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REPORTS OF CASES

DECIDED BETWEEN

MARCH 26, 1982 and JUNE 20, 1982

IN THE

Supreme Court of Nebraska

JANUARY TERM 1982

VOLUME CCXI

DONALD C. PATTON

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George H. Stanley	Papillion
Third	Lancaster	Samuel Van Pelt	Lincoln
		William D. Blue	Lincoln
		Dale E. Fahrnbruch	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		Theodore L. Richling	Omaha
		Samuel P. Caniglia	Omaha
		John E. Clark	Omaha
		John T. Grant	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		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

Eighth	Dakota, Dixon, and Cedar	Francis J. Kneifl	Dakota City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin Richard L. DeBacker	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart Keith Windrum	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Cherry	Henry F. Reimer	O'Neill
Sixteenth	Sheridan, Dawes, Box Butte, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff, Morrill, and Garden	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Jefferson and Gage	William B. Rist	Beatrice
Nineteenth	Banner, Kimball, Cheyenne, and Deuel	John D. Knapp	Kimball
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TABLE OF CASES REPORTED

Adoption of Simonton, In re 777
Ainsworth; Steffen v. 291
Almarez v. Hartmann 243
Application of Mahan for Writ of Habeas Corpus, In re 671
Art Kraft Signs, Inc.; State v. 625

Bankers Union Life Ins. Co. v. Nebraska Corp. 350
Barkdoll; Dukes v. 546
Beach; State v. 660
Beckner; State v. 442
Bedke; Larson v. 247
Beeder v. Fleer 294
Bentz v. Nebraska P.P. Dist. 844
Black v. Schmitz 378
Blaha GMC-Jeep, Inc. v. Frerichs 103
Blue v. Champion International Corp. 480
Board of Regents; Shelton v. 820
Bodzek v. Callahan 600
Bouc, State ex rel. v. School Dist. of City of Lincoln 731
Boyer; State v. 139
Bradley; Walker v. 873
Brehmer; State v. 29
Browers v. Browers 166
Brungardt, In re Interest of 519
Bryde; Empire State Building Co. v. 184
Bukacek; Peerless Ins. Co. v. 505
Byerly; Dana F. Cole & Co. v. 903

Callahan; Bodzek v. 600
Champion International Corp.; Blue v. 480
City of Grand Island; Watson v. 622
City of Omaha; Kohlbeck v. 372
City of Omaha; Mann v. 583
City of Omaha; Teague v. 872
Collister; Z & S Constr. Co., Inc. v. 348
Commercial Federal Savings & Loan Assn.; Jones v. 487
Connealy v. Mueller 484
Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
Corbett, In re Estate of 335

Dana F. Cole & Co. v. Byerly 903

DeFilipps v. Skinner 801
Dept. of Banking & Finance; Phelps County Savings Co. v. 683
Devine v. Dept. of Public Institutions 113
Douglas County Social Services Admin.; McGinn v. 72
Dukes v. Barkdoll 546
Dunne v. Dunne 636
Dworak v. Michals 716

Earnest v. Lutheran Memorial Hospital 438
Edmunds; State v. 380
Empire State Building Co. v. Bryde 184
Ericksen v. Pearson 466
Estate of Corbett, In re 335
Estate of Haddix, In re 814
Estate of Kleeb, In re 763
Estate of Nicholson, In re 805

F.H.T., Inc. v. Feuerhelm 860
Fairbanks; Mingus v. 81
Farmers Mut. Home Ins. Co.; Graff v. 13
Ferguson v. Ferguson 646
Feuerhelm; F.H.T., Inc. v. 860
First Nat. Bank & Trust Co.; Spilker v. 540
First National Bank; Lindsay v. 285
Fleer; Beeder v. 294
Floair, Inc.; Jensen v. 403
Fortner, State ex rel. v. Urbom 309
Frahm; Gleeson v. 677
Frederiksen v. Frederiksen 777
Frerichs; Blaha GMC-Jeep, Inc. v. 103
Frohm Holdings, Inc.; Meyers v. 329

GMC; State ex rel. Kizzier Chevrolet Co., Inc. v. 626
Gastineau v. Tomahawk Oil Co., Limited 537
Gates v. Howell 85
Gingrich; State v. 786
Gleeson v. Frahm 677
Gonzalez; State v. 697
Graff v. Farmers Mut. Home Ins. Co. 13
Grand Island, City of; Watson v. 622
Greco; Prudential Ins. Co. v. 342
Guardianship of Jonas, In re 397
Guardianship of Sain, In re 508
Guerra v. Iowa Beef Processors, Inc. 433
Gustav's Stable Club, Inc.; Continental Ins. Co. v. 1

Haddix, In re Estate of 814
Hall; Omaha Public Schools v. 618

Halpin v. Nebraska State Patrolmen's Retirement System 892
Hand; John Deere Co. v. 549
Hansen; Rogers v. 132
Hanzlik v. Paustian 322
Hartmann; Almarez v. 243
Harvey v. Van Aelstyn 607
Hastings, In re Interest of 209
Heimsoth v. Kellwood Co. 167
Hemenway v. MFA Life Ins. Co. 193
Hengen v. Hengen 276
Herman Bros., Inc.; Knutson v. 603
Hilbers Property Freehold Transfer, In re 268
Hiross; State v. 319
Hoppe v. Phoenix Homes, Inc. 419
Houtwed; State v. 681
Howell; Gates v. 85
Hubbard; State v. 531
Hunsberger; State v. 667
Husker Aviation, Inc.; Safeco Ins. Co. of America v. 21

In re Adoption of Simonton 777
In re Application of Mahan for Writ of Habeas Corpus 671
In re Estate of Corbett 335
In re Estate of Haddix 814
In re Estate of Kleeb 763
In re Estate of Nicholson 805
In re Guardianship of Jonas 397
In re Guardianship of Sain 508
In re Hilbers Property Freehold Transfer 268
In re Johnson Trust Estates 750
In re Interest of Brungardt 519
In re Interest of Hastings 209
In re Interest of Levey 66
In re Interest of Shepherd 313
In re Proceedings re School Dists. R-4 & R-3 453
In re Valuation, etc., for Tax Year 1981 535
Iowa Beef Processors, Inc.; Guerra v. 433

Jacobberger v. Terry 878
Jameson v. Nelson 259
Jensen v. Floair, Inc. 403
Jensen v. Jensen 537
John Deere Co. v. Hand 549
Johnson Machine & Press Co.; Jones v. 724
Johnson Trust Estates, In re 750
Jonas, In re Guardianship of 397
Jones v. Commercial Federal Savings & Loan Assn. 487
Jones v. Johnson Machine & Press Co. 724

Kayser-Roth Corp.; Thomas v. 704
Kearney Clinic Bldg. Corp. v. Weaver 499
Kelley; State v. 770
Kellwood Co.; Heimsoth v. 167
Kingery v. Kingery 795
Kizzier Chevrolet Co., Inc., State ex rel. v. GMC 626
Kleeb, In re Estate of 763
Knutson v. Herman Bros., Inc. 603
Kohlbeck v. City of Omaha 372
Kresha v. Kresha 92
Krueger v. Krueger 568

Lane; State v. 46
Larson v. Bedke 247
Lave v. Neumann 97
Levey, In re Interest of 66
Lillich v. Lowery 757
Lincoln, School Dist. of City of; State ex rel. Bouc v. 731
Lindsay v. First National Bank 285
Longa; State v. 356
Lowery; Lillich v. 757
Luna; State v. 630
Lutheran Memorial Hospital; Earnest v. 438

MFA Life Ins. Co.; Hemenway v. 193
Mahan, In re Application of, for Writ of Habeas Corpus 671
Mann v. City of Omaha 583
Mayhew Products Corp.; State v. 300
McBride v. McBride 459
McFarland v. McFarland 673
McGinn v. Douglas County Social Services Admin. 72
Metzger; State v. 593
Meyer v. Sandhills Beef, Inc. 388
Meyers v. Frohm Holdings, Inc. 329
Michals; Dworak v. 716
Miller Chemical Co., Inc. v. Tams 837
Mingus v. Fairbanks 81
Morse; State v. 448
Mueller; Connealy v. 484
Mulford v. Mulford 747
Mullenax; Omaha Nat. Bank v. 830

Nebraska Corp.; Bankers Union Life Ins. Co. v. 350
Nebraska P.P. Dist.; Bentz v. 844
Nebraska State Patrolmen's Retirement System; Halpin v. 892
Nelson; Jameson v. 259
Nelson v. State 793
Neumann; Lave v. 97

Nicholson, In re Estate of 805
Noland v. Noland 452
Northwestern National Bank; Raynor v. 119

Omaha, City of; Teague v. 872
Omaha Nat. Bank v. Mullenax 830
Omaha Public Schools v. Hall 618
O'Toole v. Yunghans 852

Packaging Co. of America; Sandel v. 149
Paulson; State v. 711
Paustian; Hanzlik v. 322
Pearson; Ericksen v. 466
Peerless Ins. Co. v. Bukacek 505
Peterson; Wichman v. 402
Phelps County Savings Co. v. Dept. of Banking & Finance 683
Philip G. Johnson & Co. v. Salmen 123
Phoenix Homes, Inc.; Hoppe v. 419
Pope; State v. 425
Prudential Ins. Co. v. Greco 342
Puetz v. Puetz 674
Purolator Filter Div.; Rhen Marshall, Inc. v. 306

Quarrels; State v. 204

Raynor v. Northwestern National Bank 119
Rhen Marshall, Inc. v. Purolator Filter Div. 306
Richter; State v. 63
Rogers v. Hansen 132
Runge; Todsen v. 226

Sacco v. Sacco 371
Safeco Ins. Co. of America v. Husker Aviation, Inc. 21
Sain, In re Guardianship of 508
Sain v. Sain 519
Salmen; Philip G. Johnson & Co. v. 123
Sandel v. Packaging Co. of America 149
Sandhills Beef, Inc.; Meyer v. 388
Sayers; State v. 555
Schmer v. Schmer 414
Schmitz; Black v. 378
School Dist. of City of Lincoln; State ex rel. Bouc v. 731
School Dists. R-4 & R-3, In re Proceedings re 453
Scott; State v. 237
Shelton v. Board of Regents 820
Shepherd, In re Interest of 313
Simonton, In re Adoption of 777
Skinner; DeFilipps v. 801

Spaulding; State v. ... 575
Spilker v. First Nat. Bank & Trust Co. ... 540
State ex rel. Bouc v. School Dist. of City of Lincoln ... 731
State ex rel. Fortner v. Urbom ... 309
State ex rel. Kizzier Chevrolet Co., Inc. v. GMC ... 626
State; Nelson v. ... 793
State v. Art Kraft Signs, Inc. ... 625
State v. Beach ... 660
State v. Beckner ... 442
State v. Boyer ... 139
State v. Brehmer ... 29
State v. Edmunds ... 380
State v. Gingrich ... 786
State v. Gonzalez ... 697
State v. Hiross ... 319
State v. Houtwed ... 681
State v. Hubbard ... 531
State v. Hunsberger ... 667
State v. Kelley ... 770
State v. Lane ... 46
State v. Longa ... 356
State v. Luna ... 630
State v. Mayhew Products Corp. ... 300
State v. Metzger ... 593
State v. Morse ... 448
State v. Paulson ... 711
State v. Pope ... 425
State v. Quarrels ... 204
State v. Richter ... 63
State v. Sayers ... 555
State v. Scott ... 237
State v. Spaulding ... 575
State v. Weible ... 174
State v. Williams ... 650
State v. Williams ... 693
Steffen v. Ainsworth ... 291

Tams; Miller Chemical Co., Inc. v. ... 837
Thomas v. Kayser-Roth Corp. ... 704
Teague v. City of Omaha ... 872
Terry; Jacobberger v. ... 878
Todsen v. Runge ... 226
Tomahawk Oil Co., Limited; Gastineau v. ... 537

Urbom; State ex rel. Fortner v. ... 309

Valuation, etc., for Tax Year 1981, In re ... 535
Van Aelstyn; Harvey v. ... 607

Walker v. Bradley 873
Watson v. City of Grand Island 622
Weaver; Kearney Clinic Bldg. Corp. v. 499
Weible; State v. 174
Wichman v. Peterson 402
Williams; State v. 650
Williams; State v. 693

Yunghans; O'Toole v. 852

Z & S Constr. Co., Inc. v. Collister 348

CUMULATIVE LIST OF CASES
DISPOSED OF WITHOUT OPINION
January 1982 Term

No. 43857: **City of Madison v. C&R Engineering.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43981: **State Farm Mutual Auto Ins. Co. v. Battle Creek Mutual Ins. Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44160: **State v. Hattix.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44183: **School District of the City of Norfolk v. Brungardt.** Appeal dismissed as moot by order of the court.

No. 44223: **Harwan v. Knight.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 44266: **Kresha v. Kresha.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 44289: **State v. Wills.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44297: **Computer Business Services Marketing, Inc. v. Hutchinson.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 44365: **State v. Mitchell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44387: **State v. Newsome.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 20-A(8).

No. 44409: **State v. White.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44482: **In re Interest of Stokes.** Motion of appellees for summary dismissal sustained; appeal dismissed; see Rule 20-A(8).

No. 44496: **State v. Taylor.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-572: **Foote v. Foote.** Affirmed as modified by order of the court.

No. 81-612: **State v. Yeutter.** Affirmed; see Rule 20.

No. 81-635: **State v. Mason.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8); motion of appellant for appointment of counsel overruled.

No. 81-665: **State v. Happold.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 81-678: **State v. Cox.** Affirmed; see Rule 20.

No. 81-689: **State v. Jones.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-695: **State v. Landess.** Affirmed; see Rule 20.

No. 81-709: **State v. Sherman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-761: **State v. Saathoff.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 81-763: **State v. Foster.** Dismissed for failure to file briefs.

No. 81-767: **State v. Medlock.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-774: **Bullock v. Bullock.** Stipulation for

dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 81-790: **State v. Murphy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-805: **Brame v. First National Bank & Trust Co. of Lincoln.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-806: **State v. McCauley.** Affirmed; see Rule 20.

No. 81-813: **Allen v. Workman.** Motion of appellees for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 81-817: **State v. Evans.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-818: **State v. Gallatin.** Affirmed; see Rule 20.

No. 81-826: **The Prudential Ins. Co. of America v. Clearwater Ranch, Inc.** Settlement approved; affirmed as modified by order of the court.

No. 81-832: **In re Interest of Barnard.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 81-834: **State v. Brown.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-835: **Hoefelman v. Hoefelman.** Motion of appellants for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellants.

No. 81-843: **Dalke v. Iowa Beef Processors.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-846: **Borg-Warner Acceptance Corp. v. Sargent.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

Nos. 81-848, 81-905: **State v. Overton.** Motion of appellee for summary dismissal sustained; appeal

dismissed; see Rule 20-A(1).

No. 81-856: **Kresha v. Kresha.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-858: **State v. Kryznanowski.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-866: **State v. Kilgore.** Affirmed; see Rule 20.

No. 81-869: **McCloud v. Adams.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 81-872: **Raintree Ltd. v. Richardson.** Motion of appellee for dismissal of appeal sustained; the judgment of the District Court is vacated; appeal dismissed as moot.

No. 81-877: **State v. Moles.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-882: **Martin K. Eby Construction Company, Inc. v. State.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 81-885: **Beaumont v. Beaumont.** Affirmed as modified by order of the court.

No. 81-886: **State v. Bush.** Affirmed; see Rule 20.

Nos. 81-895, 81-896, 81-897: **State v. Burback.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-899: **State v. Smith.** Affirmed; see Rule 20.

No. 81-902: **State v. Creech.** Affirmed; see Rule 20.

No. 81-907: **Bowley v. Bowley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 81-908: **Stephens v. Dept. of Public Welfare.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice.

No. 81-909: **Coakley Industrial Service v. Hanlon.** Affirmed as modified by order of the court.

No. 81-919: **State v. Ureste.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-922: **State v. Bauer.** Affirmed; see Rule 20.

No. 81-929: **State v. Washington.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-003: **In re PSC Northwestern Bell Telephone Co., Inc. v. NPSC.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-013: **State v. Davis.** Affirmed; see Rule 20.

No. 82-016: **Penrod v. Stark.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 82-017: **State v. Anderson.** Affirmed; see Rule 20.

No. 82-018: **McCormach v. Adams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 82-023: **State v. Jones.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

Nos. 82-026, 82-027: **State v. Gibbs.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8); motion of appellant for appointment of other counsel overruled.

No. 82-029: **Painter v. The Chez Ami Corp.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-031: **McCauley v. McCauley.** Affirmed as modified by order of the court.

No. 82-033: **Thurber v. Jones Oil Company, Inc.** Stipulation for dismissal of appeal allowed; appeal

dismissed at costs of appellant.

No. 82-037: **State v. Ronzzo.** Affirmed; see Rule 20.

No. 82-042: **Security National Bank v. Fitch.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-044: **State v. Patmore.** Affirmed; see Rule 20.

No. 82-049: **Simon v. Dolejs.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellee.

No. 82-053: **Malone v. Priesman.** Dismissed for failure to file briefs.

Nos. 82-055, 82-056: **State v. Bugay.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-059: **State v. Barr.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-060: **Stahla v. Lopez.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-062: **State ex rel. Barnett v. Friedman.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-064: **Conrad v. Lockwood Corp.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-067: **State v. Albrecht.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-069: **State v. Hipsher.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-074: **Vandenberg v. The Seward County Board of Adjustment.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 82-075: **Zadina v. Zadina.** Affirmed as modified by order of the court.

No. 82-076: **State v. Johnson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-077: **Holman v. Holman.** Joint motion for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 82-078: **State ex rel. Douglas v. Stevenson.** Motion of appellee for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-079: **Gadeken v. Gadeken.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-081: **Wasilewski v. Perkins.** Joint motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-082: **State v. Strube.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 82-087: **Cross v. Cross.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-088: **Heybrock v. Heybrock.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-098: **Krohn v. Krohn.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-112: **Larson v. Gant.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-116: **State v. Young.** Affirmed; see Rule 20.

No. 82-120: **State v. Detter.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-122: **State v. Powell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-126: **Fraternal Order of Police v. County of Hall.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-131: **Pagel v. Autenrieth.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-136: **Anderson v. Zeilinger.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-138: **State v. Shaddy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-144: **In re Fecht, Heine v. Traders Grain, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 82-145: **Davis v. Davis.** Affirmed as modified by order of the court; costs taxed to appellee.

No. 82-148: **State v. Levering and Ellis.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

Nos. 82-151, 82-152, 82-153, 82-154, 82-155: **State v. Taylor.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-169: **State v. Anderson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-174: **Albrecht v. Harms.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-175: **Smith v. Dvorak.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-181: **Becker Corp. v. Jones Oil Co.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-190: **State v. Moore.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 20-A(8).

No. 82-192: **State v. Sweet.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-200: **Molene v. Hanlon.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice at costs of appellant.

No. 82-215: **State v. Douglas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-216: **State v. Lester.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-217: **State v. Austin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-218: **State v. Hartford.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-239: **Wolfe v. Wolfe.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-249: **Ford v. Ford.** Affirmed as modified by order of the court.

No. 82-258: **Stafford v. Stafford.** Affirmed as modified by order of the court.

No. 82-260: **Polikov v. County of Sarpy.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-263: **Northwestern State Bank v. First Nat. Bank of Omaha.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-290: **Herrick v. Herrick.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-302: **State v. Webster.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-315: **Doolittle v. Doolittle.** Affirmed as

modified by order of the court.

No. 82-316: **Hoeppner v. City of Omaha.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 82-361: **Ames Bank v. Nicola.** Motion of appellants for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellants.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1982

THE CONTINENTAL INSURANCE COMPANY, APPELLEE, V. GUSTAV'S STABLE CLUB, INC., A CORPORATION, APPELLANT.

317 N.W.2d 734

Filed March 26, 1982. No. 43627.

1. **Corporations: Insurance: Arson.** Generally, the willful burning of property by a stockholder of a corporation is not a defense against the collection of insurance by the corporation; nor can a corporation be prevented from collecting insurance because its agents willfully set fire to the property without the participation or authority of the corporation or all of the stockholders of the corporation.
2. _____: _____: _____. An insured corporation will not be allowed a recovery on fire insurance policies where the incendiarist owns all or practically all of the stock in the insured corporation, or is in dominant management of the corporate property.
3. **Insurance: Fraud.** In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to, and the insured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud or the criminal misconduct of the insured is, in contracts of marine or of fire insurance, an implied exception to the liability of the insurer.
4. **Corporations: Insurance: Arson.** Where the beneficial owner of practically all of the stock in a corporation, or who has the dominant management and control of its affairs and property, sets fire to the property of a corporation, or causes it to be done, there is no sound reason to support the contention that the corporation should be allowed to recover on a policy for the destruction of the corporate property by a fire so occasioned.
5. **Partnerships: Insurance: Arson.** The rule as to partnerships or joint ventures is that innocent partners and joint venturers are also

barred from recovery where the arson is perpetrated by a partner or joint venturer.

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

Dennis M. Coll of Raymond, Olsen & Coll, P.C., for appellant.

Francis L. Winner of Winner, Nichols, Meister & Douglas, for appellee.

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

BRODKEY, J., Retired.

The Continental Insurance Company (Continental), plaintiff and appellee herein, brought this declaratory judgment action in the District Court for Scotts Bluff County, Nebraska, seeking an adjudication with reference to a comprehensive business policy issued by plaintiff to its named insured, Gustav's Stable Club, Inc., and praying for a judgment declaring that a claim for a fire loss filed by the defendant under such policy was properly denied by the plaintiff. On April 17 and 21, 1980, this matter was tried before the District Court sitting without a jury. In its declaratory judgment entered on May 12, 1980, the court found that the claim submitted by the defendant to Continental for payment of such loss was properly denied, and that there was no coverage afforded to the defendant corporation from Continental under the policy in question. The court in its judgment specifically found that the defendant was a Nebraska corporation and was the owner of the insured building, which was known as the Stable Club Restaurant; that prior to August 12, 1979, Continental had issued the comprehensive business policy affording certain coverage on the premises in question; that on or about August 12, 1979, Gustav E. Platz and E. Nancy Platz were stockholders in the defendant corporation, each owning one-half of the

shares of stock therein, and Gustav E. Platz was president of the corporation; that during the first week in August 1979 and on August 12, 1979, two fires occurred at the Stable Club Restaurant; that the cause of the fires was arson and Gustav E. Platz was a principal perpetrator of the arson and resultant damages to Gustav's Stable Club Restaurant; that prior to and at the time of such fires in August 1979, Gustav E. Platz was performing and carrying out all principal functions of the defendant corporation, which were (a) collection of rent under a lease of the insured premises, and (b) acquisition and payment for insurance on said premises; and that prior to and at the time of such fires in August 1979, Gustav E. Platz was the "alter ego" of the defendant corporation and exercised a dominant control of said corporation.

The facts as presented in the record indicate that Gustav's Stable Club, Inc., a Nebraska corporation, is the owner of a restaurant and lounge called the Stable Club and located in Terrytown, Nebraska. Gustav and Nancy Platz, husband and wife, purchased the Stable Club in 1969, and operated it as a partnership until 1974, at which time the business was incorporated as a Subchapter S corporation. Upon the incorporation of the Stable Club, Gustav and Nancy became the sole shareholders, each owning 63 shares of corporate stock. Gustav became president of the corporation and Nancy became secretary-treasurer, and they were also the board of directors of the corporation.

The parties thereafter operated the Stable Club until the spring of 1978, at which time they separated. They were subsequently divorced. In March of 1978 the defendant corporation entered into a lease agreement with K & J Inc., a corporation solely owned by Sherry Kearney and managed by her husband Dennis. The Kearneys took over the operation of the Stable Club at an agreed monthly

rental of $4,500. Thereafter, the only business conducted by the corporation was the collection of the rental payments and maintenance of the insurance policy of the corporate property. It appears that during the term of the lease, Gustav Platz collected the rental payments and also acquired insurance on the Stable Club.

The Kearneys were unsuccessful in operating the Stable Club, and by July of 1979 they notified Gustav and Nancy that they were unable to make the payments on the lease. It was at this time that Gustav began to have conversations with Dennis Kearney about the possibility of burning down the Stable Club Restaurant. The record reflects that a scheme was devised whereby Kearney would find an individual to commit the arson and Gustav would pay $2,000 to that individual.

The fire insurance policy covering the Stable Club was Continental policy No. 410210. This policy, dated June 20, 1977, contained policy limitations of $275,000 on the structure and $75,000 on the building's contents. According to James Fenimore, the insurance agent for the defendant, Gustav Platz contacted him on July 19, 1979, and told him to raise the insurance coverage on the policy to $350,000 on the structure and $100,000 on its contents. Fenimore testified that Gustav wanted the higher coverage to be effective immediately and that Gustav paid the required premiums for June and July with a personal check.

Shortly thereafter, Kearney contacted one Rupert Johnson who agreed to start the fire at the Stable Club. With the assistance of another individual, Raymond Cervantes, the evidence discloses that Johnson initially set fire to the restaurant on or about August 10, 1979. According to Deputy Fire Marshal Richard McKee, who examined the premises, the first attempted arson was poorly set and resulted in minimal damage to the structure. Rupert

Johnson testified that he thereafter met with Kearney, who set the date for a second fire on August 12, 1979, to take place at approximately 2:30 a.m. on that date. Rupert was given money by Kearney to purchase gasoline, which he apparently stored in the Stable Club prior to the fire. The fire of August 12, 1979, resulted in damage to the building estimated to be $47,093.41 and damage to the contents of approximately $13,000. As a result of his participation in the fires, Gustav Platz was tried and convicted of the felony charge of conspiracy to defraud an insurance company. In September of 1979, after the fire, Gustav Platz assigned his 63 shares of stock in the defendant corporation to Nancy.

As previously stated, the trial court found that at the time of the fires in August of 1979, Gustav Platz exercised dominant control of said corporation. The record amply supports that conclusion by the trial court. At all times, he was the president of the corporation and a 50 percent shareholder therein. During the existence of the lease to K & J Inc., he exclusively managed the corporation for all practical purposes, collected the rental payments for the premises from the Kearneys, and also attended to all the insurance needs for the defendant. He was the sole negotiator for the additional insurance placed on the burned premises and its contents, the premiums for which insurance were paid by him out of his personal account. It is clear from the evidence that both Gustav and Nancy would have benefited from the receipt of the insurance proceeds had Continental paid them on the policy. This is made clear from the record in this case. Nancy was asked on cross-examination as follows: "Q. And if that fire had not been arson and the insurance company had decided to pay, Gus would have got half and you would have got half? A. That's right. Q. And Gus was president at the time? A. That's right." Also, on redirect examination she was

asked by her attorney: "Q. Mrs. Platz, when Mr. Winner asked you the question, would you divide the insurance proceeds if this hadn't been arson, that was after the payment of all the indebtedness? A. Right." Pertinent to this issue is the taped telephone conversation held on August 13, 1979, between certain police officers and Gustav Platz, and we quote certain pertinent portions of that conversation: "Q. Well, backing up to the stage where you was talking about indebtedness, what did you tell me your total indebtedness was? A. Oh, about- Q. $230,000? A. $210,000. Q. $210,000. What do you owe on the Stable Club? A. Well, between the uh the note at Commerce Savings and the note on the cabin which is attached to the Stable Club is probably about $155,000. Q. How much insurance do you have on the Stable Club? A. $350. Q. $350,000? A. Uhuh. Q. As of when? A. Well, $350,000 we have carried on it now for, I don't know the last time we had that increased, it was $275 and we had it increased to $350 a year ago, maybe. Q. Didn't you have it increased again a month ago? A. Yeah, I don't think it is in effect yet."

