 to 70 feet apart. Class schedules covering the fall of 1974

indicate that Forycki and Ellis had classes 3 days a week in the same building at the same time of the day, although on different floors of the building.

Ellis was enrolled in a class which met on Tuesday and Thursday afternoons during the fall of 1974. His instructor for that class testified that, although she had no independent recollection of the day, Ellis was absent from class on the first Thursday in October, which was October 3rd, according to her records.

A short time after her disappearance on October 3, 1974, a police officer found a note while examining Forycki's possessions. The note, which was subsequently misplaced by the police so that its whereabouts were unknown at the time of trial, was undated. The police officer testified, over objection, that the contents of the note were as follows: "Meet John Kondowski 10:30 at the Student Union." Subsequent investigation failed to reveal the existence of any person by that name in Lincoln.

In October of 1974, Ellis met a woman who was attending the University of Nebraska-Lincoln, with whom he used the alias of "John Tronzowski." A search of university records and of directories of the area failed to reveal a person by either the name of "Kondowski" or "Tronzowski." The woman appeared at trial and testified, over objection, as to the details of a breakfast date which she had with Ellis on October 17, 1974. According to her, when she met him that particular morning, he had a piece of rope trailing from his jacket pocket, which he explained as being used for some class that he was taking. Ellis was rather vague as to where they were going, only saying that a friend had given him permission to use his house where they could cook ham and eggs. It was, in fact, a house rented by Ellis. During the early part of their stay at this house, Ellis brought out some apples which he was cutting with a large knife. He made some advances toward this young woman, which she resisted, and he then grabbed her arm with one hand and the knife with the other,

which he held near the level of her throat. He then stuffed a handkerchief in her mouth which she wiggled free, and he then told her to get down on the floor, and threatened to break her arm if she screamed. However, she did scream and became hysterical, and finally was able to leave the house. The police were informed of the incident, but charges were not filed.

The testimony of another witness with reference to her experience with Ellis in 1976, approximately 2 years after Forycki's disappearance, was adduced. This witness testified, over defendant's objection, that in the later afternoon of June 10 she received a telephone call from Ellis making a date with her for that evening to eat at a certain restaurant located on East O Street in Lincoln. He at first suggested that she meet him there in the parking lot, but she insisted that he pick her up at her residence. He then called a second time and arranged for her to meet him at the sidewalk in front of her residence. She then got into his automobile. She was not certain whether it was at that time or during the second phone call that he told her they were going to a barbecue at a friend's house out in the country near Elmwood, instead of to the restaurant.

After turning off the main highway south of Elmwood, Ellis all of a sudden turned into a farm road which was screened on either side by high weeds and trees. Shortly after they stopped, the witness saw or felt a knife at her neck, and Ellis then grabbed the top of her hair and pulled it tightly and tried to grab her left arm and pull it behind her. She managed to struggle free and grabbed the blade of the knife. After some calmer discussion between them, the knife was dropped outside the car. The witness then suggested going into Elmwood, which apparently enraged Ellis, who again grabbed the top of her hair, clutched her arm, and forced it behind her neck. He pushed her down on her knees to the floor of the car and tied her arms behind her back. He then tried to place masking tape over her mouth, but she commenced to scream. This seemed to

cause a change in attitude in Ellis, and he freed her bonds, and they drove to Elmwood where the witness was able to leave Ellis' car.

The assault on this witness occurred within 75 feet of the location of the water wagon containing the remains of Forycki. Charges were filed against Ellis, and he was convicted and sentenced to jail time in Cass County for this assault.

The location of the antique water wagon was approximately 20 miles from Lincoln. Ellis did not own an automobile in 1974. However, his wife, whom he married on June 6, 1974, owned an automobile that he had access to and use of. Subsequent investigation of the automobile revealed the presence of certain hairs which, according to the testimony of an expert witness, exhibited the same characteristics as that of Forycki's. There was testimony, however, that the hairs might also have come from the daughter of Ellis' wife from a prior marriage who had access to the automobile.

Further evidence with reference to Ellis' familiarity of the Elmwood area was adduced. A cellmate of Ellis' during his incarceration for the 1976 assault testified that Ellis stated that the people in Elmwood were really stupid; and that "if you ever killed somebody and wanted to hide the body, that would be a really good place to do it, that the police would never find it." Ellis further allegedly stated to this witness that he had found a secluded place outside Elmwood to which he had taken people from college on occasions.

Finally, evidence was adduced with reference to statements made by Ellis during an interrogation just prior to his arrest in Evanston, Illinois, for the homicide. The police officers testified that initially Ellis was told that they wanted to talk to him about the death of Deborah Ann Forycki, and he replied that he would like to meditate. A period of meditation of approximately 20 minutes passed, and he was again asked about her death, this time specifically as to whether he, Ellis, was present when she died. His reply, according

to the testimony, was that he could not do anything that brutal. This statement was made even though no details regarding the finding of her skeleton were made known to Ellis at the time. Another officer who interviewed Ellis separately testified that he had accused the defendant three times of causing the death of Deborah Forycki and the first two times no response was noted. The third time Ellis replied that "he had put that part of his life out of his mind."

One of the officers testified that Ellis, when told that the police knew that he had been involved in offenses against young women, and specifically the incidents involving the two female witnesses previously mentioned, replied that he was "beginning a new life in Evanston and that was a part of his life that he was putting out of his mind and would not remember that portion of his life." He was then asked, according to the officer, if he had killed anyone, could he put that out of his mind; and he replied, "I think so."

Ellis did not testify in his own behalf at trial. However, evidence with regard to Forycki's emotional state prior to her disappearance was adduced. An instructor of a class which she had in the fall of 1974 and a friend both testified that Forycki had exhibited a marked change in attitude within the week before her disappearance. The friend further testified that Forycki had been depressed for much of September 1974. Finally, an acquaintance of Forycki testified that she had seen Forycki between 12 o'clock and 12:30 p.m. on October 3, 1974, in a downtown Lincoln store. However, rebuttal evidence indicated that the witness might have seen Forycki on October 2, 1974, the day prior to her disappearance.

The jury was instructed on the crimes of first degree murder, second degree murder, and manslaughter. Following deliberation, the jury returned a verdict finding Ellis guilty of manslaughter. The court sentenced Ellis to a term of imprisonment of 10 years. Ellis has appealed to this court, assigning various errors to the trial

proceedings, as were earlier set forth.

We first discuss Ellis' contention that the court lacked jurisdiction to try the case because of improper venue of the crime, and that the proper venue should have been in Cass County where the body was found. In *Hawkins v. State*, 60 Neb. 380, 83 N.W. 198 (1900), this court held that in a prosecution for murder, evidence of the finding of the body of the person alleged to have been murdered, in an old well which had been subsequently filled, situated in Frontier County, was sufficient, *in the absence of other proof*, to warrant the jury in concluding the homicide was committed in that county. That case, however, was decided prior to our current statute with reference to venue in criminal cases. Our Legislature has provided that all criminal cases shall be tried in the county where the offense was committed, with certain exceptions, one of which is: "If any person shall commit an offense against the person of another, such accused person may be tried in the county in which the offense is committed, or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense, or in aiding, abetting, or procuring another to commit such offense." Neb. Rev. Stat. § 29-1301.01 (Reissue 1979).

The evidence is clear from the record that Forycki left her home in Lincoln on the morning of October 3, 1974, with every intention of returning that evening. She had a luncheon engagement with another person, which she failed to keep, contrary to her stated plans and inherent characteristics and habits of being prompt, reliable, and, as testified to, always early for her appointments. Her body was found in a secluded area in Cass County of which she apparently had no knowledge. In addition, she had no automobile or means of transportation of her own, and it is therefore fairly inferable that she was taken from Lincoln to Cass

County by someone. In addition, it is clear from the evidence that when her body was found in the water wagon there was no clothing, jewelry, or articles of adornment found in the water wagon with her remains. This lack of clothing, considered in connection with her reputation for promptness and her clear intention of returning to her home that evening, would permit the conclusion that Forycki was taken from Lincoln to Cass County for criminal purposes by someone, and the trial court so found. It has long been the established rule in this state that questions of venue may be established by circumstantial evidence as well as direct evidence. See, *Clark v. State*, 151 Neb. 348, 37 N.W.2d 601 (1949); *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978). While there was no direct evidence that Ellis transported Forycki to Cass County on that date, there is evidence that he was absent from class on that date and, also, that hairs were found in the automobile used by him which exhibited the same characteristics as hairs taken from Forycki. We therefore believe that there was ample evidence sustaining the action of the court in refusing to dismiss the action on grounds of venue.

Ellis also contends that the court erred in submitting the case to the jury on charges of first and second degree murder. He does not assign as error the court's instruction with reference to the crime of manslaughter. We believe the court was proper in submitting all three degrees of homicide for the determination of the jury. In *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927), we held that, ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. Likewise, in *Moore v. State*, 148 Neb. 747, 29 N.W.2d 366 (1947), we held that where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury, and where the

evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences. See, also, *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953); *State v. Marion*, 174 Neb. 698, 119 N.W.2d 164 (1963); *Kraus v. State*, 102 Neb. 690, 169 N.W. 3 (1918). In view of the fact that in this case there were no eyewitnesses to the death of Forycki, and that the evidence adduced was largely circumstantial, the court was correct in instructing the jury as to the law governing murder in the first degree, second degree, and manslaughter.

Ellis principally contends that the trial court comitted error in admitting evidence of other crimes, wrongs, or bad acts committed by him. The statutory rule with regard to admissibility of such evidence is: "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." Neb. Rev. Stat. § 27-404(2) (Reissue 1979).

The evidence of which the defendant complains, of course, is that of the two assaults as reflected by the testimony of the two young women, earlier set forth in some detail in this opinion. The evidence was introduced, it would seem, to prove the identity of the assailant of Miss Forycki, knowledge by the defendant of the secluded area where the victim's body was found, and plan or scheme or modus operandi.

"The 'other-crimes' rule is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime. Where such evidence, however, is in fact relevant the 'other-crimes' rule does not apply. As recently as in State v. Knecht, 181 Neb. 149, 147 N.W.2d 167, we stated the rule as follows: 'The

defendant cites cases holding that a mistrial should be granted where evidence of other crimes is brought into the record. It is not necessary to discuss these cases here. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.'" *State v. Riley*, 182 Neb. 300, 305, 154 N.W.2d 741, 744 (1967). See, also, *State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904 (1979). And it is no answer for the defendant to claim that the evidence as to knowledge of the location was unnecessary because the witness Burns had already testified that Ellis had knowledge of the area. This fact should not and does not foreclose the State's introduction of additional evidence on a disputed question of fact. It is elementary that a plea of not guilty places in issue every relevant fact to prove the State's case, and until and unless the trial court, in the exercise of its discretion, determines that further evidence on a point is irrelevant, the State is entitled to attempt to prove its case.

As stated in *People v. Condon*, 26 N.Y.2d 139, 142, 257 N.E.2d 615, 616, 309 N.Y.S.2d 152 (1970): "[S]o long as the evidence adduced as to the Suffolk County crime was relevant on the issue of identity, the People should not have been precluded from introducing evidence of that crime merely because there was some other evidence in the case tending to establish the identity of the defendant."

This court does not require that the prior or subsequent activity be identical to the act charged to be admissible. As stated by the Eighth Circuit Court of Appeals: "It is enough that the evidence be of similar involvement reasonably related to the offending conduct and be presented in a manner in which prejudice does not outweigh its probative value." *United States v. Gocke*, 507 F.2d 820, 825 (8th Cir. 1974). Section

27-404(2) is identical to Fed. R. Evid. 404(b). The advisory committee's note to that rule states: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Id.* at 92.