It is clear from the above testimony that in view of the indebtedness on the Stable Club, as testified to by Gustav Platz, and the very large amount of insurance carried on the property, both Gustav and Nancy would have undoubtedly profited by the payment of Continental on the insurance policy involved in this action. The pertinence of this fact will be made apparent following a discussion of the authorities referred to later in this opinion. In addition, we point out that the record discloses that Gustav and his former wife, Nancy, were the only members of the board of directors. At the trial, both parties could not name the date of the last board meeting. Gustav testified that it had been over 3 years previous to the time of the trial. Nancy stated that they did not have yearly corporate meetings since the

time of incorporation in 1974. Gustav testified that there had been shareholders' meetings but could not identify a date other than 3 years prior to trial. It was agreed by both parties that during the term of the lease, which was still in effect on the date of the fire, the only corporate duties were to collect the rental payments and maintain insurance. In this regard, even Nancy testified that Gustav Platz took care of those duties. We believe that for all practical purposes, the evidence reveals that Gustav exercised complete control of the corporation and that in every essential respect he was the sole person of Gustav's Stable Club, Inc., in any way conducting the business of the corporation at the time of the fire in question. Although the record bears out Nancy's contention that she was innocent of and had no knowledge of or complicity in the fires, we think it is clear that she abandoned the control and operation of the defendant corporation to her former husband. Her sole activity at that time, as reflected by the record, is that she had signed an application for a liquor license for the premises after being informed by the Kearneys that they intended to turn the operation of the Stable Club back to the Platzes. The Kearneys were still operating the club under the lease from the Platzes at the time of the fires in question.

We now discuss the legal principles applicable to the facts of this case. It appears that the question of what effect the actions of an officer or shareholder of a corporation in intentionally destroying corporate property has upon the right of the corporation to recover on a policy of fire insurance is one of first impression in this state. In its brief on appeal, the defendant contends that the intentional destruction of corporate property by a stockholder or officer does not preclude the remaining stockholders from collecting fire insurance, and that before a corporate insured can be precluded from recovering un-

der an insurance policy, it must be shown that the stockholder made the corporate entity a mere instrumentality for the transaction of the stockholder's own affairs.

Also strongly involved in the disposition of this case is the question of public policy in allowing a person to profit by his own wrong. It is undoubtedly the general rule that the willful burning of property by a stockholder of a corporation is not a defense against the collection of insurance by the corporation; nor can a corporation be prevented from collecting insurance because its agents willfully set fire to the property without the participation or authority of the corporation or of all the stockholders of the corporation. 44 Am. Jur. 2d *Insurance* § 1366 (1969). However, it is also stated in the above section at 211: "Likewise, under the salutary principle of law that no one should be allowed to profit by his own wrong, it has been held in several cases that an insured corporation will not be allowed a recovery on fire insurance policies where the incendiarist owns all or practically all of the stock in the insured corporation, *or is in exclusive management of the corporate property.*" (Emphasis supplied.) "It is axiomatic that fraudulent losses are necessarily excepted from a fire policy upon the moral principle that no man can be permitted in a court of justice to allege his own turpitude as a ground of recovery in a suit." *Miller & Dobrin, etc., Co. v. Camden Fire, etc., Assn.*, 55 N.J. Super. 205, 150 A.2d 276 (1959). In that case the court held that the corporation was barred from recovery where the incendiary was a 50 percent shareholder, the secretary-treasurer, a director, and who exercised the dominant control of the management of the corporation. The court further held that although the business was being conducted under the guise of being a corporation, it was in fact a partnership, and applied the rule applicable to partnerships.

In 5 Appleman, Insurance Law and Practice § 3113 at 387-88 (1970), that author states the rule to be as follows: "Of course, the insured's wilful burning of the property would be an absolute defense to an action upon the policy. This is true even though the policy contains no express provision so providing, as permitting the insured to profit by his own criminal act would violate public policy." Likewise, in *Kimball Ice Co. v. Hartford Fire Ins. Co.,* 18 F.2d 563 (4th Cir. 1927), the court held that a corporation cannot recover on a fire insurance policy covering property willfully burned by its general manager who was also owner of one-fourth of the corporation's stock and a large creditor of the corporation. In its opinion at 566-67, the court quoted from the opinion in *Ritter v. Mutual Life Insurance Co.,* 169 U.S. 139, 18 S. Ct. 300, 42 L. Ed. 693 (1898), as follows: " 'In all contracts of insurance, there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud or the criminal misconduct of the assured is, in contracts of marine or of fire insurance, an implied exception to the liability of the insurer.' " In *Kimball,* the court went on to observe at 567: "If recovery could be had in the present instance, all that would be necessary would be to turn over the property of a corporation to the exclusive management and control of a single person, who could procure insurance fraudulently and effect the willful burning of the insured premises, and assert a mere claim of innocence on the part of those interested in the company, who would thereby secure the benefit of the direct fraud."

The authorities on the issues presented in this case are collected and analyzed in an annotation appearing in 37 A.L.R.3d 1385 (1971), entitled, "Fire Insur-

ance On Corporate Property As Affected By Its Intentional Destruction By A Corporate Officer, Employee, Or Stockholder." At 1387, the editor of that annotation states the rule to be as follows: "As a general rule, it may be said that an arsonist's status as a corporate officer, employee, or stockholder per se, will not necessarily prevent a recovery by the corporation upon the policy, such rule having found expression in several cases within the scope of the annotation, and that *an analysis must be made in each case to determine if the arsonist stands to recover directly or indirectly upon the policy.*" (Emphasis supplied.) In 5 Appleman, Insurance Law and Practice, *supra,* that author concludes at 393-94: "The better rule would seem to be that the arsonist's status as an officer, stockholder, employee or agent of an insured corporation does not necessarily preclude the corporation from recovering on the policy; rather an analysis must be made in each case to see if the arsonist will benefit by recovery on fire policy, either directly or indirectly."

The present status of the law in this country on the issues under discussion is contained in the much-quoted case of *Erlin-Lawler Enterprises, Inc. v. Fire Ins. Exch.,* 267 Cal. App. 2d 381, 385-86, 73 Cal. Rptr. 182, 185-86 (1968): " 'When . . . the beneficial owner of practically all of the stock in a corporation, and who has the absolute management and control of its affairs and property, . . . sets fire to the property of a corporation, or causes it to be done, there is no sound reason to support the contention . . . that the corporation should be allowed to recover on a policy for the destruction of the corporate property by a fire so occasioned.' (*Felsenthal Co.* v. *Northern Assur. Co.* (1918) 284 Ill. 343 [120 N.E. 268, 1 A.L.R. 602, 607].)

"If an officer or stockholder has absolute control in the conduct of the business of a corporation, his acts if he acts on behalf of the corporation become

the acts of the corporation barring it from recovery even though he is not the dominant shareholder. (*Northern Assur. Co.* v. *Rachlin Clothes Shop* (1924) 32 Del. 406 [125 A. 184, 187-188, 190].) Where the fire is set by a manager owning only one-fourth of the stock, but having complete control and management of the corporation, the latter may not recover. (*Kimball Ice Co.* v. *Hartford Fire Ins. Co.* (4th Cir. 1927) 18 F.2d 563, 564, 565-566 [52 A.L.R. 799].) Where the minority shareholder is the president and a secured creditor of the corporation, but his part in the corporate management is limited to participation and not control, it has been held that his act of incendiarism does not bar the corporation from recovering if the judgment provides that only other bona fide creditors and innocent stockholders are to share in the proceeds of the insurance. (*Fidelity-Phenix Fire Ins. Co.* v. *Queen City Bus & Transfer Co.* (4th Cir. 1925) 3 F.2d 784, 785.) A Georgia court has even barred corporate recovery if the innocent stockholders will not actually realize any benefit because of the insolvent state of the corporation. (*Sandersville Oil Mill Co.* v. *Globe & Rutgers Fire Ins. Co.* (1924) 32 Ga. App. 722 [124 S.E. 728].) While we are not prepared to go to this extreme limit, if payment to creditors lightens the personal liability of the individual wrongdoers, then the benefit accruing to them would become apparent.

"In *Miller & Dobrin Furniture Co.* v. *Camden Fire Ins. Co. Assn.* (1959) *supra,* 55 N.J. Super. 205 [150 A.2d 276, 284], the court held the corporation barred from recovery where the incendiary was a 50 percent shareholder, the secretary-treasurer, a director, and who exercised the dominant control of the management of the corporation. The court further held that although the business was being conducted under the guise of being a corporation, it was in fact a partnership, and applied the rule applicable to partnerships."

Numerous other authorities might be cited in connection with the above legal issues, but we are of the opinion that those cited above adequately present the general thinking of the courts on the problem in question. The facts of this case have been previously set forth in this opinion in some detail and will not be repeated again. Suffice it to say that the action of the trial court in denying recovery to the defendant corporation on the fire policy is not only supported by public policy but also on the basis of the facts in the case showing that the instigation of the arson of the property was the act of its president, Gustav Platz, who was also one of the two sole directors of the corporation and an equal stockholder therein, and without question the dominant force in running the corporation at and prior to the time of the burning of the property. As previously demonstrated, both he and his ex-wife, Nancy, stood to gain financially from the payment of the insurance proceeds by Continental had such payment been made.

We conclude, therefore, that the record in this case presents ample evidence supporting the judgment of the trial court. Ultimately, the proposition as to whether Gustav Platz may be considered the "alter ego" of the defendant corporation is a question of fact. It should be remembered that prior to becoming a Subchapter S corporation, Gustav and Nancy ran the business as a partnership. We conclude that the corporate veil in this case should be pierced and that the business be considered as it formerly was, to wit, a partnership, and that the rule with regard to partnerships be applied as stated in *Erlin-Lawler, supra* at 386, 73 Cal. Rptr. at 186: "The rule as to partnerships or joint ventures is that innocent partners and joint venturers are also barred from recovery where the arson is perpetrated by a partner or a joint venturer." Public policy also requires this result in the instant case.

In *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980), we held that in an action at law the findings of the trial court will not be disturbed on appeal unless clearly wrong. We are not able to state that the trial court was clearly wrong under the facts in this case; and therefore the judgment of the District Court should be and hereby is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

CURTIS GRAFF, APPELLEE, V. FARMERS MUTUAL HOME INSURANCE COMPANY OF HOOPER, DODGE COUNTY, NEBRASKA, APPELLANT.

317 N.W.2d 741

Filed March 26, 1982. No. 43920.

1. **Insurance: Damages.** Whether a wind is of sufficient force to be within the meaning of a policy insuring against damage caused by wind must in each instance be a question of fact.
2. **Appeal and Error.** In determining whether the findings of the District Court are supported by the evidence, the Supreme Court must consider the evidence and all permissible inferences therefrom in a light most favorable to the successful party.
3. **Judgments: Appeal and Error.** Where a jury has been waived and the case tried to the court, the judgment of the trial court has the effect of a verdict of a jury and will not be disturbed unless clearly wrong.
4. **Insurance: Liability.** If a windstorm was the efficient cause of the loss covered by a policy insuring against "loss by windstorm," the fact that other causes may have contributed to that loss does not relieve the insurer from liability.
5. **Insurance: Damages.** The loss for which recovery is sought under a tornado, cyclone, or windstorm policy seldom results from a single isolated cause, but rather from a combination of causes, such as wind and water, or wind and snow, and the like. In the absence of a specific provision in the policy to the contrary, it is generally sufficient, in order to recover upon a cyclone, tornado, or windstorm policy, to show that the cause designated therein was the efficient cause of the loss, although other causes contributed thereto. Where an object, damage from which is not expressly

excluded from coverage of the policy, is blown by the force of a windstorm against the insured property, causing damage thereto, the loss is within the policy coverage, since the wind-driven object is merely the passive agent of the damage, and the windstorm by its propulsive force is the controlling causal agent directly responsible for the loss.

6. **Attorney Fees.** Where allowed, the amount of an allowance for attorney fees generally rests in the sound discretion of the court.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Affirmed.

George E. Svoboda, P.C., of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellant.

Moodie & Moodie, for appellee.

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

KRIVOSHA, C.J.

The appellant, Farmers Mutual Home Insurance Company of Hooper, Dodge County, Nebraska (Farmers Mutual), appeals from a judgment in the amount of $6,390.79, together with interest and costs, entered by the District Court for Cuming County, Nebraska, in favor of the insured, Curtis Graff (Graff), and against Farmers Mutual. We affirm.

Farmers Mutual issued its policy No. 36263 to Graff for a term of 3 years from the 15th day of December 1978 to the 15th day of December 1981. This policy was apparently a replacement policy for an earlier identical policy issued by Farmers Mutual to Graff. The policy specifically provided that Farmers Mutual insured Graff "against loss or damage by fire, lightning, *wind*, tornado, supplemental . . . ." (Emphasis supplied.) There are no exceptions in the policy which are relevant to this case.

During the fall of 1974 Graff constructed a new hog house on his farm near Bancroft, Nebraska. Before construction was completed, an agent for Farmers Mutual personally inspected the building, observing the structural design as well as its size and location.

Following the inspection, the hog house was added to the policy of insurance which was then in existence and which preceded policy No. 36263.

The record further discloses that early in March 1979 a blizzard occurred in the area of the Graff farm. Rain started falling on March 2, 1979. The rain turned into snow accompanied by high winds and extended through March 3 and Sunday, March 4. On Sunday morning, March 4, Graff worked until 1 p.m. taking care of the chores. About 3 o'clock on Sunday afternoon, March 4, Graff left his house to check on the livestock. He testified that he had great difficulty walking north into the wind toward the hog house which was only 100 feet away but which was not visible because of blowing snow. As he approached the hog house, he could see a huge drift of snow on top of the hog house. The drift appeared to be some 12 or 14 feet high. He entered the hog house through its walk-in door and heard creaking and could see the building curve off to the south. He went to another building to get 6- x 8-inch timbers to prop against the south side of the hog house.

However, before he could return with the supports, the hog house failed, falling to the south. Graff testified that in his opinion the wind velocity during the storm was up to 80 miles per hour. Graff's wife further testified that in her opinion the wind velocities were between 70 and 80 miles per hour. Graff made claim for the damages under his policy with Farmers Mutual. Farmers Mutual denied coverage, maintaining that the evidence was insufficient to establish that the damages to the hog house were caused by a windstorm within the meaning of the policy.

The parties waived a trial to a jury and the case was tried to the court. Following conclusion of all the evidence, the trial court entered judgment in favor of Graff and against Farmers Mutual. In a letter to the attorneys for the parties, the trial court

advised them: "In my opinion, the insurance company accepted the risk of the structure when the policy was issued, in that the uncontradicted evidence is that an agent for the company came to the farmsted [sic], looked the structure over and after so doing, issued the policy of insurance. . . .

"The more difficult issue is whether or not the loss was one occasioned by wind storm or from some other cause. Again, the uncontraverted [sic] evidence is that a violent storm took place on the day of the loss and that as a result of that storm, this loss occurred. I am not unmindful of the weather reports from Sioux City and Norfolk that were offered and received into evidence, but I do feel that the more probative evidence came from the mouths of the witnesses who were on the spot at the time the storm hit."

Farmers Mutual's principal contention seems to be that absent evidence of a wind of "unusual violence or tumultuous force," there is no coverage under the policy. *Sherman v. Travelers Ind. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975). Apparently, Farmers Mutual's position is to the effect that nothing less than a tornado-like wind may be sufficient to constitute a wind of "unusual violence or tumultuous force."

Our decision in *Hoagland & Co. v. Insurance Co.*, 131 Neb. 105, 267 N.W. 239 (1936), is most helpful in addressing the question of what is a windstorm within the meaning of an insurance policy of this type. In *Hoagland* we held that a wind blowing at 30 miles per hour was sufficient to constitute a windstorm as the term is used in a policy of insurance. In particular, we said at 110, 267 N.W. at 241-42: "In some of the cases it has been said that to constitute a windstorm the wind must assume the aspects of a storm; that is, an outburst of tumultuous force. Webster defines a windstorm as a storm characterized by high wind, with little or no precipitation.

"It must be conceded that none of these definitions affords an exact yardstick by which to determine when a wind becomes a windstorm. It is apparent that only a very general definition of the term can be given. It must be a wind of unusual violence or tumultuous force, and whether it attains that proportion is a question of fact.

"Defendant contends that, since it is not shown that any other buildings in the vicinity were blown down or damaged by the wind, it tends to negative the thought that it was a windstorm and that plaintiff's building was demolished thereby. We think it is a matter of common knowledge that in this part of the country a wind may attain the proportions of a windstorm and blow with great violence for a few seconds; may lift and only cover a small space. It is a matter of common knowledge that one of a group of farm buildings may be destroyed by a windstorm, while other buildings, in close proximity, are uninjured. Likewise, in orchards and groups of shade trees, one or more trees may be broken and damaged by the wind, showing great violence, while trees in close proximity thereto may be uninjured. The freakish character of the wind and the way it shifts and rises in this particular part of the country are matters of common knowledge. Where the evidence as to whether a windstorm is of sufficient violence or so tumultuous as to constitute a windstorm is in conflict, the question is one for the determination of the jury."

Even in the *Sherman* case, relied upon by Farmers Mutual, we said at 105, 225 N.W.2d at 548: "We do not pass upon the question of whether a 22 mile per hour wind is evidence of an unusually violent or tumultuous character . . . ."

Cases may be found in other jurisdictions where winds as low as 15 to 28 miles per hour have been held to be "windstorms" under a property damage policy, as well as a windstorm of 62 miles per hour.

See, *Gerhard v. Travelers Fire Ins. Co.*, 246 Wis. 625, 18 N.W.2d 336 (1945); *Higginson v. Fireman's Fund Ins. Co.*, 186 Pa. Super. 650, 142 A.2d 737 (1958); *Humphrey v. Fidelity-Phenix Fire Insurance Company*, 135 So. 2d 81 (La. App. 1961).

We believe what was said in *Hoagland, supra,* to be the better approach to this problem. Whether a wind is of sufficient force to be within the meaning of a policy insuring against damage caused by wind must in each instance be a question of fact.

In the instant policy the language selected by Farmers Mutual was not "windstorm," as in *Hoagland* or even *Sherman,* but only "*wind.*" Whether the evidence was sufficient to establish that the damages were within the coverage of the policy was for the trier of facts. The trial court found in favor of Graff, and we may not ignore that finding absent clear error. We have frequently held that in determining whether the findings of the District Court are supported by the evidence, we must consider the evidence and all permissible inferences therefrom in a light most favorable to the successful party. See *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980). We have further held that where a jury has been waived and the case tried to the court, the judgment of the trial court has the effect of a verdict of a jury and will not be disturbed unless clearly wrong. *Tibbs v. Fisher,* 208 Neb. 306, 303 N.W.2d 293 (1981); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981).

Farmer's Mutual urges us to ignore the evidence offered by Graff and apparently relied upon by the trial court. For reasons already noted, we know of no principle of law which would permit us to do so. We therefore find that the trial court's conclusion that the wind in the instant case was of sufficient force to bring it within the terms of the policy is supported by the evidence and should not be disturbed.

Farmers Mutual further argues that even if the

court should find that the particular wind was of unusual violence or tumultuous force, the evidence does not clearly establish that the building was blown down by the wind or that the damage to the building was caused by the wind. Farmers Mutual argues that the building more likely collapsed from the weight of the snow on a portion of the building's roof and not from the action of the wind. Even if that were the case, under the evidence herein and the policy involved, judgment would still be for the plaintiff. Unlike policies which require loss or damage resulting from "direct loss by windstorm," the instant policy merely insured against loss or damage "by wind." The case of *Lydick v. Insurance Co. of North America,* 187 Neb. 97, 187 N.W.2d 602 (1971), is an example of a case where the policy required "*direct*" loss rather than merely loss. The policy in *Lydick* specifically provided: " '[T]his Policy is Extended to Insure against *Direct* loss by Windstorm, Hail, Explosion, * * *.' " *Id.* at 99, 187 N.W.2d at 604.

In denying recovery for the insured in *Lydick*, this court specifically found that the loss was not the direct result of windstorm. We said at 99, 187 N.W.2d at 604: "The evidence demonstrates that the loss of these cattle was due to a combination of different factors and that the wind was merely one of the prior conditions contributing to the loss.

"The policy insures against *direct* loss only." (Emphasis in original.)

We believe that the distinction is significant and controlling in this case. The uncontradicted evidence in the instant case was that the building collapsed *either* as a direct result of the wind blowing against the building or by reason of the wind blowing the snow upon the building, causing its collapse, or a combination of the two. In any event, however, it is clear from the evidence that the loss was occasioned by the wind. The policy in question was prepared

by Farmers Mutual and did not require that the loss be *directly* caused by a windstorm, but only caused by a wind. There appears to be no serious question but that the huge mound of snow located on the hog building was blown there by the wind and did not just fall from the sky upon the roof.

While deciding the case on other grounds, we acknowledged in *Parish v. County Fire Ins. Co.*, 134 Neb. 563, 279 N.W. 170 (1938), that if a windstorm was the efficient cause of the loss covered by a policy insuring against "loss by windstorm," the fact that other causes may have contributed to that loss does not relieve the insurer from liability.

In 44 Am. Jur. 2d *Insurance* § 1392 at 235 (1969), the author notes: "The loss for which recovery is sought under a tornado, cyclone, or windstorm policy seldom results from a single isolated cause, but rather from a combination of causes, such as wind and water, or wind and snow, and the like. In the absence of a specific provision in the policy to the contrary, it is generally sufficient, in order to recover upon a cyclone, tornado, or windstorm policy, to show that the cause designated therein was the efficient cause of the loss, although other causes contributed thereto. Where an object, damage from which is not expressly excluded from coverage of the policy, is blown by the force of a windstorm against the insured property, causing damage thereto, the loss is within the policy coverage, since the wind-driven object is merely the passive agent of the damage, and the windstorm by its propulsive force is the controlling causal agent directly responsible for the loss." See, also, Annot., 93 A.L.R.2d 145 at 156 (1964).

We are unable to say that the trial court's findings in this case were clearly wrong. That being the situation, it cannot be disturbed.

Farmers Mutual further objects to the amount of the attorney fee ordered by the trial court to be paid

Graff by Farmers Mutual. Counsel for Graff submitted an affidavit in support of his claim for fees which establishes that counsel devoted 81 hours in the preparation and trial of the case. The trial court allowed a fee based upon the 81 hours multiplied by a reasonable per hour rate. In *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968), we held that, where allowed, the amount of an allowance for attorney fees generally rests in the sound discretion of the court. We cannot say that under the circumstances the trial court abused its discretion.

The amount of the fee appears large as compared to the amount of the claim involved. That is not, however, Graff's fault. The affidavit does not indicate the performance of any unnecessary work for which Graff's counsel should not be paid. That a relatively minor claim may produce a large fee is simply one of the factors the parties have to consider in determining whether to litigate a claim or attempt to settle it.

The judgment of the trial court is in all respects affirmed. An additional fee of $1,000 is awarded Graff as part of the costs in this court.

AFFIRMED.

SAFECO INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE, V. HUSKER AVIATION, INC., A CORPORATION, AND MARY ANN KINNEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAX W. KINNEY, DECEASED, APPELLANTS.

317 N.W.2d 745

Filed March 26, 1982. No. 44013.

1. **Insurance: Contracts.** Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of

money on the happening of a specified contingency. It is true, however, that an insurance contract will be construed against the insurance company when the contract or policy is indefinite or ambiguous because it drafted the contract or policy and is responsible for any indefiniteness or ambiguity therein. But where the contract is plain and unambiguous in its meaning, the contract will be enforced according to its terms.

2. _____: _____. The parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

John R. Timmermier and Michael A. Nelsen of Schmid, Ford, Mooney & Frederick, for appellant Kinney.

Frank Matthews of Matthews & Cannon, P.C., for appellant Husker.

C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

KRIVOSHA, C.J.

This is a declaratory judgment action brought by Safeco Insurance Company of America (Safeco) to determine the rights of the parties under two policies issued by it to Husker Aviation, Inc. (Husker), as its insured. The appellant Mary Ann Kinney (Kinney), as personal representative of the estate of Max W. Kinney, deceased, was joined as a necessary party defendant. Both Safeco and Kinney filed motions for summary judgment, and after a hearing in which evidence was adduced the trial court sustained the motion of Safeco for summary judgment

and entered a declaratory judgment determining that neither of Safeco's policies afforded liability coverage for the tort action by Kinney against Husker, or obligated Safeco to defend such action. We affirm.

On June 4, 1978, Dr. Max W. Kinney was piloting an aircraft provided to him by Husker. The plane crashed and Dr. Kinney was killed. At the time of the crash, Safeco had issued to Husker two insurance policies. One policy was an aircraft hull and liability policy and the other policy was an airport fixed base operator's liability policy.

On July 17, 1979, Kinney, as personal representative for her deceased husband, filed suit for damages against Husker. Basically, her petition alleged that the decedent was involved in an accident which resulted in his death due to certain acts of negligence on the part of Husker. Essentially, Kinney contends that Husker performed certain acts of negligence with respect to the operation of its pilot training school which were the proximate cause of decedent's accident and resulting death. Under the provisions of the aircraft hull and liability policy, only the aircraft described in the declaration of the policy was covered by the policy. The aircraft being operated by Dr. Kinney was a Piper leased from a company called Alpha Flying Service, Inc. The lease agreement makes it clear that Husker was to obtain the insurance coverage for the Piper and simply failed through inadvertence to do so. All of the parties concede that the aircraft being operated by the decedent at the time of the crash was not described in the policy and that the policy did not afford any coverage for the accident.

While Husker and Kinney concede that the aircraft hull and liability policy does not afford a right of defense or coverage due to the fact that Husker failed to list the Piper as one of the aircrafts covered by the policy, they maintain that there is coverage

under the airport fixed base operator's liability policy because the policy, by inference, provides coverage for the operation of a pilot training school. Whether that is the case or not need not be decided here. The airport fixed base operator's policy issued by Safeco specifically contained an exclusion which read in part: "This insurance *does not apply*: . . . (b) to bodily injury or property damage arising out of the ownership, maintenance, *operation, use,* loading or unloading of (1) any automobile or *aircraft* owned or operated by or rented or loaned to any insured . . . ." (Emphasis supplied.) The language of the policy is clear and unambiguous. It specifically provides, as noted, that there is no coverage for bodily injury arising out of the operation or use of an aircraft rented to the insured.

Husker and Kinney seek to avoid the exclusion of the policy by maintaining that the injury in the instant case did not arise out of the operation of an aircraft but, rather, by reason of Husker's negligence in training the decedent and permitting him to fly the aircraft at a time when he was not qualified to do so. While the argument is ingenious, it cannot overcome simple facts of the matter. Regardless of what may have been a contributing cause of the decedent's death, it is clear beyond question that the bodily injury resulting in his death was directly related to the operation of an aircraft leased to Husker. Whatever else may have been a cause of the decedent's ultimate death, it is clear from the record here that if he had not been operating the aircraft at the time it crashed, he would not have been killed. That is specifically what the policy excluded.

Our obligation in interpreting an insurance policy is clear. In *Adolf v. Union Nat. Life Ins. Co.,* 170 Neb. 38, 44, 101 N.W.2d 504, 508-09 (1960), we said: "Under the law of this state the acquiring of insurance has always been a matter of contract. Insurance is a contract by which one party assumes speci-

fied risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency. It is true, however, that an insurance contract will be construed against the insurance company when the contract or policy is indefinite or ambiguous because it drafted the contract or policy and is responsible for any indefiniteness or ambiguity therein. But where the contract is plain and unambiguous in its meaning the contract will be enforced according to its terms. Unless this be the law, the attaching of liability on an insurance company, contrary to the plain meaning of the contract, would be nothing less than a rewriting of the liability provisions of the contract. It appears to us that it would be a dangerous innovation of contract law to hold that one is not bound by what he signs, and that that which he fails to read or understand should be read out of the contract."

And in *Koehn v. Union Fire Ins. Co.*, 152 Neb. 254, 260-61, 40 N.W.2d 874, 878 (1950), we said: "An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted. There is, however, a difference between a favorable construction and a favorable finding for the insured. The former does not mean imposing upon the insurer a gratuitous obligation not justified by the usual meaning of the words employed. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a

new contract is not interpolated by construction. Construction ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured. The policy should be given meaning and effect according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense."

Husker and Kinney ask us to ignore the plain language of the policy which excludes injury caused by the operation of an aircraft. We cannot do that.

In *Stone v. Physicians Casualty Ass'n,* 130 Neb. 769, 773, 266 N.W. 605, 607 (1936), we noted: " 'It does not follow, however, that the terms of an insurance policy may be distorted from their natural meaning, or that the agreed liability of the insurer should be enlarged into one which only a new contract could have imposed, nor, indeed, that a court should indulge in scholastic subtleties to extend the rights of the insured.' "

And in *Lonsdale v. Union Ins. Co.,* 167 Neb. 56, 58-59, 91 N.W.2d 245, 248 (1958), we said: " '* * * the parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.' "

We are not permitted to create an ambiguity simply to afford coverage where a clear reading of the policy would otherwise deny coverage.

In *Sampson v. State Farm Mut. Ins. Co.,* 205 Neb. 164, 167, 286 N.W.2d 746, 748-49 (1980), we recently said: "The language of the policy is not ambiguous in any respect, nor was the language of the offer to reinstate. This court has held that contracts of

insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract. Cordes v. Prudential Ins. Co., 181 Neb. 794, 150 N.W.2d 905."

And in *Hartford Acc. & Ind. Co. v. Olson Bros., Inc.*, 187 Neb. 179, 187, 188 N.W.2d 699, 704 (1971), we stated: "We are not unmindful of the principles that ambiguities must be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not then the construction which affords coverage must be adopted. There is no ambiguity in the policy. *Complexity is not the same as ambiguity.*" (Emphasis supplied.) In the instant case we conclude that while there is, undoubtedly, complexity involved in the policy provisions, there is no ambiguity. An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.

Obviously, nothing we say here in any way affects Kinney's right to sue Husker for whatever negligence Kinney may prove, and, indeed, if the decedent's inability to properly operate the aircraft was due to Husker's negligence in training and permitting the decedent to operate the aircraft, it may be liable. We do not pass on that question. The only question we pass upon is the only question raised by this case. Must Safeco defend Husker against the suit brought by Kinney, and if Husker is liable to

Kinney, must Safeco pay the damages? That must be answered in the negative due to the language of the policy excluding such coverage.

A case almost exactly on point is the case of *Littrall v. Indemnity Insurance Co. of North America,* 300 F.2d 340 (7th Cir. 1962). The *Littrall* case involved an accident similar to the case involved herein and concerned a policy with similar coverage. In finding that the coverage did not apply, the court said at 344: "The next question is whether the Airport Liability Policy requires the Insurer to pay the Garnishor's judgment. Here again the policy without ambiguity specifically states:

" 'This policy does not apply: * * * to bodily injury * * * caused by or arising out of * * * use of any aircraft owned by * * the insured or any aircraft in flight by or for the account of the insured.' . . .

"Garnishor contends that since the accident was caused by Insured negligently directing Schindler to take off, the use of the plane was not the cause of the accident and the exclusion clause was evaded. This might be true without the words *arising out of* the use of any aircraft owned by the Insured. It must be admitted that 'arising out of' is a very broad phrase. Cf. Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W.2d 181, 154 A.L.R. 1088. Although such negligence of the Insured proximately caused the crash and the injuries of the Garnishor it cannot be denied that the accident and injuries arose out of the use of the aircraft. Such construction as urged by the Garnishor is unreasonable and cannot be accepted under the wording of this policy. Cf. Underwriters at Lloyd's of London v. Cordova Airlines, 9 Cir., 1960, 283 F.2d 659; Bruce v. Lumbermen's Casualty Co., 4 Cir., 1955, 222 F.2d 642."

The trial court was correct in its interpretation of the fixed base policy and the judgment is affirmed.

AFFIRMED.

CAPORALE, J., disqualified.

STATE OF NEBRASKA, APPELLEE, V. GARY M. BREHMER, APPELLANT.

317 N.W.2d 885

Filed March 26, 1982. No. 44023.

1. **Criminal Law: Indictments and Informations: Joinder of Actions.** Defendants charged in separate informations may be joined for trial if they could have been joined in a single information or complaint.
2. **Criminal Law: Joinder of Actions.** Joinder is permissible if the defendants are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.
3. _____: _____. Two charges arise out of the same act or transaction if they are so closely linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge.
4. _____: _____. Joinder may be permitted only where the facts of each charge can be explained adequately only by drawing upon the facts of the other charge.
5. _____: _____. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard.
6. **Criminal Law: Appeal and Error.** It is not harmless error to violate a fundamental procedural rule designed to prevent mass trials.
7. **Criminal Law: Joinder of Actions.** A trial court may not consolidate defendants' cases for trial if joinder of those same defendants is not allowed by Neb. Rev. Stat. § 29-2002(2) (Reissue 1979).
8. _____: _____. In those cases where multiple defendants are joined for trial in a manner inconsistent with Neb. Rev. Stat. § 29-2002 (Reissue 1979), such misjoinder is prejudicial per se and severance is not a matter of discretion but is a matter of right.
9. **Witnesses: Evidence.** Proof of contradictory statements of a witness may be received in evidence for the purpose of aiding the jury in estimating the credibility of the witness, but unless made as an admission by a party to the record, such statements may not be utilized as substantive evidence of the facts declared.
10. **Witnesses: Impeachment.** However, a party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.
11. **Witnesses: Prior Inconsistent Statements: Impeachment.** The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of

placing before the jury substantive evidence which is not otherwise admissible.

12. _____: _____: _____. A mere refusal to testify or testimony negative in nature indicating a lack of testimonial information does not present the grounds for impeaching the witness that affirmative testimony in favor of the opposite party gives for inquiry concerning prior statements contradictory of the testimony under oath at the trial.

13. _____: _____: _____. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made.

14. **Judges: Witnesses.** The right of a judge, under Neb. Rev. Stat. § 27-614(2) (Reissue 1979), to interrogate a witness should be very sparingly exercised, and generally counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause.

15. **Criminal Law: Appeal and Error.** The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantive legal right.

Appeal from the District Court for Sheridan County: PAUL J. EMPSON, Judge. Reversed and remanded for a new trial.

Charles A. Fisher, David E. Veath, and Lynn B. Lamberty, for appellant.

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

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

HASTINGS, J.

The defendant, Gary M. Brehmer, was convicted by a jury of the January 10, 1980, violation of Neb. Rev. Stat. § 28-517 (Reissue 1979), namely, the receiving, retaining, or disposing of stolen movable property of another, knowing or believing that it had been stolen, to wit, a 1979 Ford pickup truck valued in excess of $1,000. He was sentenced to a term of

probation of 3 years, which included imprisonment in the Sheridan County jail for a period of 30 days. On appeal, he has assigned as errors: (1) The improper joinder for trial with a codefendant charged in a separate information with the same offense as well as with an additional count; (2) The admission of certain hearsay evidence under the guise of impeachment; (3) The interrogation of a witness by the trial judge; (4) The overruling of his plea in abatement; (5) The giving of certain instructions; and (6) The insufficiency of the evidence to sustain the jury's verdict. We reverse and remand for a new trial.

Donald Schwarting, a partner of the defendant's in the ownership and operation of Pioneer Mobil station in White Clay, Nebraska, was charged in a separate information with the same crime as that alleged against the defendant, plus a second count of receiving, retaining, or disposing of a stolen 1976 Ford pickup truck, also on January 10, 1980. On motion of the county attorney, the two cases were joined for trial over the objections of both the defendant and Schwarting. Some 3 weeks before trial, motions to sever were argued and overruled.

The evidence adduced would support the following findings: On January 10, 1980, law enforcement officers were contacted by a Jack Jones, a former employee at the Pioneer Mobil station, which led the sheriff and a State Patrol investigator to walk by Schwarting's body shop in Rushville, Nebraska, to look for a stolen pickup truck. A green 1979 Ford pickup truck, matching the description of one stolen from Gordon, Nebraska, was observed inside the shop. On January 11, 1980, after obtaining permission and assistance from Schwarting, the officers entered the shop and identified the truck which had been reported stolen. A 1976 black Ford pickup truck was also observed inside the shop. Examination of the 1979 pickup revealed that the plate con-

taining the so-called public vehicle identification number, referred to as a VIN, was missing from the doorpost where it should be found. Therefore, it was necessary to secure this number from the frame where the same number was stamped. Use of this number allowed the officers to positively determine that the pickup was stolen. An examination of the black 1976 Ford truck disclosed that the public VIN plate on the doorjamb did not correspond with the number stamped on the frame. Further investigation disclosed that this truck had been reported stolen from a South Dakota dealership and that the identification number located on the doorjamb, as well as the license plates attached to the truck, had belonged to a wrecked 1976 red Ford pickup that had been purchased by Schwarting from an Ed Holderness.

According to the testimony of the officers, Schwarting told them that on December 29, 1979, he had been asked by a man by the name of Al to pick up this 1979 truck at a location near the moccasin factory in Pine Ridge, South Dakota, and haul it to Schwarting's body shop to do some work on it. The officers then stated that Schwarting had said that he had picked up the truck on either December 30 or 31, 1979, and that he was alone when he accomplished this. Schwarting, it is claimed, finally admitted that he thought the vehicle might have been stolen, but that he never raised any questions in that regard.

These same officers, Sheriff Talbot and Patrol Investigator Streeter, on January 11, 1980, then talked to the defendant Brehmer, after reading the *Miranda* rights and warnings to him. They said that Brehmer told him that, at Schwarting's request, he went with him to some place out in the country north of Pine Ridge and picked up this green truck which was sitting on its hubs on the ground out in some trees. He helped Schwarting load the truck onto a trailer which was returned to White Clay and parked

behind the filling station. At trial, Brehmer testified that he never saw the green truck again. He also testified that this all happened on December 30, 1979.

The only direct evidence as to when and how Schwarting came into possession of the 1976 black pickup truck was provided by Schwarting himself. According to Investigator Streeter, Schwarting told him during the investigation that the truck belonged to Ed Holderness and that he was to repair the rear seals for him. However, Ed Holderness testified that it was the wrecked 1976 red Ford pickup which he in fact had owned and had sold to Schwarting. This was the truck mentioned earlier in the opinion which had carried the doorjamb serial number and license plates which were later found to be attached to the stolen black pickup. During the course of the trial, Schwarting, apparently giving a different version of the facts, testified that it was this same man, called Al, who had asked him, Schwarting, to take some dents out of the black truck, paint the top, and repair some leaky rear wheel seals. Also, as revealed by his testimony, this truck was left with him, Schwarting, shortly before Thanksgiving of 1979, and he had retained it in his possession since that time, but had not as yet completed the work on it.

Jack Jones, the former Pioneer Mobil station employee, testified that Schwarting had told him that the 1979 green pickup was a stolen vehicle. He also claimed that after the truck had been brought to White Clay he was in a conversation with both Schwarting and the defendant in which Jones was asked to store the truck in his barn, but he declined because he did not want to be involved with a stolen vehicle. He claimed that Brehmer then said that the truck could be stored in his garage because nobody would be looking for it out there. The only evidence that in any way linked Brehmer with the

stolen 1976 black pickup, other than the fact that he was a partner of Schwarting's in the White Clay operation, was testimony to the effect that on one or more occasions in this period of time Brehmer had been in Schwarting's body shop. No other admissible evidence of a connection between the vehicle or the offenses was adduced at trial.

As noted, defendant's first assignment of error raises the question of the propriety of joining the defendant and Schwarting for trial. We cannot agree with the State's contention that this assignment of error was not properly raised in the motion for a new trial. Paragraph 9 of that motion is as follows: "The Court erred in giving instructions to the Jury as to both defendants and commingling same, in the instruction given, after request by each defendant, to have the instruction as to him given separately and distinctly from the other defendant, the cases having been consoldiated [sic] for trial over the objection of defendant, and Schwarting. Severance having been refused to the defendant Brehmer."

The matter of consolidating criminal prosecutions for the purpose of trial is governed by Neb. Rev. Stat. § 29-2002 (Reissue 1979). Section 29-2002(3) allows the joinder of defendants for trial "if . . . the defendants . . . could have been joined in a single indictment, information or complaint." The joinder of defendants in an indictment or information is governed by § 29-2002(2), which allows joinder if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." This subsection goes on to note that all defendants need not be charged in each count of the indictment or information. Finally, once a case has been properly joined, a court may sever it for trial pursuant to § 29-2002(4), which provides: "If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment,

information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires."

In relation to these provisions it has been noted: "It is clear from the statute set out above that the matter of the propriety of a joint trial of criminal prosecutions involves basically two questions, that is, whether the *consolidation* was proper in that the defendants could have been joined in the same indictment, information, or complaint, and secondly, whether there was a right to *severance* because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial." (Emphasis in original.) *State v. Pope,* 192 Neb. 755, 765-66, 224 N.W.2d 521, 528 (1974).

This reasoning compels us to make the initial determination of whether Brehmer and the codefendant could have been joined in a single indictment or information in this instance pursuant to § 29-2002(2). Only in the event that such joinder was proper will it be necessary to determine whether the defendant was prejudiced by the joint trial and was thereby entitled to severance.

It is well settled that criminal actions "may be consolidated for trial if the offenses charged are based on the same act or transaction." *State v. Shiller,* 191 Neb. 291, 292, 214 N.W.2d 616, 617 (1974). See, *State v. Erving,* 180 Neb. 824, 146 N.W.2d 216 (1966); *State v. Pope, supra; State v. Saltzman,* 194 Neb. 525, 233 N.W.2d 914 (1975); *State v. Edwards,* 197 Neb. 354, 248 N.W.2d 775 (1977). However, in none of these instances have we had the opportunity to promulgate a definition of the phrase "same act or transaction" as that phrase has been used in various cases and joinder statutes of Nebraska.

The State would have us believe that joinder for trial is proper so long as the separate offenses charged are "substantially similar in time, and nature." Such a standard fails to meet the express language of the joinder statute which requires the allegation of the "*same* act or transaction." § 29-2002(2). As other courts have noted, this phrase "contemplates more than similar violations within a limited time period," *United States v. Stafford,* 382 F. Supp. 1401, 1403 (E.D. Pa. 1974), and "a mere showing that the events occurred at about the same time, or that the acts violated the same statutes, is not enough." *United States v. Satterfield,* 548 F.2d 1341, 1344 (9th Cir. 1977).

Numerous federal jurisdictions have been called upon to interpret the meaning of the phrase "same act or transaction" due to the inclusion of the phrase in the federal rules of joinder. While discussing an allegation of misjoinder of defendants under Rule 8(b) of the Federal Rules of Criminal Procedure, one court noted: "Where conduct upon which each of the counts is based is *part of a factually related transaction or series of events in which all defendants participated,* charges may be properly joined although various offenses were distinct and defendants were not charged on each count or guilty of the same offenses." (Emphasis supplied.) *United States v. Leach,* 429 F.2d 956, 960 (8th Cir. 1970). Another court noted: "Rule 8(b)'s 'goal of maximum trial convenience consistent with minimum prejudice' is best served by permitting initial joinder of charges against multiple defendants *whenever the common activity constitutes a substantial portion of the proof of the joined charges.*" (Emphasis supplied.) *United States v. Roselli,* 432 F.2d 879, 899 (9th Cir. 1970).

A test has also evolved in the Oregon courts, which have found that "the two charges arise out of the same act or transaction if they are so closely linked

in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge." *State v. Fitzgerald,* 267 Or. 266, 273, 516 P.2d 1280, 1284 (1973). This test was later construed to permit joinder "only where the facts of *each* charge can be explained adequately only by drawing upon the facts of the other charge." (Emphasis in original.) *State v. Boyd,* 271 Or. 558, 566, 533 P.2d 795, 799 (1975).

It is readily apparent that, under any of these tests to determine whether the offenses arose out of the "same act or transaction or in the same series of acts or transactions," the facts in the present case do not support joinder of the defendants for trial. Substantially the same facts need not be adduced in order to prove each of the offenses since the only common facts involving both pickups are the involvement of the codefendant and the fact that the pickups were found in the same building. Similarly, this is not an instance where both offenses are part of a factually related transaction or series of events in which all defendants participated, since the record contains no admissible proof that the defendant assisted in receiving the 1976 black pickup or that he assisted in placing or retaining either pickup in the codefendant's body shop. Furthermore, it cannot be said that the common activity constituted a substantial portion of the proof of the joined charges in light of the fact that the only common activity of which there is evidence is the drive from White Clay to Pine Ridge to obtain the 1979 green pickup. No common activity was proven regarding the receipt of the black pickup or the retention of either pickup. Finally, this is not a case where the facts of one charge can only be adequately explained by drawing on the facts of the other charge. The only substantive evidence that was admissible against the defendant involved the 1979 green pickup only, with no mention of the 1976 black pickup necessary.

Therefore, we conclude that receipt or retention of the 1976 pickup was not a part of the same act or transaction or series of acts or transactions. The charges could not have been joined in the same information and, consequently, the defendants could not be joined for trial.

The question remains, however, whether, without a showing that the defendant was prejudiced thereby, such misjoinder is merely harmless error. It is a longstanding rule of this court that it will not reverse a criminal conviction in the absence of prejudice to the defendant. *State v. Kirby,* 198 Neb. 646, 254 N.W.2d 424 (1977). However, "[t]he error here was no mere technicality. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. . . . It is not 'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials.' " *Ingram v. United States,* 272 F.2d 567, 570-71 (4th Cir. 1959). "If multiple defendants are misjoined, the trial court has no discretion, since misjoinder is prejudicial per se." *Haggard v. United States,* 369 F.2d 968, 973 (8th Cir. 1966). See, also, 1 Wright, Federal Practice and Procedure § 144 at 328-29 (1969).

We also note that § 29-2002(3) clearly and expressly provides that a "court *may* order two or more indictments, informations, or complaints . . . to be tried together if the offense, and the defendants . . . could have been joined in a single indictment . . . ." (Emphasis supplied.) The natural inference to be drawn from this language is that a court *may not* consolidate defendants for trial if joinder of defendants is not allowed by § 29-2002(2). Should this court adopt a rule requiring proof of prejudice in spite of misjoinder under the statute, it would give rise to the danger that it would become accepted practice to join defendants as a matter of course, placing the burden on the joined defendants to show they are en-

titled to severance due to prejudice. Such a practice is not within the clearly expressed restrictions on joinder and will not be encouraged by this court.

Therefore, we conclude that in cases where multiple defendants are joined for trial in a manner inconsistent with § 29-2002, such misjoinder is prejudicial per se and severance is not a matter of discretion but is a matter of right. In light of this conclusion we are compelled to reverse defendant's conviction and remand the matter for retrial.

The fact that we are reversing this conviction makes it appropriate to discuss those assignments of error that are likely to occur again on retrial. One such assignment of error challenges the manner in which the State impeached one of its own witnesses by the production of extrinsic evidence of a prior inconsistent statement made by the witness.

During its case in chief the State called one Joe Bolek, Jr., to the stand. Mr. Bolek admitted to having visited with defendant Brehmer in late December 1979 in the codefendant's Rushville body shop. Bolek also testified that he saw a wrecked brown pickup in the body shop at the time, and that when he asked Brehmer what was to be done with the wreck, the latter responded that it was to be sold for parts. Thereafter, the prosecutor proceeded to ask a series of questions concerning whether Bolek had spoken to Brehmer about switching vehicle identification numbers of another pickup with that of the wrecked pickup and whether he, Bolek, had observed Brehmer working on the wrecked pickup's identification number. Mr. Bolek responded negatively to each of these questions.

Following this exchange the prosecutor set out to impeach Mr. Bolek by asking him about a conversation he had allegedly had with the authorities investigating the matter on or about January 11, 1980. After Bolek admitted talking to the sheriff and State Patrol investigator on that date, the prosecutor

asked the following questions: "[D]id you tell them that the defendant, Mr. Brehmer, was working on the VIN when you were at the body shop? . . . Did you tell them that you did not want to get involved in the switching of the VIN or the vehicle identification numbers? . . . Did you tell [them] that you did not believe the defendant, Mr. Brehmer, was kidding when he said that they were going to use the serial number off of the wrecked truck on another truck?" Upon the court's overruling of defense counsel's objections to these questions, Mr. Bolek flatly denied ever having made such statements to the sheriff and investigator.

Immediately thereafter, the State called the sheriff and the investigator to the stand. After establishing that each was present during the conversation with Mr. Bolek, the prosecutor asked the sheriff the following questions: "[D]id Mr. Bolek tell you that in late December of 1979 he saw Gary Brehmer working on a VIN number or serial number in Don's Body Shop? . . . Did Mr. Bolek tell you that Mr. Brehmer had told him that they were going to junk out a wrecked pickup and use the VIN or serial number for another pickup truck? . . . Did Mr. Bolek tell you that he left the shop . . . because he did not want to be involved in the switching of VINs or serial numbers? . . . Did Mr. Bolek tell you that he did not believe that Brehmer was kidding when he said that he was going to use the serial number off the wrecked pickup truck on another pickup?" Questions similar to these were asked the investigator in a like manner. Once again, the court overruled defense counsel's objections to these questions, based on relevancy and hearsay, and the officers were allowed to reply that Mr. Bolek had indeed made such statements to them on January 11, 1980.

The court did not admonish the jury at the time of the questioning as to the limited use of the officers'

testimony. In fact, defense counsel did not request such an admonishment. The court did, however, instruct the jury at the close of the case that it had heard testimony concerning certain prior statements of witnesses that were inconsistent with their testimony at trial. The jury was cautioned that such evidence was to be used as an aid in determining the witnesses' credibility and was not evidence of the facts declared in the statements.

The defendant challenges this method of impeachment as an attempt to offer inadmissible hearsay evidence as substantive evidence under the guise of impeachment. We have frequently recognized the general proposition that proof of contradictory statements of a witness may be received in evidence for the purpose of aiding the jury in estimating the credibility of the witness, but unless made as an admission by a party to the record, such statements may not be utilized as substantive evidence of the facts declared. *State v. Payne,* 205 Neb. 522, 289 N.W.2d 173 (1980); *Texter v. State,* 170 Neb. 426, 102 N.W.2d 655 (1960). It has yet to be determined, however, whether this general rule is applicable under the peculiar set of circumstances presented by the case at bar.

These peculiar circumstances include the fact that Mr. Bolek was the State's own witness, called during the State's case in chief. Furthermore, it is quite obvious that the prosecutor was well aware of an unwillingness on Mr. Bolek's part to testify in the case. This prior knowledge is evidenced by the prosecutor's questioning of Bolek concerning an alleged inquiry Bolek had made to the sheriff regarding the punishment for refusing to testify. The prosecutor also pointed out the fact that Mr. Bolek had allegedly refused to talk to him about the case.

We are well aware of the fact that one need no longer be "surprised" by the testimony of one's own witness in order to be allowed to impeach that wit-

ness. This rule was abandoned in *State v. Fronning,* 186 Neb. 463, 183 N.W.2d 920 (1971), and this abandonment was codified in Neb. Rev. Stat. § 27-607 (Reissue 1979). However, the abandonment of the "surprise" element of impeaching one's own witness does not require that this court condone the manner of impeachment utilized in this instance.

We believe that from those portions of the interrogation of the witness Bolek, set out above, the prosecutor had no reason to believe that he would get other than negative answers from the witness. Although the substance of the extrajudicial statements alleged to have been made by the witness were important elements of the prosecution's case, nevertheless, there was no affirmative damage done to that case by answers given at trial. "He [the prosecutor] may not claim affirmative damage from Mrs. Brisson's mere failure to testify favorably as he had hoped. *Absent affirmative damage,* impeachment was improper. A party 'is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of [a] witness, by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.' " (Emphasis supplied.) *Bushaw v. United States,* 353 F.2d 477, 481 (9th Cir. 1965). To the same effect is *United States v. Cunningham,* 446 F.2d 194, 197 (2d Cir. 1971), wherein the court said: " '[t]he maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised,' and 'where the witness gives no testimony injurious to the party calling him, but only fails to render the assistance which was expected by professing to be without knowledge on the subject, there is no reason or basis for impeachment. * * *' " The most recent federal case on this point seems to be *United States v. Miller,* 664 F.2d 94 (5th Cir. 1981). Noting that Rule 607 of the Federal Rules of Evi-

dence permits the government to impeach its own witness by prior inconsistent statement, the court nevertheless said that it "may not use such a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible." (Emphasis in original.) *Id.* at 97. Finally, in *State v. Adams,* 355 Mo. 1186, 1195, 200 S.W.2d 75, 79 (1947), that court said: "A mere refusal to testify or testimony negative in nature indicating a lack of testimonial information does not present the grounds for impeaching the witness that affirmative testimony in favor of the opposite party gives for inquiry concerning prior statements contradictory of the testimony under oath at the trial."