The trial court must balance between the danger of unfair prejudice to the defendant and the probative value of that evidence. It is for this court to determine whether the trial court abused its discretion, taking into consideration all factors and other means of proof. The defendant contends that the admission of the two independent assaults was prejudicial because of an alleged lack of other reliable evidence of the defendant's guilt.

"[A] purported showing of a paucity of evidence does not prove that trial court abused its discretion in balancing the probative value against prejudicial effect of a particular item of disputed evidence. . . . In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available. [Citations omitted.]" *State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979). All factors must be put in the balance, and the trial court has a large amount of discretion in this regard.

This court has consistently stated the rule that the admissibility of evidence of other crimes lies within the discretion of the trial court. *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977); *State v. Moore*, 197 Neb. 294, 249 N.W.2d 200 (1976); *State v. Ray*, 191 Neb. 702, 217 N.W.2d 176 (1974).

"The extent to which the discretion of the trial court will be allowed to be exercised in this regard has not been fixed by any decision of this court. Probably it cannot be but depends upon the facts in each case. . . . In State v. Siddoway, 61 Utah 189, 211 P. 968, it was held: 'No exact limitation of time can be fixed as to when another offense tending to prove the intent of the act

charged is remote. The decision of that question must depend upon the circumstances of the particular case, and whether evidence is too remote or not is a question whose decision is largely in the sound discretion of the trial court.' [Citations omitted.] The doctrine generally accepted is that remoteness in point of time may weaken the evidential value of the evidence but does not justify its exclusion. [Citations omitted.]

*"Likewise it is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that evidence thereof has probative value." Sall v. State,* 157 Neb. 688, 697-98, 61 N.W.2d 256, 262 (1953). (Emphasis supplied.)

It cannot seriously be contended that the other offenses must have preceded the principal charge as to time of occurrence. *The State v. King,* 111 Kan. 140, 206 P. 883 (1922). Likewise, there is no magic in the amount of time by which the other offenses must have preceded or followed the case being tried, e.g., a period of 15 months did not affect the relevancy of the evidence. *Umbaugh v. Hutto,* 486 F.2d 904 (8th Cir. 1973).

We are well aware of the responsibility which falls upon the shoulders of the judicial system to protect the rights of a defendant in excluding evidence whose probative value is far outweighed by its unfair prejudice. However, it is no answer for us to stick our heads in the sands of caution and exclude all evidence of other crimes because of the mere possibility of prejudice. After all, any evidence offered by the prosecution in a criminal case is assumed to be prejudicial, otherwise it would not be offered. Nevertheless, as stated in 70 Yale L.J. 763, 773 (1961): "[W]here the highly prejudicial evidence also has great probative worth and plays a crucial role in the prosecutor's case, exclusion of the evidence may destroy his case and result in an unjustified acquittal." In this instance, we cannot say that the trial court abused its discretion when it determined that the probative value of the evidence of other crimes

in the facts and circumstances of this case was not outweighed by the prejudicial effect. The evidence was properly received.

A juror by the name of Wilson was called as a member of the panel to constitute the jury in this case. Mr. Wilson was at the time of the trial a member of the Lincoln Police Department, and had been for approximately 5 years. He was acquainted with many of the officers who would be testifying and had heard the case discussed to some extent within the department, but had not done any work on it himself. He did state, in answer to questions on voir dire, that it was his opinion that Miss Forycki was murdered, but that he did not have any opinion as to whether or not John Ellis was the one responsible for that murder. Finally, the juror stated that if instructed to do so, he could set aside any opinions about the case that he held at that time. The defendant's challenge for cause was overruled. However, Mr. Wilson was not one of the jurors who was retained on the jury which actually heard the trial.

Neb. Rev. Stat. § 29-2006 (Reissue 1979) provides that it is a good cause for challenge of a juror who has "formed or expressed an opinion as to the *guilt* or innocence *of the accused* . . . ." (Emphasis supplied.) However, the statute goes on to provide that if the juror states under oath that notwithstanding such opinion he can render an impartial verdict, the court may in its discretion "admit such juror . . . as competent to serve in such case." The defendant in his brief concedes that "[t]he granting of a challenge of a prospective juror for cause is within the discretion of the trial court, and is generally not reversed unless clearly wrong." This position is supported by *Bemis v. City of Omaha*, 81 Neb. 352, 116 N.W. 31 (1908); *Ward v. State*, 58 Neb. 719, 79 N.W. 725 (1899); and *Kitts v. State*, 153 Neb. 784, 46 N.W.2d 158 (1951). In *Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), the Court said: "Qualified jurors need not, however, be totally ignorant of the facts and issues involved.

'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.' [Citations omitted.]" There is no merit to defendant's complaint.

Defendant also contends that he was unduly restricted in his cross-examination of the witness who testified about being assaulted by the defendant in the Elmwood area. The defendants' counsel attempted to cross-examine her on relationships with Ellis, including past sexual conduct. At the time to be covered in such cross-examination, the witness was married to another man. She claimed her privilege against self-incrimination and public ignominy, and the trial court sustained the objection. This ruling was fully in accord with Neb. Rev. Stat. § 25-1210 (Reissue 1979) which states in part: "When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer . . . ."

The defendant also complains that the trial court prohibited the defendant from inquiring of the witness Burns as to a prior petit larceny conviction as constituting an act of dishonesty within the meaning of Neb. Rev. Stat. § 27-609 (Reissue 1979). He also claims that he was not permitted to inquire as to the different times that Burns had been in jail before the incident involving the conversation with Ellis about which he testified. The answer to the second contention is that, in the final analysis, the trial court did not direct the defendant's attorney not to make such inquiry, but the defendant chose not to cross-examine Burns in that regard. The other problem, whether the crime of petit larceny is one involving "dishonesty or false statement" within the meaning of § 27-609, cannot be disposed of in such a summary fashion.

At first blush, it might appear that to steal is to be dis-

honest; therefore, larceny is a crime involving dishonesty. However, that conclusion does not necessarily follow. The specific language of § 27-609 was taken from Fed. R. Evid. 609, 28 U.S.C. at 563 (1976). Referring to Notes of Conference Committee, House Report No. 93-1597, we find this language at 565: "By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify honestly." That report was discussed in *United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976), and the term "crimen falsi" was defined at 362-63: "Even in its broadest sense, the term 'crimen falsi' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." The court then goes on to say at 363-64: "Two recent Third Circuit cases, decided the same day, have argued convincingly that petty larceny is not ordinarily a crime involving dishonesty or false statement under Rule 609(a)(1)."

One of the two cases referred to was *Government of Virgin Islands v. Toto*, 529 F.2d 278 (3d Cir. 1976). At page 281 of that opinion appears the following: "For our purposes here, we have no difficulty in accepting the government's formulation of the concept: 'Although the term "Crimen Falsi" has been subject to many definitions, the generally accepted scope of the term would be crimes that are in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense or any other offense the commission of which involves some element of deceitfulness, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.' Appellee's Brief at 4. Absent special circumstances, and as the district court so aptly put it: *'Petit larceny is just not that.'*"

(Emphasis supplied.) See, also, footnote 3: "It is conceivable that a conviction for petit larceny might subsume a crime in the nature of *crimen falsi*, e.g., 'petit' stealing by false pretenses. There is no indication that the petit larceny involved here was other than ordinary stealing. If appellant's prior conviction was for petit larceny which might be classified as *crimen falsi*, it will be incumbent upon the prosecution to bring that point to the trial court's attention if evidence of the conviction is sought to be introduced on retrial."

Although the statements set out above were dictum in that case, we agree with the reasoning of the court. The defendant, in his offer of proof, having failed to show that the petit larceny offense of which the witness had been convicted involved deceit or deception so as to be classified as "crimen falsi," the District Court was correct in prohibiting its introduction into evidence.

The defendant insists that the testimony of the two witnesses who testified as to the contents of a note containing the name of "John Kondowski," found among Miss Forycki's possessions, should have been excluded as hearsay. Neb. Rev. Stat. § 27-1004 (Reissue 1979) provides in part: "The original is not required, and other evidence of the contents of a writing . . . is admissible if: (1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ." The record supports the admission of the testimony under the authority of that section. However, the defendant urges us to find that note itself constituted hearsay because it was claimed to have been written by Miss Forycki. However, the testimony was not offered to prove the truth of any statement made by the victim, but, rather, that the name "John Kondowski" appeared on a piece of paper in Miss Forycki's handwriting. The evidence of the writing itself supported a logical inference that the two were acquainted and was not hearsay.

We next turn to defendant's complaint of misconduct on the part of the prosecuting attorney in asking certain

questions and in comments made during final summation. We should observe at the outset that this was a very long, complicated, and hard-fought trial, filled with innumerable objections by defense counsel in conscientiously defending his client, which in turn spawned increasingly aggressive questioning by the prosecutor in performing his lawful duties. For example, in the final closing, the county attorney stated that the defense had made him prove every detail of the crime. Defendant urges that this is tantamount to saying that guilt can be inferred because the defense required the State to prove its case, which he insists is an overzealous misstatement of the law. It was that, and it was perhaps a bit unartful. "Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant." *State v. Tiff*, 199 Neb. 519, 529, 260 N.W.2d 296, 302 (1977). Also, one must look to the prior remarks of defense counsel in closing, during which he inquired of the jury, in effect, why did the prosecutor spend so much time in proving the identity of the victim, in proving that she did not die of self-inflicted wounds or of natural causes. One cannot leave questions dangling and then object because answers are attempted. The prosecutor's laudatory remarks about the quality of the investigational work done by the Lincoln Police Department were quite irrelevant, but hardly rise to the level of inflammatory remarks tending to prejudice the jury. The other questions or remarks simply consisted of logical inferences that could be deduced from the record, even though not directly supported by specific evidence. We have examined the record carefully in this regard, and conclude that the remarks complained of did not rise to a level sufficient to have required the granting of defendant's motion for a mistrial. "Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case." *State*

*v. Costello*, 199 Neb. 43, 53, 256 N.W.2d 97, 104 (1977).

Finally, we must examine the defendant's claim that the evidence did not support the jury's verdict and that the court erred in failing to sustain his motion to dismiss or for a directed verdict. The trial court gave as its instruction No. 13, NJI 14.50, concerning circumstantial evidence. We have held that "the law is well settled that a person charged with a crime may be convicted on circumstantial evidence only" but "that if circumstantial evidence is used to convict a defendant in a criminal case, it must be of such weight and character as to establish proof of guilt beyond a reasonable doubt." *State v. Payne*, 205 Neb. 522, 531, 534, 289 N.W.2d 173, 178, 179 (1980).

We have set forth the relevant evidence earlier in this opinion. The following language from *State v. Williams*, 205 Neb. 56, 72-73, 287 N.W.2d 18, 27-28 (1979), is particularly appropriate here: "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.' [Citation omitted.]

"While the evidence in this case may be entirely circumstantial . . . 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."

The defendant's various assignments of error are not sustainable. The judgment and sentence of the District Court are affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. I believe that the majority's conclusions are in error, both with regard to venue properly lying in

Lancaster County and concerning the admissibility of the testimony of two female witnesses involving subsequent acts with the defendant Ellis.

There is no question but that the death of Deborah A. Forycki was tragic and that the perpetrator of the horrible crime must be apprehended and convicted. The tragedy of the death, however, should not cause us to ignore basic rules of evidence in criminal cases. It is because of a case exactly like the instant case that we have developed strict rules of evidence which must be followed in a criminal case.