Perhaps the case most nearly on point from this court is *State v. Isley,* 195 Neb. 539, 239 N.W.2d 262 (1976). In that case, the witness Slankard was called by the defendant, who was charged with manslaughter, and testified that he was not at the Sahara Lounge at the time of the fatal attack on the victim. Cathy Tucker was then called to offer impeachment testimony. She stated that Slankard had told her that he was at the scene at the time of the incident. Further testimony was objected to by the prosecutor and sustained by the District Court. The defense made an offer of proof to the effect that, if allowed to testify, Cathy Tucker would testify that Slankard had told her that he witnessed the assault and that the defendant was not one of the assailants. In affirming the action of the trial court, we said: "Slankard was impeached as to all the direct testimony he gave when Cathy Tucker testified he told her (at a subsequent time) that he was in the Sahara Lounge parking lot at the time of the incident. Slankard's testimony that he was not there was therefore impeached. The only possible result in admitting *further* Tucker hearsay testimony as to what Slankard told her would be to influence the

jury as to the truth of the facts 'believed' to be present in the offer of proof as to Tucker's testimony." (Emphasis in original.) *Id.* at 543, 239 N.W.2d at 265.

We believe that the following syllabus point from *Wilson v. State,* 170 Neb. 494, 103 N.W.2d 258 (1960), is applicable here: "The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made."

The defendant also challenges the propriety of the trial court's interrogation of a witness from the bench during the trial. In regard to this assignment of error, we note that the judge may interrogate witnesses, whether called by himself or by a party. Neb. Rev. Stat. § 27-614(2) (Reissue 1979). " 'However this right "* * * should be very sparingly exercised, and generally counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause." ' " *Foremost Ins. Co. v. Allied Financial Services, Inc.,* 205 Neb. 153, 162-63, 286 N.W.2d 740, 746 (1980).

In this instance the question from the bench was directed to the owner of the 1976 black pickup and concerned the witness' valuation of that pickup. The defendant was not charged with any offense relating to this pickup and, therefore, any error committed by the court in this instance would not have prejudiced the defendant's rights. "The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantial legal right." *State v.*

Packett, 206 Neb. 548, 552, 294 N.W.2d 605, 608 (1980). The court's action, standing alone, would not require reversal of the defendant's conviction.

Defendant's objection to the instructions related only to the court's having failed to give them separately as to the defendant and his codefendant Schwarting. Inasmuch as we have concluded that the two defendants were joined improperly for trial, we need not address that alleged error, other than to state that in a proper case we do not believe that it is necessary to give two complete sets of separate instructions.

The final assignments of error challenge the overruling of the defendant's plea in abatement and the insufficiency of the evidence to sustain a verdict of guilty. We can consider these together.

While the general rule is that any error by the District Court in ruling on a plea in abatement is cured by a subsequent finding by the jury of guilt beyond a reasonable doubt, *State v. Franklin,* 194 Neb. 630, 234 N.W.2d 610 (1975), the rule is inapplicable in this instance. That is because, of course, we have ordered the conviction set aside and remanded the case for a new trial.

In order to resist a challenge by a plea in abatement, the evidence received by the committing magistrate need only show that a crime was committed and that there is probable cause to believe that the accused committed it. The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt. *Delay v. Brainard,* 182 Neb. 509, 156 N.W.2d 14 (1968). We have examined the record made at the preliminary hearing, as well as that of the trial itself, portions of which have been set forth in this opinion. We believe that each record, respectively, sustains a finding of probable cause and, except for the aforementioned prejudicial error, would support a finding of guilt beyond a reasonable doubt as well.

For the reasons given, the judgment and sentence of the District Court are reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BRODKEY, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. JOY LANE, APPELLANT.

317 N.W.2d 750

Filed March 26, 1982. No. 44096.

1. **Wiretaps: Affidavits.** Affidavits in support of an application for a wiretap order must contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976).
2. **Wiretaps.** While neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued, nor is the government required to use a wiretap only as a last resort, nevertheless, wiretap procedures cannot be routinely employed as an initial step in criminal investigation.
3. _____. This is true whether the wiretap sought is the first one covering a particular criminal activity, or whether a previous tap has furnished information which is the basis for the application for another tap.
4. _____. A showing must be made that the requested wiretap is not being routinely employed as an initial step in criminal investigation.
5. **Wiretaps: Affidavits: Conspiracy.** A showing that two or more principals are involved in one conspiracy as to one of which a sufficient affidavit has been filed is not alone sufficient to support an application as to all of the alleged principals or their telephones.
6. **Wiretaps: Affidavits.** The showing made in support of an application for a wiretap order must be reviewed in a practical and commonsense fashion.
7. **Wiretaps.** The validity of an application for a wiretap order, and the order, cannot be established by the exercise of hindsight. Such an application and the order must be viewed in the light of circumstances as they existed and were known or reasonably anticipated

at the time and cannot be "bootstrapped" by what the wiretap later uncovered.

Appeal from the District Court for Kimball County: ROBERT O. HIPPE, Judge. Reversed and remanded.

Winner, Nichols, Meister, Douglas & Kelly, for appellant.

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

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

PER CURIAM.

The defendant, Joy Lane, was convicted of distributing cocaine and conspiracy to solicit the sale or distribution of cocaine. She appeals from concurrent sentences to imprisonment for 3 to 5 years on each count.

This case is a companion case to *State v. Lozano,* 209 Neb. 772, 311 N.W.2d 529 (1981). Both this case and *State v. Richter, post* p. 63, 317 N.W.2d 759 (1982), decided today, arose out of an investigation conducted in Scotts Bluff County, Nebraska, in December 1979 and January and February 1980.

On January 29, 1980, the State obtained authority to place a wiretap on the telephone of Delma Lozano. As a result of conversations intercepted through that wiretap, information was obtained which indicated the defendant Lane was involved in the distribution of controlled substances. On February 10, 1980, the State obtained authority to place wiretaps on the residence telephone of the defendant and her husband and on the telephone of the "Auction House" which was owned and operated by the defendant and her husband. Conversations intercepted and recorded as a result of these wiretaps were received in evidence at the trial as a part of the evidence against the defendant.

Motions filed by the defendant to suppress the evi-

dence derived from the February 10, 1980, wiretaps were overruled. Although the defendant has assigned numerous errors, the principal issue upon the appeal is whether the evidence obtained through the wiretaps should have been suppressed.

The application for the wiretaps on the Lane telephones was supported by an affidavit of Robert B. Kinsey, a detective in the Scottsbluff Police Department, dated February 10, 1980; an affidavit of J. G. Robinson, an investigator for the Nebraska State Patrol, dated January 29, 1980; the affidavit of James R. Livingston, chief of police of Scottsbluff, Nebraska, dated January 29, 1980; an affidavit of Robert B. Kinsey, dated January 29, 1980; and an affidavit of Nadine Hopper, dated January 21, 1980. The affidavits dated January 29 and January 21, 1980, were the basis for the original January 29, 1980, wiretap order. The defendant Lane's name was not mentioned in any of these latter affidavits.

The defendant attacks the affidavits on the ground that they did not contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976). Subsection (1)(c) requires a separate showing of the *necessity* of a wiretap as a means of investigation of the crime being committed. To demonstrate necessity, the "prospective and retrospective failure" of alternative investigative techniques must be apparent from the facts submitted by the applicant. *United States v. Atkins,* 618 F.2d 366 (5th Cir. 1980). The issue is whether the February 10, 1980, application for authority to tap the Lane telephones, supported by the accompanying affidavits, adequately demonstrated the *necessity* of using a tap on the Lane telephones to investigate her involvement in drug distribution.

The Kinsey affidavit dated February 10, 1980, sum-

marizes numerous intercepted conversations to which the defendant was a party, or in which others who referred to the defendant were parties, and analyzes these conversations, coming to the conclusion that the conversations contained "drug jargon." The affidavit does not set out any information from which the court could find that alternative investigative techniques would be unlikely to succeed if tried with respect to the defendant Lane.

The affidavit of State Patrol Investigator Robinson concerned itself mainly with a showing of probable cause as to the four original suspects at whom the January 29, 1980, application was directed. On the issue of necessity, Robinson's affidavit stated only that, based on his 6 years' experience as a State Patrol drug investigator, "it has been [my] experience that drug dealers regularly use the telephone in the normal course of their illegal dealings." No mention of the defendant Lane was made in Robinson's affidavit.

The affidavit of Scottsbluff Police Chief Livingston first noted that "during the past twelve years, conventional and traditional law enforcement tactics and techniques directed against violations of Nebraska statutes and city ordinances allegedly occurring in a small section of Scottsbluff commonly known as East Ninth Street have been unsuccessful." Livingston's affidavit then detailed the nature of these violations, which included drug sales and possession, and stated that this information had been gleaned from "reliable and confidential sources of information," including not only paid police informers but neighbors and other noncriminal citizens, and also from surveillance. Livingston also noted: "Officers . . . are handicapped in conducting investigations due to instant recognition of personnel and equipment by the residents in the East Ninth Street area." Finally, he stated "that a variety of investigative techniques have been used

and exhausted in an effort to penetrate the groups. It has been revealed, according to affiant, that for the most part, victims of the crimes of drug sales, prostitution and gambling and occasionally robbery by prostitutes are generally reluctant to report these activities and when information is received which is of value, the sources demand that they remain anonymous . . . . [M]any covert and undercover operations have been attempted in order to gather evidence sufficient for prosecution and conviction of the individuals involved. Of the many operations attempted, only a few have been successful because of the tremendous amount of suspicion generated towards individuals not known to the permanent residents who are engaged in the illegal activities."

The Kinsey affidavit of January 29, 1980, detailed the history of the investigation of the "East 9th Street" area of Scottsbluff, with a description of other investigative tactics and techniques in the 9th Street area, including surveillance and attempts to infiltrate the criminal group working out of that area. Kinsey noted that detectives from Wyoming attempted "to infiltrate the criminal activities that are believed to occur at Bruces Tavern [in] Scottsbluff. The two Detectives were unsuccessful because it appeared that the people at Bruces Tavern 'made' them as police officers." Kinsey further stated that successful infiltration of this group "appears unlikely . . . because these people are not generally known to be involved in drug transactions with people that are not specifically known to them. The suspects are Black or Hispanic and there are presently no Mexican-American or Black officers available as undercover officers in the State of Nebraska for use by the Scottsbluff Police Department."

Kinsey also noted the reluctance of victims of crimes perpetrated in this area to discuss them with police "because they would be making admissions

that they took part in illegal activities." Finally, Kinsey stated: "The relationships between Dorothy Jones, Yvonne Sabala, Delma Lozano and Bruce Matlock Jr. spans many years and generations. It is unlikely that an undercover agent could ever be introduced into this group, because of these close and long relationships. It is your affiants opinion that one would most likely have to be a member of one of the families involved or a prostitute working for them in order to be accepted into the group." Defendant Lane's name was not mentioned anywhere in these four affidavits.

The Nadine Hopper affidavit detailed various criminal transactions involving the four suspects which the January 29, 1980, affidavit related to, but contained no information relating to the defendant in this case.

We have stated: "While . . . neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued nor is the government required to use a wiretap only as a last resort; nevertheless, the wiretap procedures cannot be routinely employed as an initial step in criminal investigation." *State v. DiMauro and Kessler,* 205 Neb. 275, 282, 287 N.W.2d 74, 77-78 (1980). This is true whether the wiretap sought is the first one covering a particular criminal activity, or whether a previous tap has furnished information which is the basis for the application for another tap. In the *DiMauro* case, Omaha police first sought and obtained an order to tap the telephone of Rose Trader. We held that the application and showing upon which the order to tap the Trader telephone was based demonstrated the necessity of a wiretap sufficiently. *State v. Trader,* 205 Neb. 282, 287 N.W.2d 78 (1980). The tap on Trader's phone led officials to DiMauro, and they immediately sought a tap on DiMauro's phone, without considering further investigative procedures against DiMauro. "[T]he

State's witness conceded that no other investigative procedure was attempted and all the police sought to do was obtain the wiretap." *State v. DiMauro and Kessler, supra* at 277, 287 N.W.2d at 75. In *DiMauro* we found that the affidavit filed with regard to the necessity of a tap on DiMauro's telephone was insufficient to make the necessary showing: "The affidavit filed by the State in this case upon which the DiMauro wiretap was authorized recited in part that 'while normal police investigative procedures might provide enough evidence to arrest Ross J. Diamauro [sic] for illegal gambling, normal investigative procedures have been attempted in the past by members of the Omaha . . . Police Division . . . to obtain enough evidence to apprehand [sic] or at least identify the other parties involved in this illegal gambling operation being conducted by Ross J. DiMauro, and these methods have failed and are most likely to fail in the future.' " *Id.* at 277, 287 N.W.2d at 75.

In the present case, the contents of the affidavits with regard to alternative investigative procedures which had been tried and failed or were likely to fail if tried were more detailed than the showing disapproved in *DiMauro,* but a sufficient showing was not made as to the futility of alternative investigative procedures as to the defendant Lane. While the showing which must be made has been described as "insignificant and the burden . . . impose[d on the government] de minimus [sic]," Carr, The Law of Electronic Surveillance § 4.05[4] at 179 (1977), still the showing must be made that the requested wiretap is not being " ' "routinely employed as the initial step in criminal investigation." ' " *State v. DiMauro and Kessler, supra* at 279, 287 N.W.2d at 76 (1980); *United States v. Baker,* 589 F.2d 1008 (9th Cir. 1979); *United States v. Santora,* 583 F.2d 453 (9th Cir. 1978). In *United States v. Scibelli,* 549 F.2d 222 (1st Cir. 1977), the U.S. Court of Appeals for the First Circuit

has noted that, as to an application for a second wiretap based in part on information gleaned from a first tap: "[I]ncorporation of the [first] affidavit . . . in the latter two applications went a long way towards meeting the requirement [of a showing of necessity]." 549 F.2d at 228. However, the court went on to state that "each of the two subsequent applications alleges sufficient *additional facts showing the continuing failure of normal investigative procedures.*" (Emphasis supplied). *Id.* at 228. In *Scibelli,* the second application applied for taps on four phones other than those applied for in the first application. With regard to the standard for determining the propriety of the district court's authorization of the tap, the First Circuit noted: "An appeals court's role is not to make a *de novo* determination of sufficiency as if it were a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made." *Id.* at 226.

In the present case, the February 10, 1980, application and affidavit of Kinsey stated no "additional facts showing the continuing failure of normal investigative procedures." All the facts dealing with the failure of normal investigative procedures were incorporated verbatim from the January 29, 1980, affidavits. In *United States v. Baker, supra* at 1012, the court noted: "[A] showing that two or more principals are involved in one conspiracy as to one of which a sufficient affidavit has been filed is not alone sufficient to support an application as to all of the alleged principals or their telephones."

The courts agree that the necessity-showing requirement "must be reviewed in a 'practical and common sense fashion.' " *United States v. Armocida,* 515 F.2d 29, 37 (3d Cir. 1975), *cert. denied* 423 U.S. 858, 96 S. Ct. 111, 46 L. Ed. 2d 84; *United States v. Atkins,* 618 F.2d 366 (5th Cir. 1980); *United States v. Feldman,* 535 F.2d 1175 (9th Cir. 1976);

United States v. Jackson, 549 F.2d 517 (8th Cir. 1977). However, "the validity of the application for the wiretap authorization and for the order of the authorizing judge cannot be established through the exercise of hindsight. The application and the order must be viewed in the light of circumstances as they existed and were known or reasonably anticipated at the time and cannot be 'bootstrapped' by what the wiretap later uncovered." *United States v. Curreri,* 388 F. Supp. 607, 621 (D. Md. 1974).

The January 29, 1980, affidavits did not establish the futility of alternative investigative procedures as to the defendant Lane. The showing of necessity in the January 29, 1980, affidavits focused on the inability of investigators to infiltrate and do business with the "East 9th Street" group because of their suspicion of those not known to the group for a long time. Part of the reason for the lack of success in infiltration revolved around the fact that "the suspects are Black or Hispanic and there are presently no Mexican-American or Black officers available as undercover officers in the State of Nebraska for use by the Scottsbluff Police Department." This was one of the elements cited in *State v. Lozano,* 209 Neb. 772, 311 N.W.2d 529 (1981), as strengthening the showing of necessity there. The defendant Lane is Caucasian.

The January 29, 1980, affidavits demonstrated the futility of physical surveillance of the suspects' homes, since "[o]fficers . . . are handicapped in conducting investigations due to instant recognition of personnel and equipment by the residents in the East Ninth Street area." The defendant Lane did not live on East 9th Street in Scottsbluff, nor did she live in Scottsbluff at all. Her home and business were both in the neighboring community of Gering. The futility of physical surveillance of the defendant Lane's residence or business was not established by incorporation of the January 29, 1980, affidavits' ref-

erences to unsuccessful physical surveillance.

The transcripts of the telephone calls intercepted through the Lozano tap, and the analysis of these calls in the February 10, 1980, affidavit of Kinsey, did tend to demonstrate that defendant Lane's part in the drug trading was at a slightly higher level than that of the four persons named in the January 29, 1980, order. But there was nothing in the incorporated affidavits, or in Kinsey's February 10, 1980, affidavit, which would indicate to the trial court that this difference in the part played by Lane would not respond to investigative techniques other than a wiretap. While certain statements with reference to the defendant Lane's family and her position in the community of Gering did appear in an addendum to the application of February 13, 1980, to tap the defendant Richter's telephone, see *State v. Richter, post* p. 63, 317 N.W.2d 759 (1982), which statements could have strengthened the showing of necessity as to the defendant Lane, these statements did not appear in the February 10, 1980, application or affidavits.

The trial court must make its finding of necessity "on the basis of the facts submitted by the applicant." § 86-705(3). The officers who intercepted the conversations set out in the February 10, 1980, Kinsey affidavit all admitted that they had considered no other investigative techniques with regard to the defendant Lane, but upon discovering her involvement immediately applied for a tap on her telephone.

We conclude that the showing made in support of the February 10, 1980, application failed to satisfy the statutory requirement of necessity for the wiretap on the Lane telephones. The failure to sustain the motions to suppress was prejudicial error which requires that the judgment be reversed.

It is unnecessary to consider the other assignments of error.

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

REVERSED AND REMANDED.

BRODKEY, J., not participating in decision.

CAPORALE, J., participating on briefs.

CLINTON, J., dissenting.

For reasons hereafter stated, I dissent. The purposes of Neb. Rev. Stat. §§ 86-705(1)(c) and 86-705(3)(c) (Reissue 1976) are designed only to insure that wiretapping is not routinely employed as the initial step in a criminal investigation. *State v. DiMauro and Kessler,* 205 Neb. 275, 287 N.W.2d 74 (1980). These sections of the statute do not require the exhaustion of all other possible or reasonable avenues of investigation. They do not in fact require that other methods even be tried if the application demonstrates other procedures are *unlikely to succeed* or are too dangerous. Their requirements are alternative. Other methods must have been tried and failed "or" the second alternative must be demonstrated. *State v. Kolosseus,* 198 Neb. 404, 253 N.W.2d 157 (1977).

The majority opinion concludes that the application in this case is insufficient because it was routinely employed as the initial step in the criminal investigation. I dissent because I believe a careful examination of the application sufficiently demonstrates that methods other than wiretap are unlikely to succeed.

As the facts of the application described in the majority opinion demonstrate, and as our opinion in *State v. Lozano,* 209 Neb. 772, 311 N.W.2d 529 (1981), shows, the law enforcement officials were engaged in the investigation of a conspiracy to acquire, sell, and distribute controlled substances involving Lozano and certain other named individuals, as well as certain persons *whose names were unknown.* The application in *Lozano* includes supporting affidavits and exhibits outlining the long history of the failure

of investigative methods other than wiretap. These included information from confidential informants, searches of the Lozano residence, telephone toll records, surveillance, attempts to purchase drugs by undercover officers, information indicating a close-knit network of relatives, friends, and longtime associates, and a refusal to deal with persons unknown to the conspirators. We found the application sufficient in *Lozano*.

An authorized tap on the Lozano telephone disclosed, through several intercepted conversations, that Joy Lane, a party to the intercepted conversation, was a participant in the conspiracy. The proper legal authorities then filed an application for a tap on the Lane telephone, which the District Court found sufficient, and the tap was authorized.

The initial wiretap involving the Lozano telephone was obtained on January 29, 1980; the tap on the Lane telephone was secured on February 10, 1980; and the tap on the Richter telephone (case No. 44097), on February 13, 1980. These individuals were arrested on February 21, 1980.

The application in this case incorporated all of the information in the Lozano application and, in addition thereto, the contents of the conversations between Lozano and Lane which had been intercepted pursuant to the authorized tap on the Lozano telephone which we had found to be lawful. The supporting affidavits conclude that there is an ongoing conspiracy and that Joy Lane is a supplier of drugs to Lozano.

The information in the application, including toll call records, indicates that the conspiracy is a widespread one involving connections in Salt Lake City, the State of Florida, and many other towns and cities throughout the United States, including several cities in Nebraska.

The application and the supporting affidavits indicate very clearly that Joy Lane was a part of the on-

going conspiracy and that crimes were in progress. In addition to the above, the judge would be entitled to make the following inferences from the facts set forth: (1) Joy Lane was at least as cautious as the other conspirators as to whom investigative methods other than wiretap had been unsuccessful. (2) Joy Lane's part in the conspiracy is conducted almost wholly, if not entirely, by telephone communications. (3) The only way in which the investigating officers were *likely* to get information which would enable them to act in a timely manner in obtaining search and arrest warrants would be by interception of telephone communications from or to Joy Lane.

The majority opinion relies to a large extent upon *United States v. Santora,* 583 F.2d 453 (9th Cir. 1978). *Santora* has been criticized by one of the text writers in the following language: "The court may have been too demanding. It might require a several-week hiatus between the expiration of the first-generation warrant and the completion of the normal investigation into the targets of the second-generation warrants. To insist upon such an investigation might permit crimes to go undetected (particularly if the first-generation tap revealed that the second-generation targets were about to attempt a major criminal transaction) or render the probable cause for the second-generation warrant, which is provided by the first-generation warrant, stale.

"Law enforcement officials should begin to investigate potential second-generation targets as soon as they have been identified. The second-generation application should detail the efforts which have been made and explain why the results are unsatisfactory. The application should then stress the length and complexity of the investigation which preceded the first-generation warrant, explain the importance of the second-generation warrant to the original (or expanded) goals of the investigation, explain why extensive use of ordinary procedures might alert the

targets to the existence of the initial warrant or destroy the effectiveness of the new warrant in advance of its being obtained, and emphasize the need to act quickly lest important opportunities be lost." Fishman, Wiretapping and Eavesdropping § 188 at 110 (Cum. Supp. 1981).

The *Santora* precedent does not, of course, bind this court. There are other precedents which we are free to follow and which I believe we should follow. In *United States v. Williams,* 580 F.2d 578 (D.C. Cir. 1978), the U.S. Court of Appeals, District of Columbia Circuit, was confronted with a situation similar to that which we have before us and involved what Professor Fishman referred to as second-generation applications. In that case the first-generation application, referred to as the Seventh Street investigation, set forth the long history of the investigation by ordinary methods, all of which were unsuccessful. The conclusion of that application was: " '[d]ue to the considerable length of time covered by this investigation using all possible normal investigative techniques, and through the experience of affiant and other Special Agents of the Federal Bureau of Investigation familiar with the investigation of numbers gambling operations, it is reasonably concluded [that] the continued use of normal investigative techniques would not bring this matter to a successful conclusion.'

"The Landover application, which was made after completion of the Seventh Street interceptions, incorporates the earlier affidavit and similarly details reasons for the Government's belief that the target telephones were being used in a gambling operation. The Landover affidavit also includes transcripts of calls intercepted on the Seventh Street line from the target telephones, and a concluding section similar to that in the Seventh Street affidavit.

"Appellants argue that the summary and prayer portions of the affidavits contain mere boilerplate

assertions, in derogation of the statutory command. To be sure, these sections of the affidavits are framed in conclusory terminology, but they cannot rationally be separated from the preceding detailed descriptions of the investigative events. Applications are not to be read in a piecemeal fashion, and viewed as a whole the requests here delineated the reasons—which we deem ample—why other investigative techniques either had failed or would not be feasible. The Government had conducted a multifaceted five-year investigation and still was unable to secure the evidence necessary to prosecute many of the principals of the gambling operation. This, then, is not a situation in which the Government sought to employ wiretapping as a routine investigative tool; neither is it a case in which the Government relied simply on 'the insufficiency of alternative procedures in gambling prosecutions *in general* . . . .' Instead, after scrutinizing the numbers activity over a long period of time by conventional techniques, the Government not unreasonably believed it needed to utilize electronic surveillance to gain enough intelligence about the 'nature and the scope' of the operation. In short, 'exposure of [the] entire operation required different and more sophisticated techniques.' The applications adequately set forth the basis for concluding that normal investigative procedures had been exhausted or would be unlikely to produce essential evidence, and the District Court correctly held that the statutory requirement had been satisfied." *Williams* at 589-90.

In *United States v. Baker,* 589 F.2d 1008 (9th Cir. 1979), a similar situation existed. The court said: "The Jones affidavit, in addition to individually directed details, does allege circumstances pertaining to all of the tapped telephones and the putative participants that meet the tests laid down by this court. These included a factual showing of due consideration of the possibilities of infiltration, the infeasi-

bility of locating gambling records, the reluctance of informants to testify in court, the probable unproductiveness of investigation through grand jury proceedings, the conducting of numerous physical surveillances of all of the principals listed in the affidavit, including Judd, and the discovery that they were particularly wary of surveillance. These general allegations were particularized by specific examples of difficulties and obstructions encountered in the process.

"It is true that Judd's situation unlike that of other suspects was not covered by specific examples of unsuccessful physical surveillance or infiltration. Yet we believe that the Jones affidavit read as a whole reasonably established as to Judd, as well as to the others named, that other or additional investigative procedures short of electronic surveillance if further pursued would be unlikely to succeed. Government investigators, subject to evaluation by the courts on similar bases, are entitled to use reason and common sense in the performance and documentation of their investigations to support applications for wiretaps. The statute does not mandate the indiscriminate pursuit to the bitter end of every non-electronic device as to every telephone and principal in question to a point where the investigation becomes redundant or impractical or the subjects may be alerted and the entire investigation aborted by unreasonable insistence upon forlorn hope. Upon the showing made, the district court could reasonably conclude, and did so, that alternative means of investigation had failed or likely would be unsuccessful as to Judd." *Baker* at 1012-13.

In *Cuba v. State,* 362 So. 2d 29 (Fla. App. 1978), the District Court of Appeals of Florida, after making reference to the statutory requirement, "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 suc-

ceed if tried or to be too dangerous," said at 32: "The purpose of that requirement as stated by the Supreme Court of the United States with reference to a similar provision in the Federal statute, is 'to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.' *United States v. Kahn,* 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974). Also, it is held in federal decisions that it is not the purpose of that requirement that electronic surveillance must be foreclosed until every other imaginable method of investigation has been unsuccessfully attempted, 'but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques'. *United States v. Pacheco,* 489 F.2d 554, 565 (5th Cir. 1974); *United States v. Alfonso,* 552 F.2d 605, 611 (5th Cir. 1977). It is common knowledge, derived from experience, that conventional investigative techniques generally are insufficient for adequate and successful prosecutorial termination of such criminal lottery activites. See: *United States v. Abramson,* 553 F.2d 1164, 1171 (8th Cir. 1977)."

We ought not examine the trial court's conclusions de novo. On review, an appellate court does not reexamine de novo whether alternatives might have sufficed; rather, the reviewing court's role is to decide if the facts set forth in the application were minimally adequate to support the determination that was made. *United States v. Scibelli,* 549 F.2d 222 (1st Cir. 1976), *cert. denied* 431 U.S. 960, 97 S. Ct. 2687, 53 L. Ed. 2d 278 (1977). The requirements of § 86-705(3)(c) are insignificant and the burden imposed thereby is de minimis. *United States v. James,* 494 F.2d 1007 (D.C. Cir. 1974).

Adherence to the too demanding requirements set forth in the majority opinion will, without question, greatly hinder if not render impossible the apprehension and conviction of many persons engaged in

a widespread drug conspiracy. It also results in this obviously guilty defendant being freed.

I would affirm the conviction.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
JOE RICHTER, APPELLANT.
317 N.W.2d 759

Filed March 26, 1982. No. 44097.

Wiretaps. Once it is determined that a wiretap is illegal, any evidence derived from the wiretap must be suppressed.

Appeal from the District Court for Kimball County: ROBERT O. HIPPE, Judge. Reversed and remanded.

Donald B. Fiedler of Fiedler & Hanna, for appellant.

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

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

PER CURIAM.

This is a companion case to *State v. Lane, ante* p. 46, 317 N.W.2d 750 (1982), decided today.

The defendant, Joe Richter, was convicted of possession of marijuana weighing more than 1 pound; distributing cocaine; and conspiracy to distribute cocaine. He was sentenced to imprisonment for 1 year on count I, the sentence to run consecutively to the sentences in counts II and III, and to imprisonment for 3 to 5 years on each of counts II and III, the sentences on these counts to run concurrently. He has appealed.

On February 10, 1980, the State obtained authority to place wiretaps on the residence telephone of Joy

Lane and her husband and on the telephone of the "Auction House" which was operated by Joy Lane. Conversations intercepted and recorded as a result of these wiretaps disclosed that the defendant Richter was associated with Joy Lane in the distribution of controlled substances.

On February 13, 1980, the State obtained authority to place a wiretap on the telephone at an apartment in Scottsbluff, Nebraska, where the defendant Richter and Sheryl Keller were living. As a result of conversations intercepted through that wiretap, information was obtained which was the basis for two search warrants and the arrest of Richter. Conversations intercepted and recorded as a result of this wiretap were received in evidence at the trial as a part of the evidence against the defendant.

Motions filed by the defendant to suppress the evidence derived from the February 13, 1980, wiretap were overruled. Although the defendant has assigned numerous errors, the principal issue upon the appeal is whether the evidence obtained through the wiretap should have been suppressed.

In *State v. Lane, supra,* we determined that the wiretaps on the Lane telephones were illegal and that evidence derived from those wiretaps should have been suppressed. Once it is determined that a wiretap is illegal, any evidence derived from the wiretap must be suppressed. Neb. Rev. Stat. § 86-705(11) (Reissue 1976); *State v. Aulrich,* 209 Neb. 546, 308 N.W.2d 739 (1981). Since the Lane wiretap was illegal, any evidence derived from that wiretap should have been suppressed.

The application for the February 13, 1980, wiretap order was supported by an affidavit of Robert B. Kinsey, a detective in the Scottsbluff Police Department, dated February 13, 1980, and the affidavits which were used to support the February 10, 1980, Lane wiretap order. Those affidavits, which are summarized in *State v. Lane, supra,* did not men-

tion the name of the defendant Richter.

In addition to the conversations with Richter, intercepted through the Lane wiretap, the Kinsey affidavit of February 13, 1980, alleged that Richter had been suspected of dealing in drugs for years; that he had been found in possession of large amounts of amphetamines on two occasions in the past; that the defendant and Lane were sophisticated in law enforcement investigation techniques; and that Richter had a reputation for violence and had been known to be armed in the past.

Although this affidavit made a better showing in support of the application for the February 13, 1980, wiretap order than the affidavits used to support the February 10, 1980, Lane wiretap application, the affidavit did not adequately demonstrate the necessity for the wiretap order, for the reasons stated in *State v. Lane, supra.* We, therefore, conclude the motions to suppress should have been sustained. The failure to sustain the motions to suppress was prejudicial error which requires that the judgment be reversed.

It is unnecessary to consider the other assignments of error.

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

REVERSED AND REMANDED.

BRODKEY, J., not participating in decision.

CAPORALE, J., participating on briefs.

CLINTON, J., dissenting.

For the reasons set forth in my dissent in *State v. Lane, ante* p. 46, 317 N.W.2d 750 (1982), I also dissent in this case.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

IN RE INTEREST OF MICHELLE LEVEY ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
PATRICIA LEVEY, APPELLANT.

317 N.W.2d 760

Filed March 26, 1982. No. 44306.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights requires a de novo review upon the record.
2. **Parental Rights.** The right of a parent to maintain custody of his or her children is a natural but not an inalienable right subject only to the paramount interest which the public has in the protection of the rights of a child.
3. _____. The primary consideration in any case involving termination of parental rights is the best interests of the children.
4. _____. The separate juvenile court may terminate parental rights when it finds such action to be in the best interests of the children and where such action is supported by clear and convincing evidence that the parent has substantially and continuously or repeatedly neglected the children and refused to give them necessary parental care and protection.
5. **Juvenile Courts: Appeal and Error.** Even though an appeal of a juvenile proceeding is heard de novo upon the record, findings of fact by the juvenile court should be accorded great weight because it heard and observed the parties and witnesses, and those findings should not be set aside on appeal unless they are against the weight of evidence or there is a clear abuse of discretion.

Appeal from the Separate Juvenile Court of Lancaster County. Affirmed.

Waggoner Law Office, for appellant.

Ron Lahners, Lancaster County Attorney, and Toni G. Thorson, for appellee.

J. Michael Rierden, guardian ad litem.

Tim Sindelar, for natural father.

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

WHITE, J.

This is an appeal from the separate juvenile court of Lancaster County, Nebraska, from an order ter-

minating the parental rights of appellant, Patricia Levey, in her children, Michelle, Scott, and Todd Levey. Harold Levey, natural father of the children, was divorced from appellant in 1975. Throughout the proceedings in question, Harold Levey was represented by court-appointed counsel and had authorized counsel to relinquish his parental rights. Harold Levey is not a party to this appeal. We affirm.

On or about January 27, 1977, appellant placed her daughter, Michelle Levey, in the temporary custody of Child Protective Services. On or about March 19, 1977, appellant placed her sons, Scott and Todd Levey, in the custody of Child Protective Services as well. At the time of their placement, Michelle's age was 5 years 8 months, Scott's age was 4 years 3 months, and Todd's age was 2 years 11 months.

At the initial hearing on May 25, 1977, appellant admitted she had no home and was unable to provide proper care and supervision for the children. On May 26, 1977, the children were adjudicated dependent children under Neb. Rev. Stat. § 43-202(1) (Reissue 1978) and were committed to the custody of the Lancaster County Division of Public Welfare to be placed in foster care. On November 10, 1977, the court entered an order continuing custody in the Lancaster County Division of Public Welfare after it was determined that circumstances had not changed.

Between May 25, 1977, and November 10, 1977, appellant visited her children only twice. During the spring and early summer of 1978, appellant visited her children with some regularity; however, between September 8, 1978, and October 23, 1978, appellant failed to visit her children. After several continuances, a hearing to review appellant's progress was held October 23, 1978. On October 25, 1978, the court continued custody in the Lancaster County Division of Public Welfare and directed the appel-

lant to correct the conditions of dependency. Sometime during November 1978 appellant moved to Colorado without leaving an address with the Lancaster County Division of Public Welfare. On February 22, 1979, appellant sent a letter to Susan Hendricks of the Lancaster County Division of Public Welfare informing Hendricks of her address and what she had been doing.

A supplemental petition to terminate parental rights was filed on March 23, 1979. Repeated efforts to contact the appellant were unsuccessful, so notice was served by publication. The termination hearing was held on May 23, 1979. Appellant did not appear; however, her former counsel was appointed to represent her at the hearing. On May 24, 1979, the court entered an order terminating her parental rights. The court found that appellant had failed to correct the conditions of dependency and determined the children to be neglected under § 43-202(2). The court also found that grounds for termination were present under Neb. Rev. Stat. § 43-209(1) and (6) (Reissue 1978). The children were committed to the custody of the state Department of Public Welfare with instructions to place them for adoption.

On September 18, 1979, almost 4 months after the hearing on termination, appellant appeared by counsel and moved to reopen the adjudication and to restrain the Department of Public Welfare from consenting to the adoption on the allegation that she had no actual notice of the hearing held on the 23rd day of May 1979 to terminate her parental rights. A hearing on appellant's motion was held on October 2, 1979. The court found that appellant had not been given actual notice and that the service by publication was defective. The court found that the letter appellant wrote to Susan Hendricks, although somewhat illegible, did contain her correct address and zip code. Adjudication was set aside and a new trial on the supplemental petition was granted on October

19, 1979. At that hearing, the court found that appellant had no contact with her children from September 26, 1978, until October 1979. The court also found that appellant had not provided care or support for the children since January 27, 1977, except for small amounts of clothing furnished prior to September 26, 1978. The court adjudicated the children to be neglected under § 43-202(2), but held that there was no showing by clear and convincing evidence that appellant had abandoned the children for 6 months or more prior to the filing of the supplemental petition. The court ordered appellant to present a plan to correct the conditions of neglect within 30 days and then gave her an additional 60 days to demonstrate that she had corrected the conditions of neglect. The termination hearing was continued.

On December 31, 1979, the court, after submission and approval of a plan to correct the conditions of neglect, ordered appellant to correct the conditions of neglect. Between December 31, 1979, and October 30, 1980, there were several dispositional hearings and the court granted appellant additional time to correct the conditions of neglect and dependency.

In January 1981 the prospective adoptive parents and current foster parents of the children filed a petition for intervention. The court allowed intervention over appellant's objections.

On February 27, 1981, a hearing was held to determine if appellant's parental rights should be terminated. On March 2, 1981, the court terminated appellant's parental rights. The court found that there had been no improvement in appellant's child-care skills, the visitations were harmful for the children, and that it was in the best interests of the minor children that the parental rights be terminated.

Appellant contends that the trial court erred in its decision to terminate parental rights because there was insufficient evidence to support the decision and because the decision is contrary to law.

An appeal from an order terminating parental rights requires a de novo review upon the record. *In re Interest of Stoppkotte,* 210 Neb. 1, 312 N.W.2d 454 (1981).

The right of a parent to maintain custody of his or her children is a natural but not an inalienable right subject only to the paramount interest which the public has in the protection of the rights of a child. *In re Interest of Stoppkotte, supra*; *In re Interest of J.L.L.*, 209 Neb. 76, 306 N.W.2d 175 (1981); *In re Interest of Kimsey,* 208 Neb. 193, 302 N.W.2d 707 (1981).

The primary consideration in any case involving termination of parental rights is the best interests of the children. *In re Interest of Wood and Linden,* 209 Neb. 18, 306 N.W.2d 151 (1981); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981).

The juvenile court may terminate parental rights when it finds such action to be in the best interests of the children and where such action is supported by clear and convincing evidence that the parent has substantially and continuously or repeatedly neglected the children and refused to give them the necessary parental care and protection. *In re Interest of J.L.L., supra*; *In re Interest of McKee,* 208 Neb. 623, 304 N.W.2d 918 (1981).

Even though an appeal of a juvenile proceeding is heard de novo upon the record, findings of fact by the juvenile court should be accorded great weight because it heard and observed the parties and witnesses, and those findings should not be set aside on appeal unless they are against the weight of evidence or there is a clear abuse of discretion. *In re Interest of J.L.L., supra*; *In re Interest of McKee, supra.*

The record is extensive, containing testimony and exhibits held over a 4-year period. The children were in foster care for 4 years prior to termination. The record indicates that the appellant, at the time she placed the children in foster care, could not con-

trol them. The evidence and the testimony produced over the 4-year period indicate that the same is true today. There is evidence that the children became very anxious during visitations and at some points even became physically and vocally violent toward appellant. At the April 2, 1980, hearing, Dr. Eli S. Chesen, psychiatrist, testified that he felt that it was in the best interests of the children to discontinue visitation. Virtually all of the psychiatric testimony indicates that the children needed some sort of permanence in their lives and needed to stabilize their position with their foster parents. Dr. Thomas Jaeger testified that he felt that Scott and Todd Levey had negative oppositional feelings toward visitation and their mother. He also testified that Michelle wanted to stabilize her position with her foster parents. Dr. Jaeger further testified to the fact that there had been a certain bonding which had occurred with the children's foster parents over the 4 years. It was Dr. Jaeger's recommendation that the children also needed some form of permanence in their lives before it was too late.

Dr. Keith Leech, a clinical psychologist, testified that he felt Patricia Levey, with the proper training and psychotherapy, could at some point maintain a meaningful life and handle the parenting duties. He could not, however, state with any certainty how long it would take. Since 1977 appellant has been told that she needs to seek help and training in developing her parenting skills. She has made a poor attempt at improving those skills. The evidence indicates that the children still do not identify with appellant as their mother and have no respect for her.

Appellant abandoned her children from September 1978 until October 1979. Her only contact with them was a Christmas card. She has furnished virtually no support for the children since January 1977, yet she states that she has approximately $4,000 to $5,000 in some sort of an account in Colorado and that she

can make as much as $2,000 a day working as a model in Colorado. Her attempts at correcting the conditions of dependency were slight. She has no job and the prospect of providing a stable home and life for the children is dim. The children recognize their foster parents as their psychological parents and have the desire to stabilize that position with them. The children have virtually rejected appellant and look on the visitations with their biological mother with extreme anxiety.

We agree with the juvenile court that the children's status cannot remain in limbo forever. The record reflects that it is in the best interests of the children to terminate appellant's parental rights. Accordingly, we must affirm.

AFFIRMED.

PETER JAMES MCGINN, APPELLEE, V. DOUGLAS COUNTY SOCIAL SERVICES ADMINISTRATION, COUNTY OF DOUGLAS, APPELLANT.

317 N.W.2d 764

Filed March 26, 1982. No. 44368.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, the Nebraska Supreme Court must modify, reverse, or set aside the award.
2. **Workmen's Compensation.** It is only when an accident arises both out of and in the course of employment that an employee is entitled to benefits under the provisions of the Nebraska Workmen's Compensation Act.
3. **Workmen's Compensation: Words and Phrases.** The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job. The term "in the course

of" refers to the time, place, and circumstances surrounding the accident.

4. _____: _____. The two phrases, "arising out of" and "in the course of," are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist.
5. **Workmen's Compensation.** Injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and do not "arise out of" employment unless the record discloses a hazard imposed upon the employee by reason of the employment greater than that to which the public generally in the area of the hazard is subjected.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

T. J. Stouffer and Sheila Priluck of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

John B. Ashford of Bradford, Coenen & Ashford, for appellee.

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

CAPORALE, J.

This is an appeal from a judgment of the Nebraska Workmen's Compensation Court on rehearing which awarded plaintiff-appellee, James Peter McGinn, benefits under the provisions of the Nebraska Workmen's Compensation Act. The defendant-appellant, Douglas County Social Services Administration, the County of Douglas (Douglas County), asserts the compensation court erred so much as the evidence is insufficient to support a finding that Mr. McGinn's injuries resulted from an accident which arose either out of or in the course of his employment with Douglas County. We find the court below erred and reverse.

Findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed

on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Erving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982); *Union Packing Co. v. Klauschie,* 210 Neb. 331, 314 N.W.2d 25 (1982); *Husted v. Peter Kiewit & Sons Constr. Co.,* 210 Neb. 109, 313 N.W.2d 248 (1981).

With the foregoing standard of review in mind, the record establishes Mr. McGinn was employed by Douglas County as a social caseworker. On June 12, 1980, while en route to make a professional call on a recipient of social services provided by Douglas County, Mr. McGinn encountered a severe and unusual rainstorm accompanied by winds up to 100 miles per hour. The storm virtually eliminated visibility. While Mr. McGinn was in the process of trying to find a place to park and wait for the storm to abate, a portion of a tree fell on his car. As a result, Mr. McGinn's neck was broken and he is totally disabled. The compensation court made a specific finding that the plaintiff was exposed to a greater hazard than the general public because the presence of trees increased the dangerous effect of the windstorm. This particular finding, however, is not supported by the record. There is nothing in the record from which it can be concluded that the trees in this particular area of the city presented any different or greater risk than trees in any other area. Indeed, the record amply demonstrates that trees throughout the city were broken and severely damaged by the storm. The finding that the plaintiff was exposed to a greater risk than the public generally is clearly wrong and must therefore be, and is, rejected.

It is only when an accident arises both out of and in the course of employment that an employee is en-

titled to benefits under the provisions of the Nebraska Workmen's Compensation Act. Neb. Rev. Stat. § 48-101 (Reissue 1978). The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job. The term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist. *Union Packing Co. v. Klauschie, supra; Stoll v. School Dist. (No. 1) of Lincoln,* 207 Neb. 670, 301 N.W.2d 68 (1981); *Appleby v. Great Western Sugar Co., Inc.,* 176 Neb. 102, 125 N.W.2d 103 (1963).

There is no question but that Mr. McGinn suffered an accidental injury. Since the accident occurred while he was en route to visit with one of Douglas County's recipients, the accident occurred in the course of his employment. The crucial question in this case, however, is whether the accident arose out of his employment. The answer is controlled by our prior decisions.

It appears we first faced this question in *Gale v. Krug Park Amusement Co.,* 114 Neb. 432, 208 N.W. 739 (1926). Therein, the deceased employee was killed when a building he was painting was lifted by a violent storm and thrown approximately 30 feet against a tree. We determined that the injury was not compensable, stating: "Thus, we conclude that injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and as not coming within the purview of workmen's compensation acts, unless the record discloses a hazard imposed upon the employee by reason of the employment greater than that to which the public generally is subjected." *Id.* at 437, 208 N.W. at 741.

We again addressed the question in *Crow v. Americana Crop Hail Pool, Inc.*, 176 Neb. 260, 125 N.W.2d 691 (1964). The decedent was employed to adjust crop hail claims. While en route from one assignment to another, his automobile was struck by a tornado, and he died as a consequence of the injuries he suffered. Therein, we relied on the *Gale* decision and concluded the death did not arise from a hazard incident to decedent's work, but rather from a hazard common to mankind generally, saying: "There is nothing in the stipulation of facts that shows the decedent was exposed to any different hazard than that which applied to all mankind in the area where his death occurred. He was driving his own car on the highway and met his death by a tornado, a hazzard any other person in that locality might have been subjected to, either upon the highway or elsewhere. He was not engaged in protecting the property of the defendant at that time. Indeed, in the instant case the defendant did not determine the manner or time or order of the adjustment of the losses by the deceased. His death resulted from a tornado of which the defendant knew nothing and concerning which it gave no directions to the deceased. Its course was unforeseeable by man and appears clearly to have been an act of God. To hold the defendant liable under the Workmen's Compensation Act in such cases would make the employer an insurer of risks having nothing to do with the employment and not arising therefrom." *Id.* at 265-66, 125 N.W.2d at 694-95.

It appears that *Crow* refined the *Gale* test somewhat in that *Crow* requires the risk to which the employee is subjected to be greater than that to which the public in the area where the injury occurred is subjected, rather than merely greater than that to which the public generally is subjected.

We encounter the rule again in *Mead v. Missouri Valley Grain, Inc.*, 178 Neb. 553, 134 N.W.2d 243

(1965). In *Mead* the employee was required to seal boxcars in temperatures which varied between 12 degrees below to 7 degrees above zero. The boxcars were unprotected, open, unheated, and elevated above the ground so that cold air circulated above and below the surface on which the plaintiff worked, as well as through the boxcars. Mead, along with other employees, had objected to working because of the extreme cold, but was required to continue. In affirming the award of benefits by the Workmen's Compensation Court, we took judicial notice of the fact that the general public in the community may be exposed to outside temperatures but are not generally exposed to a combination of conditions of outside work such as were present in the case. In our analysis we stated: "There is no evidence that general construction work in the community, or work of this type, is generally conducted at the temperatures and under the conditions present in this case. The risk of the cold was common to all outside, but the required conditions of this employment brought a danger and a peculiar aggravated risk which threatened more particularly the employees of defendant, of which plaintiff was one. [Citations omitted.]" *Id.* at 557, 134 N.W.2d at 247. We then applied the *Gale-Crow* rule that an injury caused by the elements arises out of employment only if the employee is exposed to a different hazard than mankind generally in the area where the injury occurred.

The most recent application of the rule is found in *Ingram v. Bradley,* 183 Neb. 692, 163 N.W.2d 875 (1969), wherein an employee of an outdoor movie theater was injured while working in a flimsily constructed, poorly maintained, and unsecured ticket booth resting on skids, which was blown over by a storm. In reversing a denial of workmen's compensation benefits, we concluded that the conditions of the employment environment accentuated the natural hazard from the storm. The increased hazard

attendant to being in the booth contributed to the injury, and therefore the injury arose out of employment.

The evidence in the case before us fails to establish that Mr. McGinn was exposed to any risk greater than that to which others in the area were exposed. It therefore cannot be said that Mr. McGinn's injury and resultant disability, tragic as it is, arose out of his employment.

To be sure, we have allowed recovery where the duties of employment increase an employee's exposure to the hazards of the street which are caused by human agency. Thus, in *Good v. City of Omaha,* 125 Neb. 307, 250 N.W. 61 (1933), we allowed recovery when an employee was rendered totally disabled as the result of a brick intentionally thrown at him without provocation by another. In *Goodwin v. Omaha Printing Co.,* 131 Neb. 212, 267 N.W. 419 (1936), we allowed recovery when an employee was shot and killed by a hitchhiker. At first blush it might appear paradoxical to allow recovery for injuries stemming from street risks created by human agency and deny recovery for such risks caused by acts of nature which do not present a greater hazard to the employee than to the general public in the area. On the contrary, however, analysis reveals the distinction to be logical. Allowing recovery for street risks caused by human agency results from the predictable nature of the fact that if one's employment requires him to be exposed to a greater number of human actors than would otherwise be the case, his risk of injury caused by such actors has been increased. On the other hand, when and where risks created by nature will occur cannot be predicted. Thus, it cannot be said that the duties of employment in and of themselves increase the risk of injury by acts of nature, unless they expose the employee to a greater degree of hazard than that to which the general public in the area is exposed.

Mr. McGinn asks us to find the accident caused by an act of nature arose out of his employment simply because he was where he was required to be at the time the injury occurred. Were we to so hold, we would have effectively written the "arising out of" employment requirement out of the act and made it synonymous with the phrase "in the course of." This we cannot do. The Legislature has required that both conditions be met as a prerequisite to an employer's liability under the Workmen's Compensation Act.

Accordingly, the judgment and award of the Nebraska Workmen's Compensation Court is reversed with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

I dissent. Neb. Rev. Stat. § 48-101 (Reissue 1978) states: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury."

Nebraska currently recognizes the increased risk test for determining whether injuries arise out of an employee's employment. Generally stated, the increased risk test requires that an employee's employment duties must expose that employee to a greater risk or hazard than that to which the general public in the area is exposed.

The evidence shows that the city of Omaha had a severe wind and rainstorm. The claimant, a social worker, was on his way to visit a recipient of social services at the time he was injured. The Workmen's Compensation Court found that the claimant was subjected to greater exposure to risk than the general public because of the presence of trees in the area. I also believe he was subjected to a

greater risk than the general public in the area. The claimant was in his automobile under a tree during a violent windstorm. The general public in the area, as the record showed, were sheltered inside their homes. In order to compare the claimant's exposure to that of the general public in the area, we must ask: What does an average person, free of the obligations of any particular employment, do under the same weather conditions? I would expect that any sane person that is not required to be out in the storm would have enough sense to seek shelter or stay inside. The claimant's employment required that he be outside in the storm and this increased his exposure to the risk of being injured in the storm.

I fail to find any logic in the distinction drawn by the majority in the *Good v. City of Omaha,* 125 Neb. 307, 250 N.W. 61 (1933), and *Goodwin v. Omaha Printing Co.,* 131 Neb. 212, 267 N.W. 419 (1936), cases. The risk of being shot, hit with a brick, and having a tree branch fall on a car are equally unpredictable.

I would abandon the increased risk test for determining whether an injury arises out of an employee's employment and, instead, adopt the positional risk test.

Under this theory, an employee's injuries would be compensable as long as his employment duties put him in a position that he might not otherwise be in which exposes him to a risk, even though the risk is not greater than that of the general public. In 1 Larson, Workmen's Compensation Law § 8.12 at 3-20 (1978), the positional risk test is stated as follows: " '[W]hen one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one "arising out of" the employment of the person so injured.' " Plaintiff

would recover under this theory also since his employment required him to be in that particular place at that particular time. This test would eliminate some of the absurd results we have under the increased risk test. As can be seen in our act of God cases, it is nearly impossible for an employee to show an increased exposure to the risk. The positional risk test allows the employee whose employment requires him to be out in bad weather to recover if he is injured in the course of his employment. However, under either theory, the employee's injuries are compensable.

KRIVOSHA, C.J., and MCCOWN, J., join in this dissent.

JOE MINGUS, APPELLANT, V. CHARLES F. FAIRBANKS, SHERIFF, HALL COUNTY, NEBRASKA, APPELLEE.

317 N.W.2d 770

Filed March 26, 1982. No. 81-610.

1. **Lesser-Included Offenses: Debauchery.** The offense of debauching a minor is not a lesser-included offense of pandering.
2. **Lesser-Included Offenses.** A lesser-included offense is one which is necessarily established by proof of a greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
3. **Habeas Corpus.** A writ of habeas corpus is a proper remedy to use when one seeks release upon a showing that the judgment, sentence, and commitment are void.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions.

John S. Mingus of Mingus & Mingus, for appellant.

Don Walters, Deputy Hall County Attorney, for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN,

WHITE, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired.

KRIVOSHA, C.J.

The appellant, Joe Mingus (Mingus), appeals from an order entered by the District Court for Hall County, Nebraska, denying the relief requested by Mingus in his petition for a writ of habeas corpus. We have reviewed the record and now determine that the trial court was in error in denying Mingus the requested relief. Accordingly, we reverse and remand with directions.