In the instant case, if the evidence establishes anything, it establishes that the appellant was not guilty of manslaughter, as found by the jury. There is simply no evidence, direct or circumstantial, to establish that the appellant killed Ms. Forycki either upon a sudden quarrel or while in the commission of an unlawful act, either of which element is necessary to establish the crime of manslaughter. Neb. Rev. Stat. § 28-305 (Reissue 1979). The verdict was obviously a compromise verdict and displays the difficulty which the jury obviously had in reaching a conclusion and the prejudice which the testimony of the State's two key witnesses must have created.

I turn first to the matter of venue. As noted by the majority, the trial of a criminal case is to be held in the county in which the crime was committed. Neb. Rev. Stat. § 29-1301 (Reissue 1979). We have, however, by statute, created an exception to the general rule. Neb. Rev. Stat. § 29-1301.01 (Reissue 1979) provides that if a person takes another from one county to another county for the purpose of committing a criminal act, the individual may be tried in the county from which the victim was initially taken. The difficulty with applying that statute to this case, however, is that there is no evidence, either direct or circumstantial, that the accused took the victim from Lancaster County to Cass County. The majority argues that the evidence clearly establishes that the victim did not own an automobile or have any other means of transportation and,

therefore, the only way in which the victim's remains could have been found in Cass County is if the accused took her to Cass County. The evidence, however, shows that the accused did not own an automobile. It is true that he had access to an automobile. Yet, there is no evidence in the record that on the day of Ms. Forycki's disappearance he had in fact exercised that right and had the vehicle in his possession.

But even assuming for the moment that one may infer that the accused took the victim from Lancaster County to Cass County, there is no evidence, direct or circumstantial, that at the time the trip began there was any plan or intent on the part of Ellis to ultimately commit a criminal act in Cass County, thereby satisfying the exception to § 29-1301.01. The majority assumes that the victim went from Lancaster County to Cass County with the accused against her will. Not even reliance upon circumstantial evidence can produce that result. "'"[C]ircumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist."'" *Bland v. Fox*, 172 Neb. 662, 665-66, 111 N.W.2d 537, 540 (1961). Or stated another way, "Circumstantial evidence is that which relates to a *series of facts* other than the fact in issue, which series of facts has been found, by reason of experience, to be so associated with the fact in issue that, in relation of cause and effect, they lead to a satisfactory conclusion." (Emphasis supplied.) 29 Am. Jur. 2d *Evidence* § 4 at 37 (1967). The only "series of facts" which we have in the instant case upon which our conclusion with regard to venue is based is the fact that the remains of Deborah A. Forycki were found in a water tank in Cass County, Nebraska, and there was some hair in a car owned by Ellis' former wife of the type similar to that of either the victim or the former wife's young child. Even assuming one may argue from the "series of facts" that the accused took the victim to Cass County in the automobile, one has no "series of facts" upon which a

jury may reasonably conclude that when the trip began in Lancaster County there was any intent to commit a criminal act in Cass County. We have never heretofore filled gaps in evidence with argument, no matter how logical or persuasive the argument may be.

Furthermore, it would seem that we determine there was venue in Lancaster County *after* we conclude that the accused committed the crime. Generally, venue being a jurisdiction matter, it must be established without regard to whether the individual accused is guilty. See *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978). I believe we have extended the exceptions of § 29-1301.01 beyond their reasonable limits. Venue was not properly laid in Lancaster County.

The question of venue, however, is not the most serious problem in this case. While in a criminal case all matters are of importance, I believe that the majority's interpretation of the exceptions to Neb. Rev. Stat. § 27-404(2) (Reissue 1979) is clearly in error and, if permitted to remain the law of this jurisdiction, will have effectively repealed the prohibition created both by statute and case law.

The majority acknowledges that evidence of other crimes, prior or subsequent, is generally inadmissible to prove the character of a person in order to show that he acted in conformity therewith. § 27-404(2). The exceptions are extremely limited. Pursuant to the statute, § 27-404(2), testimony may be offered for the purpose of showing (1) motive, (2) opportunity, (3) intent, (4) preparation, (5) plan, (6) knowledge, (7) identity, or (8) absence of mistake or accident. Taking each of the items listed one at a time, and carefully examining them, will quickly disclose that none of them have application to this case. We turn then to an examination of the various exceptions to determine whether evidence of subsequent criminal acts or crimes was admissible in the instant case.

The legal writers on the subject indicate that the elements of motive, opportunity, and intent are some-

what similar and can be discussed together. Motive has been defined in the law as the "[c]ause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act." Black's Law Dictionary 914 (5th ed. 1979). In criminal law, "motive" is that which leads or tempts the mind to indulge in a criminal act. *State v. Knox*, 236 Iowa 499, 18 N.W.2d 716 (1945). See, also, *Williams v. State*, 113 Neb. 606, 204 N.W.64 (1925). Intent, likewise, has been defined as "[d]esign, resolve, or determination with which person acts." Black's Law Dictionary 727 (5th ed. 1979). "Intent" in criminal law means a state of mind which willingly consents to an act done, or free will choice, or volition in doing of an act. See *State v. McLeod*, 131 Mont. 478, 311 P.2d 400 (1957).

In common usage intent and motive are not infrequently regarded as one and the same thing. In law there is a distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. Motive is that which incites or stimulates a person to do an act, while intent means the intent to commit a crime or perform an act which is criminal in nature. Therefore, before evidence of another crime is admissible in evidence to prove that the act charged was done with a criminal motive or intent, it is necessary that the instant act be proven to have been committed. Evidence of a prior crime is not admissible to prove the commission of a subsequent act, but only to prove the motive or intent with which the subsequent act was committed. Until there is some evidence, direct or circumstantial, that the accused had committed *any act*, evidence of another crime to prove motive, intent, or opportunity is inadmissible. Logic would seem to make it clear that evidence of present motive, intent, or opportunity would be of no significance until there was some evidence that a present act had been committed by the accused.

In the instant case, the State was unable to offer any

evidence that the accused committed any particular act which resulted in Ms. Forycki's death. The motive which the prosecution sought to establish was that the accused sought sexual gratification from the victim and when it was refused, killed her. The State sought to base that conclusion on evidence that the defendant had sought sexual gratification from two others on subsequent occasions. The difficulty with the argument is that there is no evidence that the victim was sexually assaulted before she was killed. The prosecution also sought to establish intent by showing that the accused had on other occasions intentionally assaulted other women. Again, there is simply no evidence of any sexual assault in the present case. Such a conclusion is sheer speculation.

Attempting to establish the commission of a present act by showing the motive and intent involved in other subsequent acts is far beyond any permissible limits heretofore permitted. This is best illustrated by this court's decision in *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975), wherein we held that evidence of similar acts with third persons was not admissible. We said in *State v. Franklin, supra* at 642-43, 234 N.W.2d at 617: "It is the usual rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Brown, 190 Neb. 96, 206 N.W.2d 331. An exception to the above rule is that evidence of similar offenses is admissible where an element of the crime charged is motive, a particular criminal intent, or guilty knowledge. State v. Ray, 191 Neb. 702, 217 N.W.2d 176; State v. Young, 190 Neb. 325, 208 N.W.2d 267; State v. Rich, 183 Neb. 128, 158 N.W.2d 533." Before we can address either nature or intent to commit an act, we must first establish the commission of the act. The evidence in this case fails in that regard.

Further, in *State v. Franklin, supra* at 643, 234 N.W. 2d at 618, we said: "*Evidence of similar crimes with third persons is not admissible.* Henry v. State, 136 Neb.

454, 286 N.W. 338; Nickolizack v. State, 75 Neb. 27, 105 N.W. 895." (Emphasis supplied.) Based upon our decision in *Franklin*, evidence of a prior crime with a third person would be inadmissible to establish motive, intent, or opportunity in the instant case. That being the case, how can the commission of a *subsequent* crime with a third person be admissible? The evidence introduced by the State was not admissible for the purpose of establishing motive, intent, or opportunity.

We turn then to "preparation and plan," which may be viewed together. Professor Wigmore, in his now famous work on evidence, discusses plan or design as follows: "Design or plan, however . . . is not a part of the issue, an element of the criminal fact charged, but is the preceding mental condition which evidentially points forward to the doing of the act designed or planned." 2 Wigmore on Evidence § 300 at 238 (1979). "Evidence showing a plan establishes a definite *prior* design, plan, or scheme which includes the doing of the act charged. As Wigmore states, there must be 'such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations.'" (Emphasis supplied.) *State v. Spraggin*, 77 Wis. 2d 89, 99, 252 N.W.2d 94, 98-99 (1977). In other words, plan or design refers to a time *prior* to the commission of the act. To introduce evidence of subsequent acts in order to establish the fact that one had a plan or design prior in time appears to defy reason and logic. The fact that it may be shown that the accused assaulted an individual at a subsequent time does not logically establish that he had a plan to commit some other prior illegal act. In the instant case, the problem is even more compounded because here there is no evidence of what act was in fact committed and, therefore, no basis upon which we can determine a plan or design for committing the act. We are here attempting to prove the commission of an act by establishing the existence of a subsequent plan to commit a subsequent act. The evi-

dence of the subsequent acts could not have been introduced to prove "preparation or plan."

We turn then to the next item, "knowledge." Whether one argues that the introduction of testimony of the subsequent acts was for the purpose of showing Ellis' knowledge that the instant act committed was criminal or for the purpose of showing that he knew of the location of the water wagon, it was improper. There is no rational basis from which it may be argued that the fact that he knew something in 1976 means that he knew it in 1974. The use of circumstantial evidence is dependent upon the ability of one to reach a logical inference from the circumstances. The evidence of a subsequent act must be disregarded where, as here, it is introduced for the purpose of establishing the knowledge of the commission of a prior crime. There is simply no basis in reason or logic to maintain that the fact one knew something subsequent to the commission of an act proves he knew it prior to the commission of an act.

Even if we accept the State's argument that the purpose of the testimony of the subsequent act at Elmwood was simply to prove that the accused knew of the location of the area where the body was found, the testimony concerning what subsequently took place at the location with a third person was clearly improper and prejudicial. If admissible at all, the witness could have easily testified that she and the accused were at the location, thereby establishing the accused's knowledge of the location, without further testimony concerning what took place. While I do not believe that evidence of subsequent knowledge is admissible to prove prior knowledge, if it is permitted, it must be permitted in an extremely limited manner and for a limited purpose. In the instant case, that limitation was grossly exceeded, to the prejudice of the accused.

Moreover, the few cases that have discussed this matter of knowledge lead one to the conclusion that the introduction of another criminal act, whether prior or subsequent, may be allowed only for the purpose of

establishing the accused's knowledge that the act being committed was a crime, and for no other purpose. See 2 Wigmore on Evidence § 300 (1979). The testimony concerning subsequent acts with the two other women was inadmissible to prove "knowledge" in this case. This then leaves us with the matter of "identity."

Before evidence of another crime may be introduced for purposes of identity, the device used must be so unusual and distinctive as to be like a signature. McCormick on Evidence § 190 at 449 (2d ed. 1972). The majority in this case has concluded that the victim met her death by violent means. I am willing to accept that conclusion. Yet, as noted by the majority, all of the witnesses called for the purpose of establishing the cause of death were unable to testify as to the exact cause. We do not, to this day, know whether the victim died by strangulation following a sexual assault, by stabbing, by poisoning, or by shooting. The most we know is that she met her death by violent means. We have therefore concluded that *any* evidence of *any* subsequent violent act may be introduced in evidence to establish the identity of a prior act. Such a conclusion far exceeds any permissible limits existing as an exception to the rule that evidence of other crimes may not be introduced in evidence.

A very clear example of this is found in the case of *People v. Guerrero*, 16 Cal. 3d 719, 548 P.2d 366, 129 Cal. Rptr. 166 (1976), wherein the California Supreme Court was asked to review a judgment of conviction of first degree murder. Evidence of an uncharged rape occurring on an *earlier* occasion and involving a *different* victim was admitted in evidence. In permitting the evidence of the earlier crime to be admitted the trial court pointed to a number of asserted similarities between the rape and the charged murder, including the fact that each offense involved the use of a maroon Pontiac Le Mans automobile, with defendant driving; the victims were approximately the same age; on both occasions defendant initially had other males with him in

the car; in each offense defendant drove around the city, stopping at the same parking lot; in each case the parties made stops to buy beer and wine and each time defendant drove while drinking; each offense involved "sexually oriented activity"; both times the defendant took or attempted to take the girl home alone; and on both occasions the court can infer from the evidence that defendant used a wrench.

In rejecting the introduction of that testimony, however, the California Supreme Court said: "However, 'It has frequently been recognized . . . that because of the sound reasons behind the general rule of exclusion, the relevancy of evidence of other crimes, and therefore its admissibility, must be examined with care. [Citation.] The evidence should be received with "extreme caution," and if its connection with the crime charged is not clearly perceived, the doubt should be resolved in favor of the accused. [Citations.]'" *Id.* at 724, 548 P.2d at 368-69.

Going further, the California Supreme Court said: "On the issue of identity the evidence of the Lopez crime is not only cumulative, it is also irrelevant. Few of the asserted similarities between the Lopez and Santana offenses aid in placing defendant at the scene of the alleged murder. . . . If the victim had been attacked in a distinctive manner that was identical to a previous crime defendant had committed, then the evidence of the other crime might have probative value. But the only claimed connection that has any logical relevance is evidence of 'sexual activity' in both cases and the possible use of a wrench. Even if both facts were established — which, as will be discussed, is highly dubious — it could not reasonably be claimed that the two offenses were committed in a particularly distinct manner that tends to inculpate defendant." *Id.* at 725, 548 P.2d at 369.

Several Nebraska decisions would indicate that on careful analysis we would, likewise, adopt the California rationale. In *State v. Irwin*, 191 Neb. 169, 214

N.W.2d 595 (1974), we held that testimony concerning Irwin's previous trouble, even as background material, was erroneously admitted in evidence, saying at 189, 214 N.W.2d at 607: "The so-called background material was clearly irrelevant and immaterial and the rulings of the court on objections to the testimony were erroneous. The quoted information could only be designed to influence the verdict and the persistence of the witness in pursuing his course seemed designed to that end."

In *State v. Casados*, 188 Neb. 91, 94-95, 195 N.W.2d 210, 213 (1972), we said: "As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. 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. See State v. Easter, 174 Neb. 412, 118 N.W.2d 515.

"In many instances, courts have limited such evidence to proof of *prior* similar acts. Other courts have extended it to include similar acts occurring after the particular crime charged, *provided there was at least one former act.* In any event, proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.

"'Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defendant is guilty of the offense for which he is being tried. * * * One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged.' 1 Jones on Evidence (5th Ed.), § 162, p. 290. See, also, 2 Wigmore on Evidence (3rd Ed.), § 302, p. 200." (Emphasis supplied.)

The majority has cited the case of *The State v. King*, 111 Kan. 140, 206 P. 883 (1922), as authority for the proposition that other offenses need not be prior in time. However, in the *King* case, there was both a *prior* murder as well as a *subsequent* murder. Moreover, in *King*, the evidence was such that one could determine the similarity in the cause of death in all three cases. That is not so in the case at bar. Because we do not know what happened to Ms. Forycki, we are unable to show any legal connection between the charged act and the subsequent acts upon which it can be said that one tends to establish the other or some essential fact in issue.

The admonition of the *Casados* decision is most applicable in the case at bar. The characteristics of the other offense and the charged offense must, indeed, be similar in detail and not merely in the fact that it was a like crime.

In *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397, 403 (1974), the Kansas Supreme Court repeated the generally recognized rule concerning the admissibility of other crimes by saying: "'The rule against the admissibility of evidence of other similar but independent offenses should always be strictly enforced . . . .'" Moreover, the Kansas Supreme Court specially found that evidence of other crimes should be excluded if its only purpose is to show the defendant's disposition, inclination, attitude, tendency, or propensity to commit crime. See, also, *Hertz v. State*, 160 Neb. 640, 71 N.W.2d 113 (1955); *City of St. Paul v. Greene*, 238 Minn. 202, 56 N.W.2d 423 (1952).

The mere fact that one may conclude that the victim met her death by violence is not sufficient to establish the requisite similarity between the manner in which she met her death and the subsequent acts committed by the accused. As a matter of fact, the evidence in the instant case, if it tends to prove anything, disproves that conclusion. The evidence of both subsequent incidents discloses that the accused retreated when the vic-

tim screamed and objected. In each subsequent instance, there was no injury committed to the individuals. To therefore suggest that, because there is evidence that on two subsequent occasions the accused retreated when rejected, we may conclude that there is a similarity with the commission of a murder is far beyond the exception to § 27-404(2).

The legal authors have further indicated that in addition to examining all of the items to determine relevancy, there must be a further examination made to determine whether, even if relevant and admissible, the evidence may not work great prejudice. In Nebraska we have, likewise, concerned ourselves with that fact by adopting Neb. Rev. Stat. § 27-403 (Reissue 1979), wherein it is said: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

McCormick on Evidence § 190 at 452-54 (2d ed. 1972) observes: "There is an important consideration in the practice as to the admission of evidence of other crimes which is little discussed in the opinions. This is the question of rule versus discretion. Most of the opinions ignore the problem and proceed on the assumption that the decision turns solely upon the ascertainment and application of a rule. If the situation fits one of the classes wherein the evidence has been recognized as having independent relevancy, then the evidence is received, otherwise not. This mechanical way of handling these questions has the advantage of calling on the judge for a minimum of personal judgment. But problems of lessening the dangers of prejudice without too much sacrifice of relevant evidence can seldom if ever be satisfactorily solved by mechanical rules. And so here there is danger that if the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes

does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.

"Accordingly, some of the wiser opinions (especially recent ones) recognize that the 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.

"Such a balancing calls for a large measure of individual judgment about the relative gravity of imponderables. Accordingly, some opinions stress the element of discretion. It should be recognized, however, that this is not a discretion to depart from the principle that evidence of other crimes, having no substantial relevancy except to ground the inference that accused is a bad man and hence probably committed this crime, must be excluded. The leeway of discretion lies rather in the opposite direction, empowering the judge to exclude the other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. Discretion implies not only leeway but responsibility. A decision clearly wrong on this question of balancing probative value against danger of prejudice will be corrected on appeal as an abuse of discretion."

In the instant case, the introduction of subsequent acts was both inadmissible as not being an exception to

§ 27-404(2) and for the further reason that it was clearly prejudicial — not that it was harmful. As noted by the majority, evidence harmful to the defendant may be introduced. However, in the instant case, the evidence of subsequent acts was legally prejudicial to the rights of the accused to obtain a fair trial. The prejudice is evidenced by the verdict of the jury. As noted at the outset of this dissent, if the accused was guilty of anything, it was not manslaughter. The conclusion reached by the jury obviously was a compromise based in part upon evidence that the accused was a "bad man" who had committed other subsequent acts which should not be approved.

If the evidence of the two subsequent acts is omitted from the State's case, as it should have been, there was simply insufficient evidence upon which the case could have been submitted to the jury. Its verdict in the case would have been based upon absolute and sheer speculation. Believing as I do that the evidence of the two subsequent crimes should not have been permitted, I would reverse and dismiss.

McCOWN, J., joins in this dissent.

BRODKEY, J., separately dissenting.

The facts of this bizarre case are set out in detail in the majority opinion, and also in the dissenting opinion written by Judge Krivosha; and, in the interest of brevity, will not be repeated in this dissenting opinion.

It is my opinion that the evidence adduced by the State at the trial of the defendant in District Court, even assuming for the moment that all of such evidence was properly received, was totally insufficient to establish beyond a reasonable doubt that the defendant was the person who killed Deborah Forycki, in which case he would not be guilty of the crime of homicide in any degree; and, more specifically, was completely insufficient to establish that the defendant was guilty of the crime of which he was convicted, to wit, manslaughter,

which not only requires the proof of a homicide committed by the defendant but also that the killing was done either upon a sudden quarrel or while in the commission of an unlawful act.

There were no eyewitnesses to the killing of Deborah Forycki, nor is there any direct evidence in the record establishing beyond a reasonable doubt when she was killed, where she was killed, and by whom and under what circumstances she was killed. There is not even evidence in the record establishing beyond a reasonable doubt what caused her death, i.e., by shooting, strangulation, stabbing, or in some other manner. There is no direct evidence in the record that the defendant even knew Deborah Forycki, or that they were seen together on the day of the alleged homicide. The evidence adduced by the State to prove these matters was all circumstantial in nature. The State introduced evidence to prove that defendant Ellis and Forycki had classes in the same building at the University of Nebraska on October 3, 1974, but such classes were not even in the same classroom. Apparently Ellis was absent from his class on that date. One might wonder how many other students were absent from classes in that building that day. Also, the police testified that after Forycki's disappearance on October 3, 1974, the police found an undated note while examining Forycki's possessions which read: "Meet John Kondowski 10:30 at the Student Union." The note, which was apparently misplaced by the police and not produced at the trial, does not indicate on what date she was to meet John Kondowski, or who he was. The State endeavored to supply this deficiency by introducing the evidence of a witness who testified that subsequent to October 3, 1974, she had a breakfast date with the defendant, whom she said used the alias of "John Tronzowski," during which she was assaulted by him, and that he used a knife in the course of the assault. The police witnesses for the State testified that they had checked the name of "John Kondowski" but their subsequent investigation failed to

reveal the existence of any person by that name in Lincoln. One might ask whether every person with a foreign sounding surname ending in "ski" in the Lincoln telephone book is automatically a suspect for the killing of Deborah Forycki. Finally, the State produced another witness who testified with reference to her experiences with Ellis in 1976, approximately 2 years after Forycki's disappearance. She testified that she was assaulted by Ellis on a farmstead in Cass County in June of 1976, which assault occurred within 75 feet of the location of the water wagon which contained the remains of Forycki. The witness was further allowed to testify, over objection, with regard to the details of the assault, which also involved a knife. Other evidence also established that Ellis was familiar with the area in which the water wagon containing the remains of Deborah Forycki was located.

The above constitutes the principal evidence adduced by the State against Ellis. While such evidence may be considered as sufficient to establish a "possibility" that Ellis may have killed Forycki, it falls far short of establishing a "probability" that he killed her, and even less to establish a "strong probability" that he did so. In no case could it be considered sufficient to establish proof "beyond a reasonable doubt," which is the test required by law in criminal cases. "Evidence creating a mere probability of guilt, even though a strong one, is not sufficient; much less is evidence creating a mere possibility of guilt, or evidence which gives rise to a mere suspicion or conjecture of guilt." 23 C.J.S. *Criminal Law* § 907 at 577 (1961). In *O'Connor v. State*, 110 Neb. 822, 829, 195 N.W. 125, 128 (1923), this court stated: "When it is sought to establish the guilt of the accused in a criminal case by circumstantial evidence, it is not sufficient that the facts create a *probability*, though a strong one." (Emphasis supplied.)