Mingus was originally charged with the felony offense of pandering in violation of Neb. Rev. Stat. § 28-802 (Reissue 1979). This is a Class IV felony. He entered a plea of not guilty and waived a trial to a jury. Following a trial to the court, the trial court found Mingus guilty of debauching a minor, a violation of Neb. Rev. Stat. § 28-805 (Reissue 1979), a Class I misdemeanor. The theory of the trial court apparently was that the offense of debauching a minor is a lesser-included offense of pandering, and therefore the trial court could, if it chose to do so, find the defendant guilty of the lesser-included offense, even though no such charge had been filed against Mingus.

Mingus filed a petition for writ of habeas corpus, alleging that he was being illegally held in that he was found guilty and incarcerated under an offense with which he had never been charged. The trial court dismissed that petition and Mingus now appeals to this court.

The simple answer to this appeal is that the offense of debauching a minor is not a lesser-included offense of pandering, and it was clearly error for the court, as the trier of fact, to reach such a conclusion. In *State v. White,* 209 Neb. 218, 227, 306 N.W.2d 906, 913 (1981), we defined what a lesser-included offense was by saying: " 'A lesser included offense is one

which is necessarily established by proof of a greater offense. [Citation omitted.] To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.' " See, also, *State v. Colgrove,* 197 Neb. 375, 248 N.W.2d 780 (1977).

In order to be guilty of debauching a minor, one must prove that a person, not a minor, debauched or depraved the morals of a boy or girl *under the age of 17* by (a) lewdly inducing such boy or girl carnally to know any other person; or (b) soliciting any such boy or girl to visit a house of prostitution or other place where prostitution, debauchery, or other immoral practices are permitted or encouraged, for the purpose of prostitution or sexual penetration; or (c) arranging or assisting in arranging any meeting for such purpose between any such boy or girl and any female or male of dissolute character or any inmate of any place where prostitution, debauchery, or other immoral practices are permitted or encouraged; or (d) arranging or aiding or assisting in arranging any meeting between any such boy or girl and any other person for the purpose of sexual penetration.

Pandering, on the other hand, is committed if the person charged (a) entices another person to become a prostitute; or (b) procures or harbors therein an inmate for a house of prostitution or for any place where prostitution is practiced or allowed; or (c) inveigles, entices, persuades, encourages, or procures any person to come into or leave this state for the purpose of prostitution or debauchery; or (d) receives or gives or agrees to receive or give any money or other thing of value for procuring or attempting to procure any person to become a prostitute or commit an act of prostitution or come into this state or leave this state for the purpose of prostitution or debauchery. Age is not an

element of this offense as it is in the debauching a minor offense.

While both offenses may involve similar activities when viewed in their entirety, the elements of the crime of pandering and the elements of the crime of debauching a minor are such that one could commit pandering without also automatically being guilty of debauching a minor. Obviously, one could commit pandering without being involved with a minor as one could be guilty of debauching a minor without doing any of the things prohibited by the pandering statute. Stated simply, debauching a minor is not a lesser-included offense of pandering and it was error for the court to so find. The facts of the case do not support the trial court's conclusion that although Mingus was charged with pandering, he could be found guilty of debauching a minor as a lesser-included offense.

Counsel for the appellee conceded at oral argument, as he was required to do, that debauching a minor is not a lesser-included offense of pandering. Nevertheless, he argues that habeas corpus is not a proper remedy in a case of this nature. We are unable to discern why that should be. A writ of habeas corpus is a proper remedy to use when one seeks release upon a showing that the judgment, sentence, and commitment are void. See, *In re Application of Dunn,* 150 Neb. 669, 35 N.W.2d 673 (1949); *Swanson v. Jones,* 151 Neb. 767, 39 N.W.2d 557 (1949); *Pruitt v. Parratt,* 197 Neb. 854, 251 N.W.2d 179 (1977).

A case directly on point is our early decision of *In re McVey,* 50 Neb. 481, 70 N.W. 51 (1897), and cited with approval by us in *State v. McClarity,* 180 Neb. 246, 142 N.W.2d 152 (1966). In *McVey,* the appellant was charged with the crime of burglary. The jury acquitted the appellant on the charge of burglary, but found him guilty of breaking and entering in the daytime. In discharging appellant from custody, we said at 483-84, 70 N.W. at 52: "The only further

question presented is whether the sentence of the court was merely erroneous or whether it was illegal in such a sense as to be void. It may be said that the modern doctrine or idea is that a court must possess jurisdiction not only of the person and subject-matter, but to impose the sentence which is adjudged. If the latter is lacking the sentence is not merely voidable but void. (Black, Judgments, sec. 258; citing, among others, *Ex parte Lange,* 18 Wall. [U.S.], 63; *Ex parte Milligan,* 4 Wall. [U.S.], 131; *Ex parte Wilson,* 114 U.S., 417; *Ex parte Kearny,* 55 Cal., 212; *In re Petty,* 22 Kan., 477. See, also, *Ex parte Cox,* 32 Pac. Rep. [Ida.], 197; *Ex parte Yarbrough,* 110 U.S., 651.) In the case at bar, the jury having, by its verdict, determined the prisoner not guilty as charged, although it further adjudged him guilty of another crime, the trial court had no jurisdiction to sentence him; hence its attempt in that direction was illegal in such sense that it was void, and *habeas corpus* the appropriate remedy. (*In re Betts,* 36 Neb., 282; *In re Havlik,* 45 Neb., 747.) It follows that the prisoner must be discharged."

The conviction in this case was also void. This court is without choice but to reverse the action of the trial court and remand the same with instructions to discharge the appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD N. GATES AND BETTY B. GATES, APPELLANTS, v. SAM J. HOWELL, TREASURER OF DOUGLAS COUNTY, ET AL., APPELLEES.

317 N.W.2d 772

Filed April 2, 1982. No. 43753.

1. **Supreme Court: Judgments: Appeal and Error.** Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate

court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed.

2. **Attorney Fees.** It is the practice in this state to allow the recovery of attorney fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.
3. **Actions: Taxation.** A suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf.

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

J. Patrick Green and Bruce H. Abrahamson of Gunderson, Abrahamson, Borchers & Grewe, for appellants.

Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer, Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellees.

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

KRIVOSHA, C.J.

Like too many cases coming before this court, this case makes its second appearance before us. In 1978 the appellants filed suit in the District Court for Douglas County, Nebraska, seeking to have the provisions of Neb. Rev. Stat. §§ 77-1238 to 77-1241 (Reissue 1976), insofar as they applied to appellants' mobile home, declared to be in violation of Neb. Const. art. VIII, § 1. The basis of that suit was that the questioned statutes improperly defined a mobile home as a motor vehicle and it was thereby unlawfully assessed. The trial court held that the statute was not in violation of the Constitution and the parties appealed to this court. On appeal, we agreed

with the appellants and specifically found that mobile homes were not motor vehicles and therefore could not be taxed as motor vehicles but, rather, must be taxed as personal property. See *Gates v. Howell,* 204 Neb. 256, 282 N.W.2d 22 (1979) (Gates I). We thought our opinion was clear and to the point. We said at page 258, 282 N.W.2d at 23: "While the problem involved in this appeal is of extreme importance, the resolution of the question is not necessarily complicated. Unless we can find and declare that a 'mobile home' is in fact a 'motor vehicle,' the Legislature is prohibited from taxing a mobile home in the same manner as a motor vehicle and different than all other personal property." We concluded that a mobile home was not a motor vehicle, and said at 264, 282 N.W.2d at 26: "For that reason we must find and determine that the provisions of sections 77-1238 through 77-1242.02, insofar as they include mobile homes within the definition of motor vehicles, are void and unenforceable." We then said at 266, 282 N.W.2d at 27: "The judgment of the trial court, therefore, is reversed and the cause remanded with directions to enter a judgment in accordance with this opinion." On October 29, 1979, our mandate in the above-entitled action was entered and on December 11, 1979, the appellees filed a motion seeking to have a judgment on the mandate entered by the trial court.

On February 1, 1980, the appellants filed a document entitled "Application," wherein they sought to obtain an order from the trial court regarding matters not determined by our opinion and beyond the issues covered by our opinion. In effect, the appellants sought to reopen the case and to seek further relief from the trial court in excess of that encompassed by our opinion in Gates I. The trial court thereafter entered a "judgment order" which in effect followed the mandate of this court. The appellants have now appealed to this court, maintaining

that the trial court erred in not providing all of the relief which they requested following our opinion in Gates I. They further maintain that the trial court erred in not allowing Gates an attorney fee for having obtained a benefit upon a class of persons, and, finally, they maintain that the court should have retained jurisdiction over the "fund" created by this action in order to determine the various tax obligations of the members of the class and to supervise the refund to the parties affected by the judgment. We believe that the trial court was correct in all respects and affirm the judgment of the trial court on the mandate.

Our opinion in Gates I did not grant to Gates a new trial. It reversed the action of the trial court and specifically determined that the provisions of the statutes questioned did not apply to owners of mobile homes. Our opinion was limited to that matter, and we said at 258, 282 N.W.2d at 23: "Therefore, such structure [mobile home] may not be taxed as a motor vehicle due to the fact that such method of taxation results in the mobile home being taxed nonuniformly and disproportionately to all other personal property. Because of that determination, we need not consider other assignments of error raised by the plaintiffs." We specifically directed the trial court to enter a judgment in accordance with our opinion. In such a case, the trial court has no discretion.

In *Jurgensen v. Ainscow,* 160 Neb. 208, 211, 69 N.W.2d 856, 858 (1955), we said: " 'When a particular judgment is directed by the appellate court, the lower court is not acting of its own motion, but in obedience to the order of its superior. What that superior says it shall do, it must do, and that alone. Public interests require that an end shall be put to litigation, and when a given cause has received the consideration of this court, its merits determined, and then remanded with specific directions, the

court to which such mandate is directed has no power to do anything but to obey the mandate; otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of that authority over inferior tribunals with which it is invested by our fundamental law. * * * Rights which may have accrued since the rendition of the original judgment, not in issue in the action in which it was rendered, are not adjudicated therein, but the trial court has no power to open or interfere with the judgment of this court in order to settle such rights. If, since the original judgment, something has occurred which would render it inequitable to carry the judgment this court has directed into execution, resort must be had to some form of original proceeding by which appropriate relief can be secured. It cannot be done by way of defense to the entry of the judgment we have directed.' "

And further in *Jurgensen, supra* at 212, 69 N.W.2d at 858, we said: " 'Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on, or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed.' " To the same effect, see *Marksbury & Washington v. Board of Education,* 199 Neb. 283, 258 N.W.2d 242 (1977); *Plischke v. Jameson,* 181 Neb. 887, 152 N.W.2d 119 (1967).

The difficulty with the additional relief sought by the appellants is in part made clear by appellants' own brief. Appellants argue in their brief, in part, as follows: "It has come to the attention of Plain-

tiffs that Defendant Frank W. Bemis, Assessor of Douglas County, Nebraska, has gone back and retaxed Plaintiffs' mobile homes for the tax years 1978 and 1979 apparently on the theory that Plaintiffs' mobile homes were omitted property during said period and subject to taxation as such."

How that matter has come to the attention of appellants, or, more importantly, how that matter may lawfully come to the attention of the court, absent the introduction of evidence, is difficult, if not impossible, to understand. That is the reason that a case, once litigated and directed back to the trial court only for the purpose of entering a judgment on the mandate in accordance with the opinion of the court, is not open to further litigation. If appellants have some further cause of action arising by reason of our decision in Gates I, they must, like all others, file a lawsuit and present evidence. They may not, however, simply extend their request for relief beyond that which was initially determined by this court. The trial court was correct in refusing to grant such additional relief.

Appellants further argue that they are entitled to an attorney fee in this case because they have conferred a benefit upon a confined class of persons and the court has available to it a mechanism for shifting the costs of litigation to the benefited class. While the action of the appellants in this case may have been indeed meritorious, though one is unable to tell for certain, that alone does not entitle the appellants to an attorney fee. In *State ex rel. Ebke v. Board of Educational Lands & Funds,* 159 Neb. 79, 96-97, 65 N.W.2d 392, 402 (1954), we said: "It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery." Clearly, in this instance there is no statute which provides for the allowance of an attorney fee, and

therefore appellants are entitled to an attorney fee only if there has been a uniform course of procedure to allow such recovery. We are unable to find such course, and in the case of *Hansen v. County of Lincoln,* 188 Neb. 461, 197 N.W.2d 651 (1972), we held contrary to appellants' position. In *Hansen* a taxpayer brought a class action to have declared null and void a tax levied against rural lands and to have the illegal tax refunded to the individuals who paid the tax. We said in *Hansen, supra* at 465-66, 197 N.W.2d at 655: "It has long been the law of this state that a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf. Monteith v. Alpha High School Dist., 125 Neb. 665, 251 N.W. 661; State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N.W.2d 5. The reason given in these cases is that generally an action cannot be maintained as a class action by a plaintiff on behalf of himself and others unless he has the power as a member of the class to satisfy a judgment on behalf of all members of the class. This the plaintiff here cannot do insofar as refunds or tax credits are concerned. Further, it would appear that the refund and credit procedures provided by section 77-1736.04, R.R.S. 1943, are exclusive and do not contemplate supervision by the court." There was no fund created by reason of our decision in Gates I; merely a declaration as to the invalidity of the statute. There is simply no basis upon which an award of attorney fees could be allowed. The trial court was likewise correct in so holding. The judgment of the trial court is in all respects affirmed.

AFFIRMED.

ROSE M. KRESHA, APPELLEE, V.
JOSEPH A. KRESHA, APPELLANT.
317 N.W.2d 776

Filed April 2, 1982. No. 43756.

1. **Ratification: Agents.** An affirmance of an unauthorized transaction by an agent can be inferred from a failure to repudiate the transaction.
2. _____: _____. Ratification of unauthorized acts of an agent may be by conduct or may be inferred from silence and inaction.
3. **Forcible Entry and Detainer: Cotenants: Case Overruled.** A single cotenant, suing alone, can maintain summary proceedings to recover possession of the premises against a stranger to the title without joinder of his cotenant as a party, and any recovery inures to the benefit of the other cotenants. *Johnson v. Hardy,* 43 Neb. 368, 61 N.W. 624 (1895), overruled.

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

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellant.

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

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

MCCOWN, J.

This is an action for forcible entry and detainer brought by one of two joint owners of a farm against a lessee tenant under an oral lease from year to year. The county court entered judgment for the plaintiff and the District Court on appeal affirmed the judgment of the county court. The defendant appeals.

The facts are largely admitted or stipulated. The plaintiff, Rose M. Kresha, and Adolph M. Kresha, husband and wife, are the owners of the farm involved here "as joint tenants or as tenants in common." The property is their homestead and they occupied the residence on the property. The defendant, Joseph A. Kresha, their son, entered into possession of the farm ground on or about March 1,

1974, under an oral lease from year to year and was in possession at the time of trial.

On August 30, 1979, notice was delivered to Joseph terminating the oral year-to-year lease and requiring him to deliver possession of the property to Rose and Adolph on March 1, 1980. The names Adolph Kresha and Rose Kresha were typed at the bottom of the notice. The notice was signed by Rose Kresha. It is stipulated "That Adolph M. Kresha is not a party plaintiff and did not join in said notice to terminate and will not become a party to action or join in notice to terminate."

Also, on August 30, 1979, Adolph M. Kresha and Joseph A. Kresha executed a written lease of the farm for a term running from August 30, 1979, to August 30, 1985. It is conceded that this lease is void because the farm is the homestead of Rose and Adolph Kresha and Rose did not execute or acknowledge the lease.

Rose Kresha filed suit for dissolution of marriage against Adolph Kresha on March 18, 1980. On March 27, 1980, Rose served a 3-day notice to vacate the premises on Joseph. Adolph did not join in the notice.

Rose filed this forcible entry and detainer action on April 8, 1980, alleging that Joseph had refused to vacate and was forcibly detaining the premises from her. Upon trial to the county court, the court found that Rose had legally terminated the oral year-to-year lease; that Adolph had effectively confirmed the notice of that termination by delivering to Joseph the written lease which was not joined by Rose; that Joseph remained in possession of the premises after notice to quit; and entered judgment for Rose for restitution of the premises.

Upon appeal to the District Court, the District Court found that the oral year-to-year lease was legally terminated by Rose; that the written lease between Adolph and Joseph was void; that Joseph

wrongfully held possession against the rightful possession of Rose; and affirmed the judgment of the county court for restitution of the premises.

The defendant contends that plaintiff could not terminate the oral year-to-year lease by herself and that the notice to terminate the lease was insufficient to terminate the oral lease as to Adolph, who did not join in it, and that the oral lease therefore continued as to Adolph.

It is clear that the findings and judgments of both trial courts turned on issues of fact. There can be no doubt that the notice of termination of the oral lease which was signed by Rose and delivered to Joseph on August 30, 1979, on its face purported to be a notice from Adolph and Rose, and in the absence of any other evidence was a legally sufficient notice of termination of the oral lease. Adolph could have adopted, ratified, or disavowed the notice. The stipulation simply states that Adolph did not join in the notice and would not join. The stipulation does not state that Rose did not have any authority to put Adolph's name on the notice. There is no evidence that Adolph disavowed the notice or took any affirmative action to repudiate it.

It is a well-established principle of law that an affirmance of an unauthorized transaction can be inferred from a failure to repudiate it. Restatement (Second) of Agency § 94 (1958). *Drainage District v. Dawson County Irrigation Co.*, 140 Neb. 866, 2 N.W.2d 321 (1942).

Ratification of unauthorized acts of an agent may be by conduct or may be inferred from silence and inaction. In the present case, instead of repudiating the notice of termination and affirming the oral lease, Adolph and Joseph entered into a new written lease upon different terms than the oral lease. It is immaterial that the new lease was void because it was homestead property. The execution of the written lease established that both Adolph and Joseph

had acquiesced in the notice of termination and regarded the oral lease as terminated. As the county court found, "both of them acted in a manner in which the oral tenancy was terminated." There was ample evidence in the record to support the findings of both trial courts that the oral year-to-year lease was legally terminated. That determination was correct.

The defendant also contends that Adolph was a necessary party to this action and that Rose cannot maintain a forcible entry and detainer action against Joseph in the absence of Adolph.

In 1882 this court held that one tenant in common could maintain an ejectment action against one wrongfully in possession and recover possession of the premises for the benefit of all cotenants. See *Crook v. Vandevoort,* 13 Neb. 505, 14 N.W. 470 (1882). The *Vandevoort* decision was overruled in *Johnson v. Hardy,* 43 Neb. 368, 61 N.W. 624 (1895). *Johnson* held that one tenant in common in an ejectment action may recover only the extent of his own title in an action against a trespasser. *Johnson* has not been cited by this court since that date. The court has subsequently recognized that an action of forcible entry and detainer is merely possessory, and that the unlawful entry and detainer statute provides a remedy for persons entitled to possession of property lawfully taken but unlawfully detained. *Jones v. Schmidt,* 163 Neb. 508, 80 N.W.2d 289 (1957); *Gregory v. Pribbeno,* 143 Neb. 379, 9 N.W.2d 485 (1943).

The great weight of authority is that one cotenant may maintain a possessory action against a stranger to the title and recover possession of the whole which inures to the benefit of the other cotenants. *DesRoches v. McCrary,* 315 Mich. 611, 24 N.W.2d 511 (1946); *Moore v. Ramsey,* 272 Ky. 582, 114 S.W.2d 1101 (1938); *Taylor v. Catalon,* 140 Tex. 38, 166 S.W.2d 102 (1942); 4 Thompson on Real Property

§ 1816 (1979); 4A Powell on Real Property ¶ 606 (1979). Powell states: "When a single cotenant suing alone brings ejectment, or other action to recover possession of land, against an outside wrongdoer, he is, in most jurisdictions, able to secure a result applicable to the whole of the common asset, and the recovery so made inures to the benefit of the other cotenants. Some jurisdictions, uneconomically, restrict his recovery to the plaintiff's fractional share." *Id.* at 625-26.

In Nebraska a forcible entry and detainer action is possessory and the question of title is not involved. The right of possession of one tenant in common extends to all the land in his own right and such right to possession meets the requirements for bringing a forcible entry and detainer proceeding. See Volkmer, *Nebraska Law of Concurrent Ownership,* 13 Creighton L. Rev. 513 at 530 (1979). We therefore hold that a single cotenant, suing alone, can maintain summary proceedings to recover possession of the premises against a stranger to the title without joinder of his cotenant as a party, and that any recovery inures to the benefit of the other cotenants. To the extent that *Johnson v. Hardy,* 43 Neb. 368, 61 N.W. 624 (1895), is in conflict, it is overruled.

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

AFFIRMED.

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

WHITE, J., dissents.

FRANK A. LAVE ET AL., APPELLEES, V. HERMAN NEUMANN, DOING BUSINESS AS PLATTSMOUTH TRANSFER, APPELLANT.

317 N.W.2d 779

Filed April 2, 1982. No. 43896.

1. **Fireman's Rule: Negligence.** A fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care.
2. **Rescue Doctrine: Negligence.** Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking.
3. **Fireman's Rule.** The "fireman's rule" held not applicable to a policeman injured in an attempt to stop a driverless moving truck from rolling downhill.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Larry E. Welch and Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman, Day & Langdon, P.C., for appellant.

Dixon G. Adams of Rice & Adams, for appellees.

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

PER CURIAM.

This was an action for damages for personal injuries sustained in an accident on December 15, 1978. The defendant appeals from a judgment in favor of the plaintiffs in the amount of $8,500.

The plaintiff Frank Lave was employed as a police

officer by the City of Bellevue, Nebraska. On December 15, 1978, at about 1 p.m., he was directed to investigate a pickup truck parked near 18th and Warren Streets in the City of Bellevue. While the plaintiff was investigating the pickup truck, a semitruck and trailer owned by the defendant, Herman Neumann, doing business as Plattsmouth Transfer, and operated by Theodore R. Emmert, an employee of the defendant, stopped near 1808 Warren Street near the pickup truck.

Warren Street at that point is in a residential area. The street is paved and approximately 24 feet wide. It slopes down to the north from the point where the defendant's truck was stopped.

Although the area was not fully developed, there were houses on both sides of the street and several vehicles were parked at the curb on both sides of the street. A senior citizens home was being constructed at 1808 Warren Street and there were five stoves on the defendant's truck which were to be delivered at that address.

Emmert parked the defendant's truck near the center of Warren Street with the truck headed in a northerly direction. Both the truck and the trailer were equipped with air brakes. Emmert applied both sets of brakes and left the motor running while he went into the building to talk to the construction foreman.

Shortly after Emmert had entered the building, the truck began to roll to the north down Warren Street. The plaintiff ran after the truck in an effort to stop it. He reached the truck and stepped on the running board with his right foot, but the door to the cab came open and he slipped to the ground. He was injured when the left rear wheels of the truck passed over his legs or pinched his legs against the curb as the truck passed by. Emmert was able to reach the plaintiff and help pull him out of the way in time so that the rear wheels of the trailer did not strike the plaintiff.

The issue upon the appeal is the standard of care which the defendant owed to the plaintiff under the circumstances in this case. The defendant contends that the "fireman's rule" is applicable and that the defendant was liable only for willful and wanton negligence or a failure to warn of a hidden danger which was known to the defendant but of which the plaintiff was unaware. The trial court refused to give a requested instruction to that effect.

The petition alleged the defendant was negligent in failing to keep his vehicle under proper and reasonable control; in failing to set the brakes on the vehicle and/or keep them in proper repair; or in allowing his vehicle to stand unattended on the highway without first stopping the motor and turning the front wheels to the curb. The answer alleged the plaintiff was a volunteer who assumed the risk of injury and that the plaintiff was contributorily negligent in attempting to jump into a moving vehicle or in leaving a place of safety and entering a place of danger.

The trial court submitted the case to the jury upon the claims of the parties and instructed the jury that it was not contributory negligence for the plaintiff "to expose himself to danger in an effort to save himself or others from injury to their person or property, unless the effort itself is an unreasonable one or the plaintiff acts unreasonably in the course of it."

The fireman's rule, which the defendant contends is applicable, is set out in *Wax v. Co-Operative Refinery Assn.*, 154 Neb. 805, 807, 49 N.W.2d 707, 709 (1951), as follows: "[A] fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the

owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care."

In *Nared v. School Dist. of Omaha,* 191 Neb. 376, 215 N.W.2d 115 (1974), we held that a similar rule was applicable to a policeman injured while searching for a burglar in the attic of a school building. We held that a police officer who is called to investigate a burglary on premises and is injured as a consequence of a condition upon a portion of the premises not open to the public has the status of a licensee. The occupier of the premises owes to the licensee the duty to warn, if an opportunity is afforded, of hidden dangers known to the occupier but unknown to and not readily observable by the licensee.

The defendant contends that the fireman's rule was extended to risks encountered in dealing with personal property in *Buchanan v. Prickett & Son, Inc.,* 203 Neb. 684, 279 N.W.2d 855 (1979). In the *Buchanan* case a volunteer fireman was injured while trying to extricate the driver from a gasoline transport after it had been damaged in a collision with another truck. The plaintiff urged that the fireman's rule should not be applicable to a volunteer fireman attempting to save a human life, and that the rescue doctrine should be applicable. We held that no distinction could be made as between volunteer and paid firemen; that no substantive distinction could be made upon the basis of the particular task being performed; and that the fireman's rule, not the rescue doctrine, was applicable under the facts of that case.

The reasons which justify the application of the fireman's rule in cases where firemen were injured in fires involving personal property are the same reasons which support the rule in fires involving real property. A similar analogy cannot be made as to policemen injured while performing their duty not on private premises.

Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. *Buchanan v. Prickett & Son, Inc., supra.*

We see no reason why, under the facts of this case, a policeman injured in the performance of his duty, by the negligence of another, has any less right to be compensated for his injuries than a person not a policeman. The requirement that the rescue effort be reasonable and the risk assumed be proportionate to the danger involved is an adequate limitation upon the right of the injured policeman to recover.

We conclude that the rescue doctrine was applicable in this case and the fireman's rule was not.

The judgment of the District Court is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

I must respectfully dissent. Plaintiff pled that at the time in question he was in the course and scope of his employment as a police officer. The defendant admitted such to be the fact.