As previously stated, the evidence in this case upon which Ellis was convicted was largely, if not completely, circumstantial. In *State v. Doyle*, 205 Neb. 234,

240-41, 287 N.W.2d 59, 63-64 (1980), we reviewed the Nebraska authorities with regard to criminal convictions based upon circumstantial evidence. In that case we stated:

"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.'"

Under the standards and guidelines as set out in the above quotations the evidence was insufficient to establish beyond a reasonable doubt either that Ellis killed Forycki or, more specifically, that he killed her while in a sudden quarrel or while in the commission of an unlawful act.

The conclusion we have reached, as above stated, is made with reference to the evidence in the record as presented to this court. A fortiori, the conclusion is even more valid if the evidence received by the trial court,

particularly the testimony of the two witnesses who testified as to certain acts and experiences which occurred after the offense under consideration, to wit, the disappearance of Deborah Forycki on October 3, 1974, is not considered. If the testimony of both, or either, of these witnesses was improperly received, and is stricken from the record, the case of the State becomes so weak as to be almost nonexistent. I note in passing that Justice Krivosha in his dissenting opinion in this case would exclude the testimony of the two witnesses in question on the grounds that the criminal offenses to which they testified occurred subsequent to the crime involved in the instant case. I do not believe that the fact that the other crimes testified to occurred subsequent to the principal offense is determinative of the question of the admissibility of other crimes, but rather the important question is the remoteness of the other crimes in point of time. See, 29 Am. Jur. 2d *Evidence* § 327 (1967); *Goldsberry v. State*, 66 Neb. 312, 92 N.W. 906 (1902); *Payne v. State*, 233 Ga. 294, 210 S.E.2d 775 (1974); 2 Weinstein's Evidence ¶404[09] (1980); Annot., "Admissibility of Evidence of Subsequent Criminal Offenses as Affected by Proximity as to Time and Place," 92 A.L.R.3rd 545 et seq. (1979). The foregoing annotation, at 598, discusses cases in which evidence of similar subsequent offenses was received for the purpose of proving the identity of the perpetrator, where the subsequent offenses were not so remote so as to preclude admission. In this connection, see, also, McCormick on Evidence § 190 at 451-52 (2d ed. 1972).

On the other hand, Nebraska has clearly recognized the importance of the element of "remoteness" in the determination of whether evidence of other crimes is admissible. *State v. Moore*, 187 Neb. 498, 192 N.W.2d 155 (1971); *State v. Rich*, 183 Neb. 128, 158 N.W.2d 533 (1968). In *State v. Moore, supra* at 499, 192 N.W.2d at 156, we stated: "Whether such other crimes are too remote is determinable by the exercise of judicial discretion, the *limits of discretion being set by the facts*

*of each case.*" (Emphasis supplied.)

In the instant case, the other crimes testified to by the two female witnesses occurred subsequent to the date of Forycki's disappearance. It is not clear how soon after October 3, 1974, the first incident at the breakfast occurred, but it apparently was during the same month. We are not prepared to state as a matter of law that this incident was too remote in time to be admitted under the rules above set out. However, the incident testified to by the second female witness occurred over 2 years after the disappearance of Forycki. In my opinion, the testimony of this witness should have been excluded as being too remote in time. The testimony of this witness was undoubtedly prejudicial inasmuch as she was the one who testified that Ellis had taken her to the same locality in which the water wagon was located. In my opinion, the admission of this testimony was clearly improper; and, at the minimum, should entitle the defendant to a new trial.

As a matter of fact, I am convinced that the evidence of both of the female witnesses should have been excluded for another reason. The applicable statute involved in this case is Neb. Rev. Stat. § 27-404(2) (Reissue 1979) which 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."

The purpose for such rule was set out in *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557, 563 (1967), where the court stated: "The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from

other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes."

Trial courts are given the difficult task of balancing the need for the evidence of other crimes against the degree to which the jury will be prejudiced by such evidence. See *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). Such discretion empowers "the judge to exclude the other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial." McCormick on Evidence § 190 at 453-54 (2d ed. 1972). See, also, 1 Underhill's Criminal Evidence § 205 (6th ed. 1973).

In this case we believe such evidence had a prejudicial effect upon the jury. It must be remembered that Ellis was charged solely with the first degree murder of Forycki. To prove its case, the State adduced evidence that Ellis had assaulted two other women with a knife during attempts to engage in sexual relations with them. The closing argument of the State makes quite clear the purpose for which evidence of such other crimes or bad acts was adduced. The State argued that because Ellis engaged in assaults against other women, it necessarily followed that he must have engaged in an assault against Forycki. Therefore, the State contended that the evidence of other assaults showed the motive, intent, *modus operandi*, and/or plan for the assault and homicide of Forycki, even though there is no evidence of the use of a knife on Forycki.

The use of such evidence is nebulous, at best; and if considered to show knowledge of the secluded area where the body was found, such evidence was not required, as the witness Burns testified that Ellis had knowledge of the area. If considered to prove the identity of the defendant Ellis, it is generally held that a

higher standard is required, and that the prior or subsequent crimes testified to must exhibit a high degree of similarity to the acts with which the accused is charged and must in effect be the "signature or handiwork" of the accused. See, *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978); McCormick on Evidence § 190 at 449 (2d ed. 1972). As previously pointed out, in the instant case, while it is true in the incidents testified to by the two witnesses referred to, Ellis had in both instances used a knife in an unsuccessful attempt to accomplish his purpose, yet, there is nothing in the record of this case to indicate that Forycki had died from a knife wound. In fact, the evidence indicates that the cause of her death might possibly have been a shooting by a gun. Moreover, if the testimony of the second witness, whose incident occurred 2 years after the disappearance of Forycki, is not considered, no *modus operandi* is established which would justify the use of such evidence in an effort to convict Ellis of first degree murder, as charged. A review of the evidence adduced by the two female witnesses, and an analysis of the use of such evidence during the trial, convinces us that the evidence of the subsequent events was used to replace evidence of what happened to Deborah Forycki. The inescapable conclusion is that the evidence was offered for the purpose of establishing that if Ellis assaulted the two witnesses with a knife, which was done after Forycki's disappearance, he therefore murdered Deborah Forycki.

It seems clear that the proof of Ellis' guilt was based on other "bad acts" committed by him, rather than on the commission of the crime for which he stood trial. This is exactly what § 27-404(2) was intended to prevent. In effect, the State stripped Ellis of his presumption of innocence.

Our criminal justice system is based on the premise that a criminal defendant is innocent until proven guilty by the State of the crime for which he stands trial. It is axiomatic that the criminal defendant cannot

be convicted of the crime charged solely on the basis of other crimes or bad acts. The right to a fair trial must necessarily include the right to be tried solely for the crime charged. I am convinced that Ellis was not only standing trial for the homicide of Forycki but also for the assaults on the other two witnesses, at least in the jurors' minds. The evidence with reference to the other assaults should not have been admitted because Ellis, in addition to the homicide of Forycki, was, in effect, standing trial for crimes with which he was not charged.

It may well be that the defendant in this case is, in fact, guilty of the crimes with which he was charged and convicted, but the State in this case has failed to prove it by proper evidence "beyond a reasonable doubt." In this case, even taking the view most favorable to the State, there is insufficient evidence to sustain the verdict. Justice requires that we abide by the established rules of evidence. If I may borrow the words of Justice Spencer in his dissenting opinion in *State v. Ohler*, 178 Neb. 596, 604-06, 134 N.W.2d 265, 270-71 (1965): "I believe our rule still is that an accused is presumed to be innocent until he has been proved guilty beyond a reasonable doubt. The defendant has been convicted solely because he had an opportunity to commit the crime because he was on the scene during a part of the period within which the crime could have been committed. . . . The most we can say about the evidence adduced is that the defendant had an opportunity to commit the crime and there is a strong suspicion that he did, but this falls far short of proving him guilty beyond a reasonable doubt. There is no question but that the actions of the defendant were to say the least very suspicious, yet suspicion does not suffice for evidence." In the instant case there was not even evidence that the defendant was present at the scene of the crime at the time it was committed.

As a result of my examination of the record, I am of the opinion that the defendant did not have a fair and

impartial trial according to law and the established rules of criminal procedure to which every person, whether guilty or innocent, is entitled. I would prefer to reverse the judgment and conviction by the District Court and remand the cause for a new trial. However, my attention has been directed to a very recent opinion released by the Supreme Court of the United States in the case of *Hudson v. Louisiana*, No. 79-5688, 49 U.S.L.W. 4159, decided February 24, 1981, in which the court indicates that the double jeopardy rule prevents the prosecution of a defendant a second time for first degree murder where either the trial judge or the appeal court has decided that the evidence was legally insufficient to support the jury's guilty verdict. In view of the implications of *Hudson v. Louisiana*, therefore, and also in view of my conclusions as expressed in my dissenting opinion set out above in which I have concluded that there was insufficient evidence to convict the defendant even considering the testimony of the two female witnesses, I would hold that the judgment of conviction and sentence by the trial court should be vacated and the cause dismissed.

McCOWN, J., joins in this dissent.

GENOA NATIONAL BANK, GENOA, NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JOHN D. SORENSEN, APPELLEE, JAMES FICHTL, JR., INTERVENOR-APPELLANT AND CROSS-APPELLEE, ROY E. NELSON AND ANNE NELSON, INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

304 N.W.2d 659

Filed March 27, 1981. No. 43122.

1. **Uniform Commercial Code.** Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies.
2. **Uniform Commercial Code: Liens.** If an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper filing under the provisions of the Uniform Commerical Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Donn K. Bieber of Otradovsky & Bieber for appellant Fichtl.

Edward Asche for cross-appellants Nelson.

Donald R. Treadway of Brower, Treadway & Bird, P.C., for appellee Bank.

No appearance for appellee Sorensen.

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

KRIVOSHA, C.J.

This appeal presents to the court what appears to be a case of first impression under the provisions of Neb. U.C.C. art. 9 (Reissue 1971). The District Court, after trial, determined that the Genoa National Bank (bank) as judgment creditor of John D. Sorensen (Sorensen), had

a superior lien on certain harvested crops owned by Sorensen and then being held at the Farmers Union Cooperative Association at Richland, Nebraska, over the security liens of the appellant, James Fichtl, Jr. (Fichtl), and the security interest of the appellants, Roy E. Nelson and Anne Nelson (Nelson), even though the Fichtl lien and the Nelson lien were acquired prior in time to the judgment lien. We believe that the Uniform Commercial Code requires a contrary conclusion and that the decision of the trial court must be reversed.

On September 12, 1977, Sorensen executed and delivered to Fichtl a security agreement and financing statement covering growing crops on certain land leased by Sorensen. A copy of the financing statement was filed in the office of the clerk of Colfax County on September 14, 1977, but not until November 3, 1978, was it filed with the Public Service Commission as required by the provisions of Neb. U.C.C. § 9-401 (1) (a) (Cum. Supp. 1978) which became effective on September 2, 1977.

Further, the record reflects that on September 22, 1977, Sorensen made, executed, and delivered to Nelson a security instrument and financing statement, also covering crops growing on land leased by Sorensen. Nelson's financing statement was filed on September 22, 1977, in the office of the clerk of Colfax County, Nebraska. It was not filed with the Public Service Commission, as required by the provisions of § 9-401(1)(a), until November 17, 1978.