Our prior holdings conclude that policemen and firemen assume the risks of their occupations and that, absent a statute or ordinance to the contrary, one creating a risk does not become liable to such public servants except for those damages proximately caused by design or by willful or wanton negligence. This result has been based on the theory that one owes no duty to be free of ordinary negligence to persons engaged in the occupations of fireman or policeman. *Buchanan v. Prickett & Son,*

Inc., 203 Neb. 684, 279 N.W.2d 855 (1979); *Nared v. School Dist. of Omaha*, 191 Neb. 376, 215 N.W.2d 115 (1974); *Wax v. Co-Operative Refinery Assn.*, 154 Neb. 805, 49 N.W.2d 707 (1951). We have also held it is immaterial that one engaged in such an occupation acts on his own initiative because of facts which come to his attention during the course of his duties. *Nared v. School Dist. of Omaha, supra.*

The majority opinion tells us that the reasons which justify the application of the fireman's rule in cases where firemen are injured when involved with personal property are the same which support the rule in fires involving real property. It then asserts that a similar analogy cannot be made to policemen injured while performing their duties on other than private premises. The majority does not undertake to tell us why such an analogy cannot be made. Such an analogy not only can be made, it cannot be avoided. Both firemen and policemen are public servants paid to incur the risks of their occupations. That is the articulated rationale of the rule in this jurisdiction. No rational distinction can be made between firemen and policemen whether they are performing their duties on private premises or in circumstances involving personal property.

The fireman's rule has withstood attack in other jurisdictions from those who misunderstand its genesis and underlying policy. See *Walters v. Sloan*, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977), which noted that the principle denying recovery to those voluntarily undertaking the hazard causing injury is fundamental in a number of doctrines, including nullification of the duty of care, satisfaction of the duty to warn because the hazard is known, contributory negligence, and assumption of risk, as well as in the fireman's rule. The rule finds its clearest application in a situation where a person who, fully aware of the hazard created by the defendant's negligence, voluntarily confronts the

risk for compensation. Firemen and policemen are paid for the work they perform and are prepared to face the hazards of their employment and deal with perils when they arise. When death, injury, or disability occurs, compensation is provided not only through the workmen's compensation law but, in certain circumstances, by other special benefit statutes. As stated in *Scheurer v. Trustees,* 175 Ohio St. 163, 192 N.E.2d 38 (1963), a suggestion that there is a difference between policemen and firemen is not impressive. Both act under authority of law, appear at any time, without notice or warning, and the owner of the property may not exclude them.

The result reached by the majority is not logically consistent with our prior pronouncements. If this case is to signal the abrogation of the fireman's rule in this jurisdiction, we should say so forthrightly and not leave the world in a quandary as to what the rule means and whether it will be applied. Moreover, I would not agree that a departure from the rule is sound or desirable.

I would reverse with instructions to dismiss.

BOSLAUGH and CLINTON, JJ., join in this dissent.

BLAHA GMC-JEEP, INC., A NEBRASKA CORPORATION, APPELLANT, V. EVERETT FRERICHS, DOING BUSINESS AS A. F. REAL ESTATE, APPELLEE.

317 N.W.2d 894

Filed April 2, 1982. No. 43919.

1. **Records: Appeal and Error.** On appeal from the county court to the District Court, it is the duty of the appellant to see that a record of the evidence in the county court was properly presented in the District Court.
2. _____: _____. In the absence of a properly certified bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the lower court.
3. **Records: Appeal and Error: Case Overruled.** In cases involving

appeals from the county court to the District Court prior to the effective date of Neb. Rev. Stat. § 24-541.06 (Supp. 1981), wherein it appears obvious from the record filed in this court that both the parties and the district judge considered the county court bill of exceptions as having been received in evidence, we will so consider it on appeal to this court. To the extent that *Tunks v. O'Brien*, 195 Neb. 735, 240 N.W.2d 349 (1976), conflicts with this holding, it is overruled.

4. **Negotiable Instruments: Pleadings.** When the signatures on a negotiable instrument are admitted, the production of the instrument entitles the holder to recover on it unless the defendant establishes a defense. However, such a defense must be affirmatively pleaded.
5. **Pleadings.** Under the code system of pleading it is not necessary to state a cause of action or a defense in any particular terms. It is only necessary to plead the facts, not the theory of recovery or defense.
6. **Judgments: Appeal and Error.** The decision of a trial judge on a question of fact in a law action will not be set aside on appeal unless clearly wrong.
7. **Negotiable Instruments: Consideration: Proof.** Where failure of consideration is pleaded as a defense to an action on a negotiable instrument, the burden is upon the defendant to prove such defense.
8. **Negotiable Instruments: Consideration.** There are two kinds of consideration for a negotiable instrument, i.e., that which confers a benefit upon the promisor and that which causes a detriment to the promisee.
9. _____: _____. In order for a detriment to the promisee to constitute a valid consideration for a negotiable instrument, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.

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

Dennis L. Arfmann of Robert M. Brenner Law Office, for appellant.

Donald J. Tedesco, for appellee.

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

HASTINGS, J.

This is an action brought by the plaintiff, Blaha GMC-Jeep, Inc., in the county court of Cheyenne

County to recover the sum of $1,875.19 from the defendant, Everett Frerichs. This sum represented the face amount of a check which had been issued by Frerichs to pay for repairs allegedly made by Blaha to Frerichs' truck tractor, and on which check Frerichs had issued a "stop payment" order.

Following a judgment in favor of Blaha, Frerichs appealed to the District Court. There the case was tried de novo on the record, with some additional evidence being permitted as provided for by Neb. Rev. Stat. § 24-541 (Reissue 1979). The District Court reversed the judgment of the county court and ordered the petition dismissed. Blaha has appealed to this court, assigning as errors: (1) The transcript and bill of exceptions from the county court not having been offered in evidence in the District Court, the original judgment should have been affirmed because it was supported by the pleadings; (2) Failure of consideration, the defense upon which Frerichs claims he relied, was not specifically pleaded; and (3) There was not a total failure of consideration because the evidence disclosed that there was a benefit or advantage to Frerichs and a loss or detriment to Blaha.

As to appellant Blaha's first assignment of error, a procedural question, the court is left to its own devices. Blaha cites no statutory law and only case law which preceded 1972 Neb. Laws, L.B. 1032, Neb. Rev. Stat. §§ 24-541 et seq. (Reissue 1979), which was applicable at the time of trial. The appellee Frerichs simply chose to ignore the problem in his brief.

Appeals of this nature taken from the county court "shall be de novo on the record," with discretion in the District Court to "receive additional evidence if the court determines that such evidence is reasonably necessary to determine the issues . . . ." § 24-541.

The District Court did, over the objections of

Blaha, permit the introduction of additional evidence. This testimony, which comprised most of the entire 49 pages of the District Court bill of exceptions, was devoted to Frerichs' counterclaim, which is not in issue on this appeal. However, some of the comments made by Blaha's counsel are of some importance in determining what in fact the District Court judge did consider in reviewing the judgment of the county court. Consideration of this question is important because it is apparent from the record that the county court bill of exceptions was never offered or received in evidence.

In support of his objection to the reception of additional evidence, counsel for the plaintiff stated in part that "there is no new evidence reasonably necessary to determine the issues to make findings of fact or to permit the Court to render judgment in the proceeding on the appeal from the County Court." He goes on to state: "I believe the testimony and I have got it, several pages in the bill of exceptions, I have my copy with me, on at least — on pages 73, I believe there was nothing wrong with the transmission and at page 90 of the bill of exceptions . . . ." Because his reference to pages 73 and 90 went beyond the number of pages in the bill of exceptions from the District Court, he could only have been referring to the one filed from county court.

On the date of trial in District Court, June 28, 1980, the judge stated: "Pursuant to statute the appeal here this morning will be heard denovo on the record with the addition that Mr. Frerichs through counsel has requested permission to adduce additional evidence on the appeal . . . . I have glanced through the bill of exceptions, I do not believe there is a necessity for opening statements . . . ." During the course of the trial on appeal, the following exchange occurred: "Q. [By Mr. Tedesco] Now, Mr. Evans, you have given testimony in this case before, haven't you? A. Yes. Q. And I am not going to go

through that entire amount but I believe it was your testimony at the earlier hearing that assuming that a truck had been revved up in excess of 2,000 rpm's that the popping of the clutch would result in some sort of damage to the truck, is that correct? Mr. Brenner: To which, Your Honor, I would object as to not stating the facts contained in the record and not fairly reflecting the evidence or the statements in the record. The Court: I will ask you, Mr. Tedesco, is there anywhere in the record that the truck was revved up to that specific amount of rpm's? Mr. Tedesco: I believe so, Your Honor, I would have to look at it, though. The Court: It is your contention that that is incorrect? Mr. Brenner: That is correct, Your Honor. Mr. Tedesco: Can I offer the bill of exceptions, if that is permissible? The Court: I think you need not, you can simply refresh the Court's recollection of what is in the record, the same as if I read it."

The rules applicable to this situation would seem to be direct and unambiguous. On appeal from the county court to the District Court, it is the duty of the appellant to see that a record of the evidence in the county court was properly presented in the District Court. *Riggert v. King,* 192 Neb. 607, 223 N.W.2d 155 (1974). In the absence of a properly certified bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. *Allgood v. Nebraska Humane Society,* 197 Neb. 373, 248 N.W.2d 778 (1977). Blaha would have us apply that same rule to an appeal from county court to District Court, which would give rise to the situation that if the record failed to disclose that the bill of exceptions from county court was received in District Court, there would be nothing left for the district judge to do but examine the pleadings, and upon finding that they supported the judgment of the county court, affirm that judgment.

The case of *Tunks v. O'Brien,* 195 Neb. 735, 240 N.W.2d 349 (1976), contains facts somewhat paralleling the situation here. Therein we said: "The bill of exceptions from the county court was filed but was not introduced in evidence. The District Court reviewed the case, considered the bill of exceptions in making his decision, and affirmed the judgment of the county court. Defendant has appealed to this court and there is no properly certified bill of exceptions in accordance with the revised rules of this court, although the county court bill of exceptions is a part of the transcript here.

"When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court." *Id.* at 736-37, 240 N.W.2d at 350.

However, in the case before us we are not faced with the absence of a properly certified bill of exceptions. It is simply incomplete in that it does not contain the evidence upon which the District Court and both parties unquestionably relied in the trial of the case. Additionally, Frerichs' counsel asked permission to introduce in evidence the absent county court bill of exceptions, but was advised by the court that it was not necessary. Blaha utilized the same bill of exceptions as reflected by his comments and objections noted earlier in this opinion. To now permit him to deny this same right to Frerichs on appeal offends our sense of justice. As stated by McCown, J., dissenting, in *Tunks*: "In this case it is clear beyond all reasonable doubt that the bill of exceptions from the county court was considered and

acted upon as the evidence in the District Court. . . . To deny appellate review under such facts makes a legal mountain out of a procedural molehill. Justice is a fragile thing and can easily be lost in a sea of rules." *Id.* at 737, 240 N.W.2d at 351. We might add, parenthetically, that since this case was heard in District Court, Neb. Rev. Stat. § 24-541.06 (Supp. 1981) makes it now unnecessary, generally, to offer in evidence the county court bill of exceptions on appeal to the District Court.

What we said in *Peterson v. Wolf,* 1 Neb. (Unoff.) 242, 95 N.W. 332 (1901), is appropriate in our consideration on this appeal: "It is also insisted that the written guaranty and subsequent letter were not offered in evidence, but they were both present in court and were read by defendant's attorneys in open court and were evidently considered by all parties as in evidence, and must be so considered now." *Id.* at 243, 95 N.W. at 332.

We conclude that in those cases involving appeals from the county court to the District Court prior to the effective date of § 24-541.06, wherein it appears obvious from the record filed in this court that both the parties and the district judge considered the county court bill of exceptions as having been received in evidence, we will so consider it on appeal to this court. To the extent that *Tunks v. O'Brien,* 195 Neb. 735, 240 N.W.2d 349 (1976), conflicts with this holding, it is overruled.

In order to consider the appellant's remaining two assignments of error, it is necessary to recite some additional facts. Frerichs owned a 1972 Kenworth truck tractor which, on September 20, 1977, developed a noise in the auxiliary transmission. It was taken to Blaha GMC-Jeep, Inc., in Scottsbluff for repairs. Blaha agreed to replace the transmission with a used transmission which it found necessary to rebuild. Frerichs paid Blaha $1,875.19 for this repair work by issuing a bank check on an ac-

count of his. After the tractor was supposedly repaired, it was picked up by Frerichs. In returning the tractor to its home base at Sidney, Frerichs discovered that the transmission was still noisy, it was difficult to shift and would not stay in gear, the transmission did not have an "under low" gear in it as did the original transmission, and the rear seal leaked oil. Upon instructions from Blaha, the tractor was returned for further repairs.

Blaha admitted having improperly repaired the tractor in the first instance. Supposedly, adjustments were made and one of Frerich's employees picked up the tractor. During the return trip to Sidney, the transmission again began to emit noise and the rear seal was leaking. Frerichs, upon calling Blaha, was told to return the tractor for further work, which Frerichs refused to do. Rather, Frerichs stopped payment on the check.

Thereafter, the auxiliary gear continued to emit noise, pop out of gear, and leak oil out of the rear seal. Upon Frerich's refusal to reissue the check, this action was filed.

Frerichs admitted the due execution of the check and the issuance of a "stop payment" order on the same. His amended answer and counterclaim further alleged that the consideration for his issuance of the check was the services rendered in repairing the tractor, but that the tractor was not properly repaired, that the transmission installed failed to have an "under low" gear as represented, and that the transmission installed by Blaha was not fit for the purposes for which it was intended.

When the signatures on an instrument are admitted, as was done here, the production of the instrument entitles the holder to recover on it unless the defendant establishes a defense. However, such a defense must be affirmatively pleaded. *Newman Grove Creamery Co. v. Deaver,* 208 Neb. 178, 302 N.W.2d 697 (1981). Nevertheless, under the code

system of pleading it is not necessary to state a cause of action or a defense in any particular form. *Benson v. Walker,* 157 Neb. 436, 59 N.W.2d 739 (1953). It is only necessary to plead the facts, not the theory of recovery. *Newman Grove Creamery Co. v. Deaver, supra.*

Admittedly, Frerichs' amended answer does not allege a failure of consideration, using that specific term. However, we believe that sufficient facts were pleaded, as set forth above, to constitute the raising of the defense of a total failure of consideration.

In moving to a consideration of the final assignment of error, the finding by the District Court of total failure of consideration, we must follow the rule that the decision of a trial judge has the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. *Dale Electronics, Inc. v. Federal Ins. Co.,* 205 Neb. 115, 286 N.W.2d 437 (1979). Where failure of consideration is pleaded as a defense to an action on a negotiable instrument, the burden is upon the defendant to prove such defense. *Plaza Hotel Co. v. Hotel Stratton,* 132 Neb. 396, 272 N.W. 224 (1937).

It is true, as contended for by Blaha, that there are two kinds of consideration, i.e., that which confers a benefit upon the promisor and that which causes a detriment to the promisee. *Leach v. Treber,* 164 Neb. 419, 82 N.W.2d 544 (1957).

In this instance, Blaha contends that it has performed services to its detriment and that, regardless of the value of these services, such a detriment gives rise to consideration in support of the check. However, " 'In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.' " *Leach v. Treber, supra* at 423, 82 N.W.2d at 547.

The evidence makes it apparent, and the District Court so found, that however detrimental the services may have been to Blaha, one can be certain that the services as rendered were not within the contemplation of Frerichs when he brought the tractor in for repair. A promise to pay for repairs to a noisy transmission cannot be said to have been made in contemplation of the fact that the transmission would remain noisy after the repairs were made, let alone that it would leak oil out of a rear seal, not stay in gear, and be absent an essential component, an "under low" gear. We must conclude that the evidence supports a finding that any detriment suffered by Blaha in rendering the services cannot be said to have been within the contemplation of the parties and therefore cannot provide consideration requiring enforcement of the check in this instance.

It is equally apparent that Frerichs was not benefited by the services rendered by Blaha, even though the latter contends that Frerichs continued to use the tractor for some period of time without having further repairs made. Regardless of this use, which Frerichs admitted, the testimony showed that the transmission was in worse condition than when it was first turned over for repair. We cannot say that the trial court was clearly wrong when it found that "defendant's truck was not rendered more valuable, more servicable [sic] or more efficient by virtue of plaintiff's work and services thereon and thereto" and, consequently, "that there was an entire failure of consideration for the check given by defendant to plaintiff."

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

AFFIRMED.

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

FRANCIS S. DEVINE, APPELLANT, V. DEPARTMENT OF PUBLIC INSTITUTIONS, APPELLEE.

317 N.W.2d 783

Filed April 2, 1982. No. 43927.

1. **Administrative Law: Appeal and Error.** The review in the District Court of an order of the State Personnel Board is on the record of the agency.
2. _____: _____. The questions to be determined are whether the findings of the board are supported by substantial evidence; whether the action taken was within the jurisdiction of the board; and whether its action was arbitrary and capricious.
3. **Constitutional Law.** The right of free speech is not absolute.
4. **Administrative Law.** Administrative probation may be imposed upon a member of the staff of a Regional Center who refuses to comply with stated policies and procedures regarding the treatment of patients.

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

Michael E. Sullivan of Helmann & Sullivan, and Alan E. Peterson, for appellant.

Paul L. Douglas, Attorney General, and John Boehm, for appellee.

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

BOSLAUGH, J.

Francis S. Devine appeals from the judgment of the District Court affirming an order of the State Personnel Board affirming the imposition of administrative probation upon the appellant.

Devine is a staff psychologist employed at the Drug and Alcohol Treatment Center of the Hastings Regional Center. As a part of his duties, Devine delivered a series of seven lectures to patients participating in the 21-day treatment program. In these lectures Devine was critical of the philosophy of the program at the Regional Center that alcoholism was a disease and expressed his opinion that the

Alcoholics Anonymous program was satisfactory for only a small number of patients. As a result of these statements, which contradicted the statements of other members of the staff, many patients became confused. As a further consequence of the statements of Devine, other staff members were required to abandon their prepared schedules and devote their efforts to a discussion and refutation of Devine's statements.

Frank Touchstone, the director of psychology at the Regional Center, is the immediate supervisor of Devine. After a series of conferences proved to be of no effect, Touchstone placed Devine on administrative probationary status for 90 days, a form of disciplinary action. Devine then filed a grievance complaint which was denied successively by the director of psychology and the superintendent of the Regional Center, the director of the Department of Public Institutions, and the Director of State Personnel. Devine then appealed to the State Personnel Board which found that Devine had failed to comply with the stated policies and procedures of the Regional Center concerning the treatment philosophy and approach toward alcoholism which, by statute, was based in part on an Alcoholics Anonymous model, and that his negative actions and derogatory statements had resulted in patient confusion and negative staff relations. From the order of the board affirming the imposition of administrative probation, Devine appealed to the District Court.

The review in the District Court of an order of the State Personnel Board is on the record of the agency. Neb. Rev. Stat. § 84-917(5) (Reissue 1976). The questions to be determined are whether the findings of the board are supported by substantial evidence; whether the action taken was within the jurisdiction of the board; and whether its action was arbitrary and capricious.

The principal issue here is whether Devine's con-

duct and statements were protected under the first amendment to the Constitution of the United States. Devine contends that the situation at the Regional Center was comparable to that of an academic institution and that Devine should enjoy a form of "academic freedom" similar to that of a professor in a college or university. The analogy is not appropriate.

The patients to whom Devine spoke were not students at an educational institution but were persons with a serious problem who were at the Regional Center to receive treatment for their problem. The treatment at the Regional Center was based on the theory that alcoholism is a disease, and by statute the center was required to include an Alcoholics Anonymous program as a part of its treatment approach. See Neb. Rev. Stat. § 83-307.01 (Reissue 1976). It is apparent that if the treatment was to have any hope of success, it was essential that the cooperation of the patients be obtained.

The negative effects and confusion that resulted from Devine's statements to patients are described in the testimony of the director of psychology, the director of the Alcohol and Drug Unit, the project coordinator of the Alcohol and Drug Unit, a senior professional counselor, and an alcohol drug counselor at the center. The following excerpt from the testimony of one of the alcohol drug counselors illustrates the problems and disruption in treatment caused by the appellant: "Q- You were going to discuss the first lecture. A- Okay, I would enter the lecture hall to give my lecture, which was on an orientation to the AA steps, and I would go in and I was introducing my name and the title of my lecture, and some of the patients responded that—let me see, how long—responded that the person before me, who was Dr. Devine, had said that counselors do not know anything about alcoholism, that the program of Alcoholics Anonymous does not work, that

total abstinence was not the answer—always the answer, I better correct that, I believe they said always the answer—and didn't this contradict what I was going to say in my lectures or had said in my lectures. And this was brought up to me at times by not just one patient in the audience but there could be as many as eight or ten involved in this out of approximately 40 people. Q- Were you able to continue with your lecture as had been planned? A- No, no way. . . . Q- In addition to giving lectures to patients you also deal with them on, you said in group? A- In group and individual counseling, yes. Q- And in either of these situations did you have patients come to you expressing concern about the conflicting information they were receiving from Dr. Devine? A- Yes, in both situations, both in individual counseling and in group. In the study group they would ask me to explain or try to explain the disease idea of alcoholism because this was one of the things that they claim Dr. Devine had disagreed with."

In *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), a case upon which the appellant relies, the U.S. Supreme Court recognized that the state has interests as an employer in regulating the speech of its employees that differ significantly from those that it possesses in connection with regulation of the speech of its citizenry in general. The court also recognized there was a need to maintain discipline and harmony among coworkers and curtail conduct which impeded the proper and competent performance of the duties of employees.

As the trial court noted, and the appellant concedes, the right of free speech is not absolute. The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting

the efficiency of the public services it performs through its employees. *Pickering v. Board of Education, supra.* We believe a proper application of the balancing test supports the conclusion in this case that the statements of the appellant to the patients at the Regional Center were not protected by the first amendment.

In the District Court, the appellant attempted to obtain certain patient records and information by discovery. The objections to these attempts at discovery were properly sustained. The review in the District Court is limited to the record of the agency.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority in this case. While I do not take issue with the general propositions of law advanced by the majority, I believe that their application to the instant case requires us to reach a contrary decision. The majority has correctly noted that the questions to be determined are whether the findings of the board are supported by substantial evidence. I take this to mean more than justly a preponderance of the evidence.

My reading of the record leads me to believe that the evidence is not substantial. At best, we have the testimony of employees who admittedly are opposed to the position taken by Dr. Devine, and who admittedly desire to present a particular position. When one examines their testimony, which admittedly is hearsay, one cannot, in my view, reach a conclusion that the evidence is substantial so as to support the state's position.

While the state maintains that Dr. Devine's behavior was having a negative effect on staff relations and patients, the testimony does not bear out that contention. The only evidence presented was

that of staff who reported in a general fashion what they perceived some of the patients were saying. No patient testified in support of the state's position. It would appear that the staff was more confused by what Dr. Devine was saying than were the patients. There is simply no substantial evidence in the record that the patients' condition of "confusion" was attributable to Dr. Devine's comments on alcoholism. At best, the evidence supports a view that some patients made inquiry as to which of the two views should be accepted.

The parties all concede that Dr. Devine's statements were not false in that there is an honest difference of opinion as to whether alcoholism is a disease, and an honest difference of opinion as to the effect of an AA program on every patient. To suggest that by saying he did not believe that alcoholism was a disease or that it was effective on all people he thereby created confusion which adversely affected the patients' treatment is simply unsupported in the record by any substantial evidence. There is no evidence that Dr. Devine's statements adversely affected the treatment of any patient or prevented a patient from obtaining his desired level of recovery, nor is there any indication that the statements made caused any patient to regress in his treatment.

If, indeed, the position of the department was as important as the department now maintains it was, one would think that an investigation concerning Dr. Devine's views would have been made before hiring him.

I wholeheartedly agree with the majority that the problem in this case is to arrive at a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees. My disagreement with the majority

is that I believe the balance tips in favor of the employee. To suggest, as the majority does now, that in every health care facility all of the employees must follow the "party line," absent any substantial evidence that the party line is correct or required, is to impose upon employees in the health care field requirements which I believe the law does not permit. I would have balanced the test in favor of Dr. Devine.

KENNETH E. RAYNOR, APPELLANT, V. NORTHWESTERN NATIONAL BANK OF SIOUX CITY, IOWA, A CORPORATION, APPELLEE.

317 N.W.2d 786

Filed April 2, 1982. No. 43966.

1. **Trusts.** Under the Nebraska Probate Code, the county court acquires jurisdiction over a trustee by registration of the trust, or by the acceptance of the trusteeship of a registered trust or a trust of which the principal place of administration is in this state. Neb. Rev. Stat. §§ 30-2803, 30-2804 (Reissue 1979).
2. _____. A trust may be registered only in the court located at the principal place of administration of the trust. Neb. Rev. Stat. § 30-2801 (Reissue 1979).
3. _____. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept. Neb. Rev. Stat. § 30-2801 (Reissue 1979).
4. _____. Neb. Rev. Stat. § 30-2808 (Reissue 1979) does not provide a method for obtaining jurisdiction over a trust. It is a venue provision which employs the concept of forum non conveniens to center litigation involving the trustees and beneficiaries at the principal place of administration of the trust.

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

Leamer Law Office, for appellant.

Michael W. Ellwanger and William S. Rawlings of Kindig, Beebe, Rawlings, Nieland & Killinger, for appellee.

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

BOSLAUGH, J.

The plaintiff is a beneficiary of a testamentary trust established by his deceased wife, Regina J. Raynor. He brought this action in the county court of Dakota County, Nebraska, to compel the trustee to increase the monthly payment he receives from the trust for support and maintenance.

The trustee, who was named in the will of the deceased, is the Northwestern National Bank of Sioux City, Iowa. It filed a special appearance alleging that the situs of the trust was in Iowa and that the Nebraska court had no jurisdiction over it. The county court sustained the special appearance and dismissed the action. The plaintiff appeals from the judgment of the District Court affirming the judgment of the county court.

In support of his theory that the Nebraska court had jurisdiction of the trustee, the plaintiff seems to rely upon a theory of "acceptance" under Neb. Rev. Stat. § 30-2804 (Reissue 1979) or lack of reciprocity under Neb. Rev. Stat. § 30-2808 (Reissue 1979). The plaintiff made no attempt to plead or present the law of Iowa.

The record shows that the testatrix was a resident of Nebraska at the time of her death on September 24, 1977. Her will was admitted to probate and her estate administered in the county court of Dakota County, Nebraska. On December 8, 1978, the bank as trustee filed a receipt in the county court acknowledging receipt of the assets of the trust. On December 13, 1978, a petition was filed in the District Court of Plymouth County, Iowa, requesting the appointment of the bank as trustee. On December 15, the bank was appointed trustee by the Iowa court.

The inventory filed in the Iowa court shows that the assets of the trust consist of a 40-acre tract of land in Plymouth County, Iowa, two contracts for the sale of Iowa land, and other personal property. The other beneficiaries of the trust are the children of the deceased. All of the beneficiaries of the trust, except one child who lives in Iowa, are residents of Nebraska.

It is undisputed that the principal place of business of the trustee is in Iowa and that the principal place of administration of the trust is in Iowa. The trustee was appointed by the District Court for Plymouth County, Iowa, the county in which the real property, which is a part of the assets of the trust, is located.