On October 21, 1977, the crops covered by the security documents were all harvested and taken from the fields to an elevator at Richland, Nebraska, where they were held in the fall of 1978.

On October 11, 1978, the appellee bank obtained a judgment against Sorensen based upon promissory notes executed by Sorensen; and on October 19, 1978, the bank caused the sheriff to levy execution, attaching the grain in the Richland elevator. Both Fichtl and Nelson intervened in the action brought by the bank

against Sorensen for the purpose of having their liens declared prior and superior to that of the judgment creditor.

The bank argued and the trial court agreed that the liens of Fichtl and Nelson were inferior to the judgment lien of the bank because Fichtl and Nelson had failed to file their financing statements with the Public Service Commission in accordance with the provisions of § 9-401(1)(a). We believe that in that respect the bank is in error.

While there appears to be no specific statutory provision contained within the Uniform Commercial Code nor any specific case directly on point, we believe that the language of the code requires us to find that the liens of Fichtl and Nelson were perfected prior to the bank acquiring its judgment lien and, therefore, prior and superior to the lien of the bank.

Though no longer the law (see Neb. U.C.C. § 9-401 (Cum. Supp. 1980)), at the time relevant to this action, § 9-401 provided in part as follows: "(1) The proper place to file in order to perfect a security interest is as follows: (a) When the collateral is *unharvested crops*, then in the office of the county clerk in the county where the land, on which the crops are growing or are to be planted and grown, is located, and in the office of the Public Service Commission, where a duplicate copy shall be filed and indexed as a crop lien. There shall be no filing fee or charge for the filing of a duplicate. . . . (c) When the collateral is any other type of tangible or intangible personal property, the following rules apply: When the debtor is a resident of this state, then in the office of the county clerk in the county of the debtor's residence." (Emphasis supplied.) The language of the statute indicates that if crops are "unharvested," then a filing must be made in both the office of the county clerk and the Public Service Commission. On the other hand, if the crops are *harvested*, then no duplicate filing need be made in the office of the Public Service Commission and the filing of a financing statement in

the office of the county clerk alone is sufficient.

Likewise, the act makes further provisions concerning when a lien attaches. Neb. U.C.C. § 9-303 (Reissue 1971) provides in part as follows: "(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in sections 9-302, 9-304, 9-305 and 9-306. *If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.*" (Emphasis supplied.)

Neb. U.C.C. § 9-402 (Reissue 1971) provides in part: "(1) . . . A financing statement may be filed before a security agreement is made or a security interest otherwise attaches."

Neb. U.C.C. § 9-402 (Reissue 1971) provides in part: in part as follows: "(1) except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor . . . *before* [the security interest] is *perfected* . . . ." (Emphasis supplied.) Subsection (2) has no application to the case at bar.

Section 9-401(2) further provides as follows: "A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as *to which the filing complied with the requirements of this article* . . . ." (Emphasis supplied.)

The evidence is clear beyond contradiction that had the crops remained "unharvested" until such time as the judgment creditor had obtained its judgment and levied execution, it would clearly have priority over the security creditors who had failed to file their financing statements in both the offices of the county clerk and the Public Service Commission. But that is not the fact with which we are presented. In this case, long before the judgment creditor acquired any interest upon which levy could be executed, the crops were harvested and taken to an elevator. In essence, the bank urges us to find that if a filing is improperly made at the outset,

it may never be corrected or made valid. We do not believe that to be either a proper reading of the code or its intended purpose.

In *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 55-56, 200 N.W.2d 1, 8 (1972), we said: "'The fundamental purpose of Art. 9 of the code is to make the process of perfecting a security interest easy, simple, and certain. It was intended to be a complete reversal of prior chattel security law and to rid the unaware of the traps of requirement of specific types of acknowledgements, technical affidavits of consideration, selection of specific proper forms, and other pitfalls that were not uncommon. The code very simply and briefly provides for a notice-filing procedure with a minimum of information required to be publicized in a filed financing statement. All that is required is a minimal description, and it may be by type or kind. The statement need not necessarily contain detail as to collateral, nor any statement of quantity, size, description or specifications, or serial numbers. *No preciseness is required with respect to whether the collateral exists at the time of filing or is to be acquired thereafter*, and no statement of charges, payment schedule, or maturity date need be included in the statement. The first to file shall prevail.'" (Emphasis supplied.) Furthermore, in *Putnam Ranches, Inc. v. Corkle*, 189 Neb. 533, 535, 203 N.W.2d 502, 503 (1973), we said: "Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies."

Obviously, the purpose of filing is to give constructive notice to the world and actual notice to those who would take the trouble to look. If at any time after October 21, 1977, the date on which the crops were harvested, and October 11, 1978, the date on which the bank acquired its judgment lien, Fichtl or Nelson wished to take further action to perfect their liens upon harvested crops, they would have been required to simply refile their financing statement in the office of the county clerk where it was already on file. Because the crops

were then harvested, the provisions of § 9-401(1)(a) were no longer applicable. In essence, what we are saying if we accept the bank's position is that even though there was a financing statement on file in the office of the county clerk prior to the time that the bank acquired its judgment and levied execution, and was proper in all respects as to harvested crops, we should ignore that financing statement because the security holders did not have a second stamp placed upon the document after the crops were harvested. We believe that to make such a requirement would be to simply ignore the realities of life and the intent and purpose of the Uniform Commercial Code.

We have already noted that one may file a security instrument in advance of acquiring an interest in property, the interest attaching when all the requirements have been met. We see no reason, therefore, why we may not hold, at a minimum, that we may consider Fichtl's and Nelson's filings to have been made in advance of their acquiring their interest in the harvested crops and attaching at such time as the crops were harvested, thereby eliminating the requirement of a duplicate filing.

The code makes it clear that if the filing was properly perfected when made, a change in status will not deprive the holder of its lien interest. See § 9-401 (3). The code, likewise, provides that a financing statement may be filed before the security interest attaches. § 9-402 (1). We, likewise, see no reason for not holding that where a lien interest satisfies all the requirements of the code with regard to a particular type of property before any other intervening interest attaches, it should be recognized even though not proper when filed. We therefore believe the better rule, and the one supported both by the language of the Uniform Commercial Code and logic, requires us to hold that if an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper

filing under the provisions of the Uniform Commercial Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected.

We therefore believe that the decision of the trial court must be reversed and the action remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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JULIA WEISS, STANLEY K. WEISS, WESLEY WEISS, AND LARRY WEISS, APPELLANTS AND CROSS-APPELLEES, V. HANS MEYER, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRIEDRICH WILHELM BREDER, HANS MEYER, INDIVIDUALLY, AND GWENDOLYN MEYER, INDIVIDUALLY, APPELLEES AND CROSS-APPELLANTS.

303 N.W.2d 765

Filed March 27, 1981. No. 43186.

1. **Equity: Appeal and Error.** In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court.
2. **Adverse Possession: Proof.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years.
3. **Statute of Limitations: Adverse Possession.** In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period.
4. **Adverse Possession.** In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.
5. **Words and Phrases: Adverse Possession: Intent.** "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title.

6. **Adverse Possession: Intent: Proof.** Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts.
7. **Adverse Possession: Intent.** The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed.
8. **Adverse Possession: Notice.** The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
9. **Adverse Possession.** The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. In this respect, ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. It is enough, however, that the land be devoted to the ordinary uses of the adverse claimant, provided the uses are such as to put the true proprietor on notice.
10. ——. Land may be generally adapted to more than one use, and if the land is used for one or more of the major purposes for which it may in its nature be adapted, then that use will be sufficient to establish continuity of possession, provided such use is sufficient to put the titleholder on notice.

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

Jacobsen, Orr & Nelson for appellants.

Firmin Q. Feltz for appellees.

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

HICKMAN, District Judge.

This equitable action was brought pursuant to Neb. Rev. Stat. § 34-301 (Reissue 1978) by appellants, here-

after referred to as petitioners, to have the court establish their southern boundary line to the north half of the southeast quarter of Section 28, Township 12 North, Range 37 West of the 6th P.M. in Perkins County, Nebraska. Petitioners also own the entire northeast quarter of the same section, but that land is not involved in this appeal.

Petitioner Julia Weiss is the record titleholder, and petitioners Stanley K., Wesley, and Larry Weiss are her sons and the contract purchasers of the above-described property.

The original respondent, Friedrich Breder, hereafter referred to as Fred, was the record owner of the south half of the southeast quarter of Section 28, Township 12 North, Range 37 West of the 6th P.M. in the same county, which real estate adjoins petitioners' farm on the south. Fred died after entry of judgment by the court on May 23, 1979, and the action was revived in the names of the present appellees, who are the personal representatives of Fred's estate and the devisees of the real estate involved under his will.

The dispute between the parties arose when Fred, in his answer, claimed by adverse possession for the statutory period certain of the petitioners' property up to a certain farming line.

The trial court, after hearing the evidence, found that Fred had indeed acquired a part of the ground he claimed by adverse possession, but not all of it. Petitioners were not happy with losing their land and Fred was not happy with getting less than he claimed. This situation brought about petitioners' appeal and the cross-appeal by the appellees. In addition, the appellees have filed in this court a motion to dismiss petitioners' appeal.

Petitioners contend that the trial court erred (1) in failing to find that Fred's use of the disputed tract was an occasional trespass; (2) in finding that Fred acquired title to the disputed tract by adverse possession; (3) in finding that Fred's use of the disputed tract was that

for which the land was adapted; and (4) in failing to find that the boundary line separating the properties of the parties was a straight line running east and west from the southwest corner of the north half of the southeast quarter to the southeast corner of the north half of the southeast quarter.

In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981).

"One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years." *Layher v. Dove*, *supra* at 739, 301 N.W.2d at 92. The statutory period in Nebraska is 10 years. Neb. Rev. Stat. § 25-202 (Reissue 1979). "'In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period.'" *Walker v. Bell*, 154 Neb. 221, 222, 47 N.W.2d 504, 505 (1951). "Claim of ownership," as used in the law of adverse possession, means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978). "In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner." *Cassens v. Wisner*, 122 Neb. 408, 240 N.W. 526 (1932) (syllabus of the court). Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957). The intent, even though mistaken, is sufficient as where the claimant occupies to the

wrong line believing it to be the true line and even though he does not intend to claim more land than that described in the deed. *Barnes v. Milligan, supra.* The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. *Purdum v. Sherman, supra.* The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. *James v. McNair,* 164 Neb. 1, 81 N.W.2d 813 (1957); *Lantry v. Parker,* 37 Neb. 353, 55 N.W. 962 (1893). In this respect, "Ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. It is enough, however, that the land be devoted to the ordinary uses of the adverse claimant provided the uses are such as to put the true proprietor on notice." 2 C.J.S. *Adverse Possession* § 125 at 681 (1936), now 2 C.J.S. *Adverse Possession* § 150 at 866 (1972).

Petitioner Julia Weiss acquired title to the property in 1943 by virtue of a referee's deed, although the land had been in the family since it was homesteaded by her father. Julia and the contract purchasers all appear to have been and now are absentee owners and have continuously paid the taxes thereon. The petitioners' cultivated land which is to the north of the disputed tract

has been tilled by the present tenant and was originally broken from sod by the tenant's father before him under the auspices of Julia's father. The disputed tract is the southern portion of the north half of the southeast quarter and, until 1974, was in its natural state, that is, unbroken and producing the natural grasses so commonly found in Nebraska. Fred's adjoining land to the south also existed in its natural state until 1974.

It appears that the land surrounding that of Fred and the petitioners was at all times suitable to cultivation and crop production, and the topography and soil content are essentially the same as that of the land of the parties to this action.

A road runs along the east side of both properties, and there is a road along the south side of Fred's property. The west side of both properties is divided by a neighbor's fence, and there is some discussion in the record that there was a gate post in the vicinity of the north-south division line which allowed entrance to the neighbor's field to the west, although the testimony as to the location of this post is purely speculation on the part of the witnesses.

The petitioners' tenant, John Froschheiser, and his father before him created, by the use of cultivation equipment, a farming line north of the actual property line established by the deeds, and this line has existed for perhaps 60 years. To the south of the farming line the natural grasses grew, and there was no fencepost, fencing, ditch, or other monument by which anyone could accurately determine where the division line between the north half and the south half of the southeast quarter lay. Fred directed his tenants or custom hay cutters to mow the hay up to the farming line and, after it cured, the hay was pulled together in stacks on his land or was baled and picked up.

In several of the drought years in the 1930s, the grass was too sparse to mow, and in other years, none of which are set forth with clarity, the grass on the disputed tract was only spot cut. In good years all of the grass was

mowed, cured, and then baled or stacked on Fred's land.

Petitioners' tenant has observed Fred's crews cutting hay each year that the hay was cut and states that it took from 4 days to 3 or 4 weeks to mow, cure, and stack the hay from both Fred's ground and the disputed tract, depending upon the weather: "Q. . . . Mr. Froschheiser, did you have an opportunity to observe the actual hay cutting at any time during the 60 years or so you farmed the Weiss Farms property? The hay cutting that went on this hayland that we are speaking of? A. Yeah, I was there every year."

Petitioner Stanley Weiss testified that he was assisting his mother in handling the farm and became aware of the boundary problem in the early 1960s, before 1965, but did not advise her of the problem because he did not wish to put a strain on his mother. Stanley and his brothers did not become contract purchasers until 1975.

It is evident that Stanley was acting as his mother's agent prior to his becoming one of the contract purchasers, and thus his knowledge of the boundary problem before 1965 is imputed to Julia under the doctrine of agency.

The evidence indicates that the invasion onto the disputed tract by those under Fred's direction lasted from 4 days to 4 weeks depending upon the weather and then only once a year for the purpose of making hay. It is obvious from the evidence that Fred and those operating under his direction were mistaken as to the location of the boundary of Fred's property. It is equally apparent that for 60 or so years the petitioners' tenant was aware that each year Fred was taking the hay up to the farming line established by the tenant and his father before him.

Petitioners complain that the court erred in finding that Fred was using the land for the purpose for which in its nature it may be adapted, that is, to crop production.

Fred was using his own land to the south as hay land, one of the uses to which the land was adaptable, as he had a right to do. In Nebraska such grasses usually lend themselves to only an annual cutting. Although most of the neighboring land was being used for crop production, it was in its natural state adapted to the production of hay. Production of hay for feed is a vital part of the farming industry as it was 60 years ago. As long ago as 1893, we stated: "In the case of arable land it is not necessary, in order to hold possession, that one should continuously have a crop in the ground. It is sufficient if, during the seasons of the year when crops are grown, the land be used for that purpose; and from harvest to seed-time one's possession is not interrupted, although during that period no acts of ownership may be exercised." *Lantry v. Parker*, 37 Neb. 353, 356, 55 N.W. 962, 963 (1893).

There is no evidence that the petitioners or their tenants have used or been on the disputed tract from the time the farming line was established until 1974, and the fact that Julia and her father paid the taxes is not determinative, but only an element and circumstance which may be considered, together with all the circumstances of the case, with respect to the subject of adverse possession. *Dunnick v. Stockgrower's Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974).

We hold that, under the facts of this case, the annual production of hay by Fred or those under his direction for 60 or more years was more than an occasional trespass and was sufficient to constitute adverse possession.

Since it is evident that land may be generally adapted to more than one use, we hold that if the land is used for one or more of the major purposes for which it may by its nature be adapted, that use will be sufficient to establish continuity of possession, provided such use is sufficient to put the record titleholder on notice.

Finding no merit to the petitioners' assignments of error, we turn to the cross-appeal of the appellees. Petitioners argue that appellees failed to file a motion

for a new trial and thus this court can only determine whether or not the pleadings support the judgment rendered. This may have been the law prior to February 6, 1981, but this court in *Petersen v. Petersen, ante* p. 1, 301 N.W.2d 592 (1981), held that an appeal from a judgment in an equitable action does not require the filing of a motion for a new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. We therefore review the findings and judgment of the trial court for possible error pursuant to the cross-appeal.

Appellees contend that there is a variance between the evidence and the findings and order of the trial court. Appellees would have us rely on a surveyor's certificate attached to their motion to dismiss; we observe that the surveyor's certificate made after the trial of this case is not part of the record and will not be considered. The only competent evidence in the record relating to distances from which the lower court could establish a boundary was the testimony of Charles D. McCullough, director of the local A.S.C.S. office, and his affidavit. Under his supervision, aerial photographs of the land involved were measured. This witness was frank to admit that measurements from the aerial photographs were subject to an error factor of less than 1 percent, which translated into 15 to 20 feet. The District Court found that the burden of proof was on Fred to establish his claim of adverse possession and that Fred was entitled to "only the lesser of the land established by his proof." Taking into consideration the error factor testified to by McCullough and the fact that the point at which the rule or measuring device was laid on the aerial photographs when measurements were made on the 1960 and 1966 aerial photographs is unknown, we cannot say as a matter of law that the trial court was clearly wrong in its location of the boundary line as described in its findings. It would serve no useful purpose to set out in this opinion the trial court's findings without the reader having the benefit of

the various exhibits to compare with it.

Subsequent to the entry of judgment by the District Court, and while this case was pending on appeal, the appellees filed a motion to dismiss the petitioners' appeal based upon the allegation that the petitioners had accepted the benefits of the decree of the District Court. It appears that, following the entry of the decree, petitioners' tenant, at the request of the petitioners, had the land surveyed in accordance with the findings of the District Court, installed several posts on the boundary line as established by the District Court, and thereafter tilled and cropped up to that line. No fencing was attached to the several posts to connect them. Petitioners claim the setting of the posts was a temporary act pending resolution of the appeal and was done to prevent further crowding onto their land by appellees. We find that petitioners' act, through their tenant, in setting several posts was one of self-protection and was not done with the intent to accept the benefits of the decree of the District Court. Appellees' motion to dismiss is thus overruled.

Under the facts and circumstances of this particular case, we find that the judgment of the District Court should be affirmed, the cross-appeal dismissed, and the motion to dismiss the appeal overruled.

AFFIRMED.

# MERLE NICOLA, TRUSTEE IN BANKRUPTCY OF INTERSTATE MACHINERY & SUPPLY COMPANY, BANKRUPT, APPELLEE, V. E. O. PETERS, INC., APPELLANT.

303 N.W.2d 771

Filed March 27, 1981. No. 43261.

1. **Bankruptcy.** Prior to October 1, 1979, before the 1978 Bankruptcy Act took effect, the bankruptcy court had summary jurisdiction over controversies with respect to property passing to the trustee under the act when the property was within the actual or constructive possession of the bankruptcy court or when the adverse claimant to the property consented to jurisdiction.
2. ____. The bankruptcy court could adjudicate title and right to possession of the crane in the turnover proceeding but in that proceeding could not determine the amount due the trustee from the defendant under lease because the defendant did not consent to the summary jurisdiction of the bankruptcy court.
3. ____. Where an agreement has been fully performed by one party and the only performance due from the other is payment, the contract is no longer "executory" as that term is used in the Bankruptcy Act.

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

J. L. Krause for appellant.

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

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

BOSLAUGH, J.

This case arises out of a controversy concerning a construction crane leased to the defendant, E. O. Peters, Inc., by Interstate Machinery & Supply Company. The written lease agreement provided for a rental of $5,000 per month. The lease was entered into on July 29, 1977, while Interstate was in reorganization proceedings under Chapter XI of the Bankruptcy Act.

On October 26, 1977, Interstate was adjudicated a bankrupt in involuntary proceedings and Merle Nicola,

the plaintiff, was appointed as trustee. In April of 1978 the trustee commenced summary proceedings in the bankruptcy court to recover possession of the crane. On September 29, 1978, the bankruptcy court issued a turnover order and the trustee took possession of the crane on October 11, 1978.

The lease terminated by operation of law on April 26, 1978, under Bankr. Act § 70 (b) and Rule 607, 11 U.S.C. § 110 (b) (1976), because the lease was not specifically assumed by the trustee. This action was commenced on October 20, 1978, to recover the rental due under the lease to April 26, 1978, and the fair and reasonable rental value of the crane after that date. The jury returned a verdict for the plaintiff in the amount of $44,333.33 on the first cause of action, and $17,600 on the second cause of action. The defendant has appealed.

The defendant's principal contentions are that the trial court erred in failing to sustain its various motions to dismiss on the ground the action was barred by res judicata because of the earlier turnover proceeding in the bankruptcy court; in excluding evidence of the failure of the trustee to give notice to the defendant of the subsequent sale of the crane; and in permitting the trustee to sue on a lease that had been rejected.

As to the res judicata defense, the critical question is whether the issues litigated in this action could have been presented and determined in the summary proceeding in the bankruptcy court. The question is determined by the scope of the bankruptcy court's jurisdiction in the turnover proceeding.

In the turnover proceeding, the trustee sought only the return of the property which was properly a part of the bankrupt's estate. Prior to October 1, 1979, before the 1978 Bankruptcy Act took effect, the bankruptcy court had summary jurisdiction over controversies with respect to property passing to the trustee under the act when the property was within the actual or constructive possession of the bankruptcy court or when the adverse claimant to the property consented to juris-

diction. *In re Warren*, 387 F. Supp. 1395 (S.D. Ohio 1975). Although the bankruptcy court had summary jurisdiction to adjudicate title to a cause of action, for example, it did not, absent consent, have summary jurisdiction to enforce the chose in action against the party liable thereon. *Id.* at 1400. Thus, the bankruptcy court could take summary jurisdiction to determine the title and right to possession of the crane if the court determined it had constructive possession of the property. This the court did when it determined that the defendant's claim to the crane was colorable only.

An adversary proceeding to determine the amount the defendant owed the trustee under the lease would necessarily involve the plenary jurisdiction of a court. Summary jurisdiction could determine the issue only if the defendant consented to its exercise. The record shows the defendant resisted the summary jurisdiction of the bankruptcy court in the trustee's suit and alleged that "the sole remedy of the Trustee is a separate and independent suit in State Court against Defendant."

In the absence of a consent to summary jurisdiction by the defendant, the trustee could not get a money judgment in the summary turnover proceeding. *In re Guillotine Splicer Corp.*, 2 B.R. 306 (Bankr. Ct. E.D.N.Y. 1980). In that case the court said at 307-08: "The United States Supreme Court in *Maggio v. Zeitz*, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948), defined the parameters of the Bankruptcy Court's jurisdiction to issue a turn-over order. In *Maggio* the Court stated:

"'In applying these grants of power, courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by "clear and convincing evidence," the turnover order has been sustained as an

appropriate and necessary step in enforcing the Bankruptcy Act. *Oriel v. Russell*, 278 U.S. 358, 49 S.Ct. 173, 73 L.Ed. 419; *Cooper v. Dasher*, 290 U.S. 106, 54 S.Ct. 6, 78 L.Ed. 203. See also *Farmer's & Mechanics' National Bank v. Wilkinson*, 266 U.S. 503, 45 S.Ct. 144, 69 L.Ed. 408.

"'But this procedure is one primarily to get at property rather than to get at a debtor. Without pushing the analogy too far, it may be said that the theoretical basis for this remedy is found in the common law actions to recover possession — detinue for unlawful detention of chattels and replevin for their unlawful undertaking — as distinguished from actions in trespass or trover to recover damages for the withholding or for the value of the property. Of course the modern remedy does not exactly follow any of these ancient and often overlapping procedures, but the object — possession of specific property — is the same. The order for possession may extend to proceeds of property that has been disposed of, if they are sufficiently identified as such. But it is essentially a proceeding for restitution rather than indemnification, with some characteristics of a proceeding in rem; the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for damages for tortious conduct such as embezzlement, misappropriation or improvident dissipation of assets.'

. . . .

"The trustee is actually seeking a money judgment against the defendant. However, unless the defendant consents to the jurisdiction of this Court, this Court lacks the jurisdiction to render a money judgment in this proceeding." (Emphasis omitted.)

In *In re 671 Prospect Avenue Holding Corporation*, 118 F.2d 453, 454 (2d Cir. 1941), the court stated: "The existence of liability for damages caused by breach of contract or by tort must ordinarily at least be established by plenary suit, even though the plaintiff be a

trustee in bankruptcy. . . . This court said that the trustee could summarily recover possession of such specific property of the bankrupt as was still of the appellant's land, and 'in a proper proceeding' could recover the value of such property as the appellant had carted away or converted. We think it clear that by 'a proper proceeding' was meant a plenary suit."

Since the bankruptcy court had no jurisdiction in the summary turnover proceeding to determine the amounts due the trustee from the defendant under the lease, the turnover proceeding was not a bar to this action.

The defendant's contention that the trustee was required to give notice to the defendant of the subsequent sale of the crane is based on his theory that the lease was intended as security and was within the scope of Neb. U.C.C. art. 9 (Reissue 1971). This in turn depended upon the defendant's theory that the lease contained an option for the defendant to purchase the crane.

The lease itself, which was a fully integrated agreement, contained no option to purchase. See *Burhoop v. Pegram*, 194 Neb. 606, 234 N.W.2d 828 (1975). Instruction No. 7 by the trial court to that effect was correct.

Although there had been some negotiations between the defendant and Interstate prior to the execution of the lease, the defendant had no option to purchase because the parties failed to agree upon a price. This matter was an issue in the turnover proceeding and was decided adversely to the defendant. The issue was within the jurisdiction of the bankruptcy court and the prior adjudication was binding on the defendant.

The defendant's theory that the trustee could not sue on a rejected lease was based on an incorrect view of the effect of the rejection. The lease terminated on April 26, 1978, because the trustee did not specifically assume the lease. This terminated the defendant's liability for future rent under the lease but did not affect his obligation for rent that had accrued up to the date of

termination. The lease was executory only as to rental payments becoming due after April 26, 1978. Where an agreement has been fully performed by one party and the only performance due from the other is payment, the contract is no longer "executory" as that term is used in the Bankruptcy Act. *In the Matter of Computer Utilization, Inc.*, 508 F.2d 673 (5th Cir. 1975); *In Re Forney*, 299 F.2d 503 (7th Cir. 1962); *In Re San Francisco Bay Exposition*, 50 F. Supp. 344 (N.D. Cal. 1943).

Since the defendant failed and refused to return the crane until it was recovered by the trustee on October 11, 1978, the defendant was liable for the reasonable rental value of the crane between April 26, 1978, and October 11, 1978.

We have examined the defendant's other assignments of error and find that they are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

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ELMER R. GOCHENOUR, APPELLANT, V. JERRY J. BOLIN ET AL., APPELLEES.

303 N.W.2d 775

Filed March 27, 1981. No. 43267.

1. **Statutes: Sentences.** 1975 Neb. Laws, L.B. 567, made no changes in the provisions for consolidation of consecutive sentences and the pertinent provisions of Neb. Rev. Stat. § 83-1,110 (2) (Reissue 1976) pertaining to consolidation are to be applied to consecutive sentences whether imposed before or after the effective date of L.B. 567.
2. **Board of Pardons: Statutes: Sentences.** Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part and remanded for further proceedings if they be requested.

Dennis R. Keefe, Public Defender, and Richard L. Goos 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.

CLINTON, J.

This is an action brought by Elmer R. Gochenour, an inmate of the Nebraska Penal and Correctional Complex, in the District Court for Lancaster County for a declaratory judgment construing the statutes of this state providing for "good time" and to determine whether the Department of Correctional Services (hereinafter DCS) properly computed Gochenour's discharge date. The petition alleged that the DCS unlawfully interrupted his service of an indeterminate sentence for the purpose of having him serve a consecutive sentence subsequently imposed before completing the indeterminate sentence. The petition further alleged that his primary and consecutive sentences were not consolidated in accordance with the provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976). The petition asks for a declaration that such procedures are unlawful.

The District Court made certain findings and then entered an order as follows:

"THEREFORE, IT IS ORDERED:

"1. The plaintiff must serve his original 3 to 5 year sentence until it has been served in full and he has been discharged therefrom under the statutes in effect at the time of that conviction.

"2. When the plaintiff begins serving his consecutive sentence, he shall receive credit against that sentence for time served from June 4, 1979 to the effective date of this order."

The order was entered on January 15, 1980. Gochenour then appealed to this court.

A simple and clear explanation of the source of the

controversy is not readily accomplished. The problems arise from changes made in the "good time" statutes as well as our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), interpreting 1975 Neb. Laws, L.B. 567, which made the statutory changes.

We will first set forth the facts from which the dispute arises and then explain the statutory changes.

On May 15, 1975, Gochenour began serving a term of 3 to 5 years for forgery. On May 6, 1977, he escaped and was not apprehended until March 3, 1978, 9 months and 27 days after his escape. He was prosecuted for the escape, found guilty, and, on March 3, 1978, sentenced to a term of 1 year to be served consecutively to the previous sentence. Because of his escape he lost, by administrative action, all accumulated good time as permitted by statute. Later, his good time on the 1975 sentence was administratively restored and on January 1, 1979, the DCS established for him a mandatory parole date of June 4, 1979, for the first sentence. This was apparently done under the provisions of Neb. Rev. Stat. §§ 83-1,107(1)(b) and 83-1,111(5) (Reissue 1976) as those statutes provided before their amendment by L.B. 567. L.B. 567 became effective 3 months after May 23, 1975.

On June 4, 1979, he was not released to serve on parole the remainder of his first sentence; rather, that sentence was "interrupted" and he began to serve the 1-year consecutive sentence. On October 2, 1979, he commenced this action.

We now examine the pertinent statutes and the changes made by L.B. 567. At the time of the imposition of the first sentence and at the time the consecutive sentence was imposed, § 83-1,110 provided, in effect, that consecutive sentences be consolidated and that every committed offender sentenced to serve a consecutive sentence, whether the sentences were received at the same time or during the original sentence, would be eligible for release on parole when he had served the total of the *minimum terms* less good time as provided

by the statutes. § 83-1,107. Section 83-1,110 also provided that "[t]he maximum terms shall be added to compute the new maximum term." The prisoner was eligible for *mandatory parole* when he had served the maximum term less good time reductions. § 83-1,107.

L.B. 567 did not make any change in the provisions of the statute for consolidation of sentences. It did, however, make changes with reference to "good time."

Statutes, at the time Gochenour received his first sentence, provided for two types of good time which we will refer to as "good behavior" and "meritorious" good time (although the terminology was changed by L.B. 567). Before L.B. 567 took effect, good time credit of both types was deducted from the minimum terms to determine *eligibility* for release on parole, and from the maximum terms to determine when release on parole became *mandatory.*

When L.B. 567 became effective in August 1975 it made the following changes in how good time reductions were treated. "Good behavior" time but not meritorious time was now deducted from the minimum term to determine eligibility for release on parole as well as from the maximum term to determine when the *discharge from custody* of the state became mandatory. L.B. 567 § 2. The reductions were to be credited from the date of sentence. Meritorious good time was credited only against the maximum term to determine when *discharge from custody* became mandatory.

The effect of these changes would be that in some instances *discharges from custody* would come at an earlier date.

Section 9 of L.B. 567 provided in part: "Any person eligible for immediate discharge or release pursuant to this act shall be so discharged or released no later than one hundred twenty days after the effective date of this act subject to the approval of the Board of Pardons."

The Legislature, apparently through oversight, made no specific provision as to how reductions granted for one purpose under previous law were to be blended with

reductions granted under L.B. 567 for a different purpose.

*Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), was an action by two inmates of the Nebraska Penal and Correctional Complex who, it was stipulated, were eligible for mandatory release if L.B. 567 were applied retroactively. We held in that case that, if L.B. 567 was applied so as to give inmates eligible for immediate release the benefit of the bill and not to benefit those who became eligible for later release, it would create a discriminatory classification and also violate the equal protection clause of our Constitution. We, therefore, interpreted the act to apply not only to inmates eligible for immediate release but those becoming eligible later under the terms of the act, provided in each case the approval of the Board of Pardons was received as provided by section 9 of L.B. 567. This interpretation negated the State's contention that retroactive application constituted a commutation of sentence and thus violated the constitutional powers of commutation vested in the executive branch of government. Neb. Const. art. IV, § 13.

The record before us does not establish that approval of the Board of Pardons has been received for retroactive application in this case. The record shows that Gochenour had hearings before the Board of Parole on May 11, 1978, May 11, 1979, and September 10, 1979, and that action was deferred in each instance.

In *Johnson & Cunningham v. Exon, supra*, we painted with a rather broad brush and we believe that has led to some misconception as to its holding. That decision can be properly interpreted only in the light of the facts in that case where it was stipulated that the petitioners become eligible for earlier discharge because of the *changes* in the statutes. Our holding, that failure to apply L.B. 567 retroactively would result in discriminatory classifications and denial of equal protection, patently pertained only to those changes in the statute which would result in earlier release than under existing laws.

The provisions for consolidation of consecutive sentences were not in any way changed. Those provisions are to be applied whether sentencing was before or after the effective date of L.B. 567. That appears not to have been done in this case. In sum, after the imposition of the 1-year consecutive sentence, its consolidation with the 3- to 5-year indeterminate sentence resulted in a 4- to 6-year consolidated term and should have been so treated. The approval of the Board of Pardons was not sought or received in this case, so the pre-L.B. 567 good time provisions should have been applied. Because Gochenour had hearings before the Board of Parole on May 11, 1978, May 11, 1979, and September 10, 1979, and early parole was denied, he has not been hurt with reference to the date he became *eligible for parole* for that date obviously occurred later because of the consolidation of sentences. His mandatory parole date also obviously occurred at a date later than June 4, 1979, determined by the DCS — 8 months later if no good time of any kind was forfeited and he earned the maximum meritorious time.

The State argues that if the DCS cannot interrupt a sentence for the purpose of having a consecutive term served, it might result in some instances, where early parole is granted, in having to retrieve the person when parole has been served and then reincarcerating him for the purpose of serving the consecutive sentence. That would not appear to be true if the statutes on consolidation are followed.

The DCS had no authority to interrupt the first sentence for the purpose of serving the second. No such authority appears in the statutes and it is apparently not an inherent power. See *Perkins v. Peyton*, 369 F.2d 590 (4th Cir. 1966).

We cannot compute any of the pertinent dates because the record does not contain information as to whether good time may have been forfeited after the period covered by the record in this case ends.

AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS IF THEY BE REQUESTED.