The Nebraska Probate Code sets out two methods by which Nebraska courts may obtain jurisdiction over a trustee. Neb. Rev. Stat. § 30-2803 (Reissue 1979) provides: "By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the court in any proceeding under section 30-2806 of this code . . . ." As regards registration, Neb. Rev. Stat. § 30-2801 (Reissue 1979) permits (but does not require) registration of "the trust in the court of this state at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept . . . ." Both of the lower courts found that the principal place of administration of the trust was in Iowa.

The other section of the Nebraska Probate Code which provides for personal jurisdiction over a trustee is § 30-2804: "By accepting the trusteeship of a trust of which the principal place of administration is in this state, or by moving the principal place of administration of a trust to this state, the trustee submits personally to the jurisdiction of the courts of

this state in any proceeding under section 30-2806 . . . ."

None of these provisions provide a method by which the Nebraska courts may obtain jurisdiction over the person of the defendant trustee. The trust was not and could not have been registered in Nebraska, since its principal place of administration is in Iowa. And since the principal place of administration of the trust is in Iowa, personal jurisdiction over the trustee could not be obtained by virtue of § 30-2804.

Section 30-2808 provides in part: "The court will not, over the objection of a party, entertain proceedings under section 30-2806 involving a trust registered or having its principal place of administration in another state, unless (1) when [sic] all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when [sic] the interests of justice otherwise would seriously be impaired if the laws of the state in which the trust is registered or has its principal place of administration grant a similar protection to trusts registered or having their principal place of administration in this state." This provision, standing alone, does not provide a method to obtain jurisdiction over the trust.

Section 30-2808, by its terms, assumes jurisdiction already exists. It refers to certain situations in which the court *will* entertain proceedings under Neb. Rev. Stat. § 30-2806 (Reissue 1979) involving a foreign trust over the objection of a party. In order to entertain proceedings, the court must first have obtained jurisdiction over the parties and the subject matter by virtue of some other statutory provision.

Section 30-2808 is a venue provision which, as stated in the comment to the section, "employs the concept of forum non conveniens to center litigation involving the trustee and beneficiaries at the princi-

pal place of administration of the trust . . . ."

There are no provisions of the Nebraska Probate Code which would permit the Nebraska courts to obtain personal jurisdiction over the trustee. The defendant's special appearance was properly sustained and the judgment of the District Court affirming the decree of the county court is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

PHILIP G. JOHNSON & CO., A PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. ROBERT S. SALMEN, APPELLEE AND CROSS-APPELLANT.

317 N.W.2d 900

Filed April 2, 1982. No. 44083.

1. **Accounting: Equity.** An action for an accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity.
2. _____: _____. Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court.
3. **Equity: Appeal and Error.** In an action at equity, this court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying.
4. **Restrictive Covenants.** Covenants not to compete, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.

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

Sutter & Olson, for appellant.

Fitzke & Langvardt, for appellee.

Heard before BOSLAUGH, MCCOWN, WHITE, and CAPORALE, JJ., and FINN, D.J.

CAPORALE, J.

The plaintiff-appellant, Philip G. Johnson & Co. (Johnson), brought an action for an accounting and to recover damages from one of its former partners, Robert S. Salmen, the defendant-appellee. Salmen counterclaimed for damages and prejudgment interest.

Johnson appeals from the decree of the trial court which refused to enforce a restrictive covenant contained in the partnership agreement between it and Salmen. Salmen cross-appeals from that portion of the decree which denies him recovery of a share of the proceeds resulting from the sale of certain partnership assets and denies prejudgment interest.

Johnson urges, in summary, that the trial court erred in (1) refusing to enforce the restrictive covenant, (2) excluding certain testimony, and (3) awarding damages to Salmen. Salmen, on the other hand, urges the trial court erred in computing his damages and in refusing prejudgment interest.

An action for an accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity. Where, as here, the intimate relationships of the parties are involved, an adequate remedy was available only within the equitable jurisdiction of the court. See, *Cook v. Wilkie,* 181 Neb. 596, 150 N.W.2d 124 (1967); *Corn Belt Products Co. v. Mullins,* 172 Neb. 561, 110 N.W.2d 845 (1961); *Schmidt v. Henderson,* 148 Neb. 343, 27 N.W.2d 396 (1947). Accordingly, we review the record de novo and reach an in-

dependent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying. *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981); *Schmidt v. Henderson, supra.*

Prior to becoming associated with Johnson, which engages in the practice of accounting, Salmen had practiced that profession in Grand Island as a sole practitioner for approximately a year. In the summer of 1969 Salmen merged his Grand Island practice with that of Johnson and moved to Hastings. Johnson has had offices in eight different Nebraska cities and has several clients who are now in a number of states.

A long period of negotiations ensued during which a number of proposals were made by Salmen and acceded to by Johnson. A partnership agreement between Johnson and Salmen was signed, effective July 1, 1975, which contains a restrictive covenant. It provides as follows:

"11.1 In the event that a partner withdraws from the partnership, or if a partner retires under the provisions of Section 9.4, it is mutually agreed that he will not for a period of three years from the date of his retirement or withdrawal from the firm take any action which may disturb the existing business relations between the firm or its successors, if any, and any of its clients, and specifically he will not during such three year period, directly or indirectly solicit or accept any professional engagements from clients or former clients of the partnership, or from officers and agents of such clients, nor will he perform such services as an employee, partner of, or associate of another firm or person doing accounting work for any client or former client of the firm, or an officer or agent of such client, nor will he take a position as an employee or paid officer or ad-

visor of such client without authorization from the partnership.

"In the event that this covenant is breached, then upon the commencement of work or services for a client or former client of the firm, either by such partner on his own account or by another partnership including such partner, or by an individual accountant or firm of accountants with whom such partner is an employee, or by such partner's joining or becoming an employee of an accounting firm already doing work for such client or former client, or by becoming an employee, officer or advisor of such client or former client, such partner agrees to pay the partnership as an acquisition cost of such business an amount equal to the greater of (1) the total amount of fees received from such client, computed on an accrual basis during the three-year period immediately preceding the date of retirement or withdrawal from the firm; or (2) the total amount of fees, salary or other remuneration received by the retiring or withdrawing partner from such client or former client computed on an accrual basis for a three-year period subsequent to the date of withdrawal or retirement. Said amount is to be paid in estimated quarterly installments computed on the total amount determined under alternative (1) hereof for a three-year period commencing from the date of withdrawal or retirement, and the final payment shall include an additional payment in the event that alternative (2) exceeds alternative (1).

"Also any partner breaching this covenant in addition to payment of an acquisition cost as above outlined, shall forfeit any right to profit participation under the provisions of Sections 9.1(a) and (c) of this agreement.

"11.2 If at the time any withdrawn or retired partner breaches this covenant there are other partners who are disabled, retired or deceased and payments are being made to them or their estates under

the provisions hereof, the partner who has breached this covenant shall be personally liable to each other disabled or retired partner and the estate of each other deceased partner for any reduction in profit participation in the years subsequent to the breach due to a reduction of the partnership income in any said year below the partnership income for the year immediately preceding the breach of this covenant. In the event that any payment is due under this section from the partner who has breached this covenant to said retired or disabled partner or the estate of a deceased partner, the amount so due shall be paid within 60 days after the close of the partnership's fiscal year."

Salmen withdrew from the partnership effective December 31, 1976. Following that departure he accepted professional employment from clients who were previously served by Johnson.

Prior to Salmen's withdrawal Johnson had reached an agreement, to be effective January 1, 1977, for the sale of its Scottsbluff office. Johnson also had a claim for insurance proceeds due to a fire loss, but it had not set the claim up as an asset, under its accrual method, by December 31, 1976. The value of Salmen's capital account, as computed by Johnson, was $21,502.57 plus $5,860 for Salmen's units of participation, or a total of $27,362.57. The trial court awarded Salmen $38,862.57, which included $3,500 as his share of the fire loss recovery and $8,000 as the value of his units of participation.

Appellant argues that the provision in question is not a covenant not to compete in that it does not purport to prohibit Salmen from entering the field of accounting, but merely obligates him to turn over the fees he earns from servicing certain clients during the 3 years following withdrawal from the partnership. Secondly, appellant urges that this is a case of first impression in this jurisdiction, as the arrangement concerns not an employer and employee, but

partners. As to the first position, we consider the distinction put forth by appellant to be artificial and meaningless in any real sense. The effect of the provision, if valid, is to prevent Salmen from earning income by competing for clients served by Johnson at any time. As to the second argument, we reviewed a covenant not to compete between partners in *Adams v. Adams,* 156 Neb. 778, 58 N.W.2d 172 (1953). We held therein that the covenant did not prohibit the covenantor from loaning money to others engaged in competition with the covenantee, and that the covenant did not prevent the covenantor's wife from using her surname in connection with a competing business. More importantly, a partner with such a minor interest as that held by Salmen is in a real sense no different than an employee.

At the early common law, a contract in restraint of trade was held to be against public policy and void. Over the years we have developed a balancing test and have held that such restraints, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee. *Welcome Wagon International, Inc. v. Hostesses, Inc.,* 199 Neb. 27, 255 N.W.2d 865 (1977); *Brewer v. Tracy,* 198 Neb. 503, 253 N.W.2d 319 (1977); *Diamond Match Div. of Diamond International Corp. v. Bernstein,* 196 Neb. 452, 243 N.W.2d

764 (1976) (applying New York law); *Farmers Underwriters Assn. v. Eckel,* 185 Neb. 531, 177 N.W.2d 274 (1970); *Securities Acceptance Corp. v. Brown,* 171 Neb. 406, 106 N.W.2d 456 (1960), *clarified and rehearing denied* 171 Neb. 701, 107 N.W.2d 540 (1961); *Roberts v. Lemont,* 73 Neb. 365, 102 N.W. 770 (1905).

We have also held that a contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed. See *Welcome Wagon International, Inc. v. Hostesses, Inc., supra,* wherein we held invalid a covenant that the employee would not compete with her former employer in the solicitation of newcomers to community businesses not only in the city in which she had rendered her services but where her former employer was then operating or had signified an intention to operate. See *Brewer v. Tracy, supra,* wherein we refused to restrict an employee engaged in refuse and trash hauling from competing in areas which neither the employer nor the employee served. The covenant in question undertakes to prohibit Salmen from earning fees from clients or former clients of the partnership, or from such clients' officers and agents, no matter where they may be. Whatever interest Johnson may have in its present clients, it certainly can have none in its former clients; in any event, the forfeiture of fees is not limited to those generated from serving Johnson clients in Hastings, where Salmen rendered his personal services. It may well be that the nature of the accounting practice is such that a partner may serve clients in cities other than where he offices. That fact, however, does not meet the objection that the restriction includes services to former Johnson clients and clients which Salmen had not served and did not know. On that ground alone, the covenant is impermissibly broad and is therefore unreasonable and unenforceable.

Johnson suggests that if the restrictive covenant is

too broad, the court may modify it so as to make it reasonable. A number of courts have, on a variety of theories, undertaken to rewrite unreasonable restraints into reasonable ones. 6A A. Corbin, *Contracts* § 1390 (1962). Illustrative of such cases are the following: *Alside, Inc. v. Larson,* 300 Minn. 285, 220 N.W.2d 274 (1974) (limiting geographical area); *Fullerton Lumber Co. v. Torborg,* 270 Wis. 133, 70 N.W.2d 585 (1955), *Lewis v. Krueger,* 153 Tex. 363, 269 S.W.2d 798 (1954), *Ceresia v. Mitchell,* 242 S.W.2d 359 (Ky. 1951), *Coolidge Co., Inc. v. Mokrymski,* 472 F. Supp. 459 (S.D. N.Y. 1979) (reducing period of time); *Toch v. Eric Schuster Corporation,* 490 S.W.2d 618 (Tex. Civ. App. 1972), *Wood v. May,* 73 Wash. 2d 307, 438 P.2d 587 (1968) (limiting geographical area and reducing period of time); *Hebb v. Stump, Harvey & Cook,* 25 Md. App. 478, 334 A.2d 563 (1975) (excluding customers generated by employee).

Johnson relies on certain dicta in *Securities Acceptance Corp., supra,* for the proposition that Nebraska has adopted the rule that a court of equity may reform an unreasonable restrictive covenant so as to make it reasonable and enforceable. It is true that *Securities Acceptance Corp.* quotes from *Gallagher v. Vogel,* 157 Neb. 670, 61 N.W.2d 245 (1953), which in turn cites *Morse v. General American Life Ins. Co.,* 130 Neb. 37, 263 N.W. 676 (1935), a case construing a policy of insurance, general language to the effect that a contract should be given a reasonable construction so as to give effect to the intentions of the parties rather than to defeat them. *Securities Acceptance Corp.* also quotes from a Massachusetts case, *Whiting Milk Co. v. O'Connell,* 277 Mass. 570, 179 N.E. 169 (1931), stating that a contract in restraint of trade in which the territory is unreasonably extensive may be divisible as to space and enforced in equity within a reasonable area. The fact remains, however, that the court in *Securities Acceptance Corp.* did not rewrite the restrictive

covenant involved in that case and did not enforce it. Neither did it do so in *Welcome Wagon International, Inc. v. Hostesses, Inc., supra,* or *Brewer v. Tracy, supra.* Whatever might be the situation in an appropriate case, the instant matter is not one wherein we are disposed, should we ever be, to rewrite the contract. Far too many variables are involved; among them are geographical area, period of time, classes of clients, percentage of fees to be forfeited, and to whom such fees must be paid.

Having reached this conclusion, it is unnecessary to consider Johnson's other assignments of error except with respect to the amount of damages awarded to Salmen, which we consider in connection with Salmen's contentions on his cross-appeal.

The evidence is clear that the sale of the Scottsbluff office was not to become effective until after Salmen's withdrawal from Johnson. The trial court correctly determined that Salmen was not entitled to participate in the proceeds of that sale. The evidence likewise establishes that at the time of Salmen's withdrawal, the proceeds of the fire loss insurance recovery had not yet accrued to Johnson. The court erred in awarding Salmen $3,500 as his share of such recovery.

We determine the value of Salmen's units of participation as of December 31, 1976, to have been $5,860 rather than $8,000 as determined by the trial court. We find Salmen is entitled to recover from Johnson the sum of $27,362.57, and the trial court's judgment is modified accordingly.

Prejudgment interest is allowable only when the amount of the claim is liquidated. Neb. Rev. Stat. § 45-104 (Reissue 1978). Where a reasonable controversy exists as to the plaintiff's right to recover and as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed. *Omaha Paper Stock Co. v. Harbor Ins. Co.,* 596 F.2d 283 (8th Cir. 1979);

Frank McGill, Inc. v. Nucor Corp., 195 Neb. 448, 238 N.W.2d 894 (1976). The trial court correctly disallowed prejudgment interest.

AFFIRMED AS MODIFIED.

THOMAS E. ROGERS, APPELLEE, V. ARNE HANSEN, D/B/A ARNE HANSEN VAN AND STORAGE COMPANY, ET AL., APPELLEES, AND MANAGEMENT, INC., A CORPORATION, APPELLANT.

317 N.W.2d 905

Filed April 2, 1982. No. 44281.

1. **Workmen's Compensation: Independent Contractors.** An owner who employs an independent contractor to do work which is in the usual course of business of the owner, and who fails to require the independent contractor to procure workmen's compensation insurance, is liable as a statutory employer under Neb. Rev. Stat. § 48-116 (Reissue 1978).
2. _____: _____. The general test of whether work being done by an independent contractor for an owner is within the ambit of Neb. Rev. Stat. § 48-116 (Reissue 1978) is whether the work being done by the independent contractor would ordinarily be done by employees of the owner in view of the owner's past practices and the practices of employers in comparable businesses.
3. **Workmen's Compensation: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
4. **Workmen's Compensation: Joint and Several Liability.** The joint and several liability imposed by Neb. Rev. Stat. § 48-116 (Reissue 1978) is for the sole benefit of the injured workman.
5. **Workmen's Compensation: Statutory Employer.** Under the Nebraska Workmen's Compensation Act a statutory employer is entitled to indemnity from the actual employer for all amounts the statutory employer has been required to pay in satisfaction of a compensation award.

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

John R. Timmermier of Schmid, Ford, Mooney & Frederick, for appellant.

Robert G. Decker, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and DEBACKER, D.J.

MCCOWN, J.

This is a workmen's compensation case. The Workmen's Compensation Court on rehearing entered judgment for the plaintiff and against defendants Curtis Hansen, d/b/a Busy Bee Van and Storage Company; Arne Hansen, d/b/a Arne Hansen Van and Storage Company; and Management, Inc. The defendant Management, Inc., has appealed. The issue on appeal is whether Management, Inc., is liable as a statutory employer under Neb. Rev. Stat. § 48-116 (Reissue 1978).

The defendant Management, Inc., is the owner and manager of shopping centers in Omaha, Nebraska. In early 1980 Management, Inc., employed the defendant Curtis Hansen, d/b/a Busy Bee Van and Storage Company, to move the business and office equipment of the corporate offices of Management, Inc., from Ralston, Nebraska, to a new location at 42nd and Center Streets in Omaha, Nebraska. A letter bid by Busy Bee, accepted by Management, Inc., by telephone, constituted the only written memorandum of the agreement. Management, Inc., did not require Busy Bee to procure a policy of insurance to guarantee payment of workmen's compensation.

On February 29, 1980, the plaintiff was directed by a state employment agency to the offices of Arne Hansen Van and Storage Company, where he was employed as temporary help, and taken to the premises of Management, Inc., in Ralston. Shortly after plaintiff began work on the job of moving the Management, Inc., office furniture and equipment, he slipped on a ramp and broke his hip. There is no dispute that plaintiff was injured in an accident that arose out of and in the course of his employment.

The defendants Hansen operated the two moving companies out of the same location in Omaha, Nebraska, used much of the same equipment, and the same estimator. The Workmen's Compensation Court on rehearing found that both Hansen defendants were liable as employers. The evidence also established that neither Arne Hansen, d/b/a Arne Hansen Van and Storage Company, nor Curtis Hansen, d/b/a Busy Bee Van and Storage Company, had any policy of workmen's compensation insurance in force on the date of the accident to the plaintiff. The initial award of the Workmen's Compensation Court and the award on rehearing found Management, Inc., liable as a statutory employer under § 48-116.

The one-judge Workmen's Compensation Court awarded plaintiff compensation and medical expenses against the defendants Curtis Hansen, d/b/a Busy Bee Van and Storage Company, and Management, Inc., and a judgment for waiting time and an attorney fee against Busy Bee. Management, Inc., applied for rehearing. On rehearing, the Workmen's Compensation Court generally affirmed the judgment of the one-judge court, but modified it by entering the judgment for compensation and medical expenses against all three defendants jointly and severally, including specific provisions as to future surgery and possible additional temporary and permanent disability, and also assessed an attorney fee against Management, Inc., as the appealing employer. Management, Inc., has appealed to this court.

Management, Inc., contends that it should not be held liable as a statutory employer under § 48-116, and argues that *Sherlock v. Sherlock,* 112 Neb. 797, 201 N.W. 645 (1924), should be overruled. Management, Inc., contends that it was not in the business of moving office furniture and equipment, that Busy Bee was an independent contractor, and that the transportation of the office furniture and equipment

of Management, Inc., was not in the usual course of its business.

Section 48-116 provides: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this act, shall be included in the term employer, and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act. This section, however, shall not be construed as applying to an owner who lets a contract to a contractor in good faith, or a contractor, who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this act to injured workmen."

In the *Sherlock* case a corporation which was engaged in the wholesale drug business employed an independent contractor to paint exterior parts of the drug company's building. The contract required the independent contractor to hold the drug company harmless in the event of an accident to the contractor or any of his employees. The drug company did not obtain insurance for the protection of injured workmen, nor require the independent contractor to do so. The contractor employed his son, who was injured on the job. This court held that under the facts in that case the painting of the building owned and used by the drug company in conducting its business was work performed in the usual course of the trade or business of the drug company within the meaning of the workmen's compensation law. The court stated that the workmen's compensation law

did not separate the building used for the general purposes of the wholesale drug business from the stock of drugs for the purpose of determining what was done in the usual course of trade, and stated: "Plaintiff, when injured while painting, had he been employed directly by the corporation, would have been a person whose employment was 'in the usual course of the trade, business, profession or occupation of his employer.' " *Id.* at 801, 201 N.W. at 647. The court also held that by failing to require the independent contractor to procure insurance, the drug company had joined the independent contractor in a device to escape liability for compensation. There was no evidence as to whether the drug company knew or did not know that the independent contractor did not have workmen's compensation insurance.

Since the *Sherlock* case this court has reaffirmed on many occasions the rule that an owner who employs an independent contractor to do work which is in the usual course of business of the owner, and who fails to require the independent contractor to procure workmen's compensation insurance, is liable as a statutory employer under § 48-116. See, *Hiestand v. Ristau,* 135 Neb. 881, 284 N.W. 756 (1939); *Wilbur v. Adams Lumber Co.,* 140 Neb. 48, 299 N.W. 268 (1941); *Keith v. Wilson,* 165 Neb. 58, 84 N.W.2d 192 (1957).

Obviously, the work of a subcontractor is ordinarily within the usual course of business of the principal contractor, and we have specifically held that under the provisions of § 48-116, when a contractor fails to require a subcontractor to carry workmen's compensation insurance and an employee of the latter sustains a job-related injury, the contractor is a statutory employer and, with the immediate employer subcontractor, is jointly and severally liable to pay compensation under the terms of the Workmen's Compensation Act. *Duffy Brothers Constr.*

Co. v. Pistone Builders, Inc., 207 Neb. 360, 299 N.W.2d 170 (1980).

Except in general terms, this court has seldom discussed the tests or standards for determining whether the work being done by an independent contractor for an owner was in the usual course of business of the owner. The broad language of § 48-116 makes it apparent that each case must be assessed on its own factual background.

One of the principal purposes of statutes such as § 48-116 is to prevent the evasion of compensation coverage by the contracting or subcontracting of the owner's or employer's normal work. The general test of applicability of such statutes is whether the work being done by the independent contractor would ordinarily be done by employees of the owner in view of the owner's past practices and the practices of employers in comparable businesses. See 1C Larson, Workmen's Compensation Law § 49 (1980). As Larson notes, the activities which produce most of the close cases are those peripheral and auxiliary operations, such as maintenance, construction, and delivery. What may be routine activity for a large business may be extraordinary for a small one, and the factual distinctions in individual cases are often critical. Larson states that the test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether the particular activity is, in that particular business, normally carried on through employees rather than independent contractors. 1C Larson, Workmen's Compensation Law § 49.12 (1980).

Although *Sherlock* did not discuss the evidence as to whether painting might have been done by employees under the conditions existing in 1924, it did hold that the burden was on the drug company to prove that the painting done was not in the usual course of trade or business of the drug company.

In the case now before us there was no evidence as

to whether employees of Management, Inc., had been used in the past to move furniture or equipment of tenants of its shopping centers or for moving furniture and equipment of Management, Inc., itself. There was no evidence to show that Management, Inc., did or did not have the equipment required for moving the offices of Management, Inc., nor that any special equipment was necessary. Neither was there any evidence that the transportation of office furniture and equipment from one office to another in the same local area by similar companies was ordinarily handled by employees or by independent contract. The estimate sheet prepared by Busy Bee, however, showed that Management, Inc., had pickups and would move calculators, chairs, typewriters, pictures, and planters, presumably with its own employees. Under that state of the record it cannot be said as a matter of law that the work here was not in the usual course of the trade or business of Management, Inc., within the meaning of § 48-116.

The determination by the Workmen's Compensation Court that Management, Inc., was a statutory employer under § 48-116 necessarily included a determination that the moving services contracted for by Busy Bee were in the usual course of the business of Management, Inc. Whether that determination was made in reliance on *Sherlock v. Sherlock,* or an interpretation of it, is beside the point. The Workmen's Compensation Court necessarily determined that the work was in the usual course of business of Management, Inc., and that determination was a factual one.

The findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the

light most favorable to the successful party. *Hilt Truck Lines, Inc. v. Jones,* 204 Neb. 115, 281 N.W.2d 399 (1979).

The joint and several liability imposed by § 48-116 is for the sole benefit of the injured workman. Between the statutory employer and the actual employer, the liability of the actual employer is primary and that of the statutory employer is secondary. Under the Nebraska Workmen's Compensation Act a statutory employer is entitled to indemnity from the actual employer for all amounts the statutory employer has been required to pay in satisfaction of a compensation award. *Duffy Brothers Constr. Co. v. Pistone Builders, Inc.,* 207 Neb. 360, 299 N.W.2d 170 (1980).

The judgment of the Workmen's Compensation Court on rehearing is affirmed. Plaintiff is allowed the sum of $1,000 as attorney fees in this court.

AFFIRMED.

BOSLAUGH and BRODKEY, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM R. BOYER, APPELLANT.
318 N.W.2d 60

Filed April 2, 1982. No. 44325.

1. **Arrests.** A warrantless arrest can be made only if there exists reasonable cause to believe a felony has been committed and the person to be arrested is guilty of the offense.
2. **Confessions.** To be admissible in evidence, a confession must be freely and voluntarily given. It cannot be induced by promises, or coerced by threats.
3. _____. A "totality of the circumstances" test is followed in which factors such as age, mental condition, education, the atmosphere in which the interrogation is conducted, and any other factor which may bear on the question is considered in determining "knowing voluntariness."
4. _____. A person under the influence of drugs may be unable to knowingly and voluntarily make a valid, useful confession.

5. **Confessions: Appeal and Error.** A finding by the trial court that a statement made by the accused is voluntary will not ordinarily be set aside on appeal unless clearly erroneous.
6. **Criminal Law: Venue: Appeal and Error.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown.
7. **Juror Qualifications: Appeal and Error.** In order to predicate error on the overruling of a challenge for cause, there must be a showing that the objectionable juror was forced upon the challenging party and sat on the jury because such party had exhausted his peremptory challenges.
8. **Evidence: Criminal Law: Constitutional Law.** The State's suppression of evidence favorable to and requested by an accused violates due process where the evidence is material, irrespective of the good or bad faith of the prosecution.
9. _____: _____: _____. The proper standard of materiality is constitutionally violated if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist.
10. **Evidence: Criminal Law: Words and Phrases.** "Suppression" means nondisclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence.

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

Leo J. Eskey of Eskey & Gless, for appellant.

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

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

CAPORALE, J.

A jury found the defendant-appellant, William R. Boyer, guilty of murder in the first degree. The District Court entered judgment on the verdict and sentenced the defendant to life imprisonment.

The defendant asserts the trial court erred in (1) admitting his confession into evidence, claiming it to have been the product of an illegal arrest and not voluntarily made; (2) failing to change venue; (3) failing to grant a mistrial due to the prosecution's failure to produce certain evidence upon motion of

the defendant; and (4) submitting the question of guilt to the jury as the evidence was insufficient. We find the assignments of error to be without merit and affirm.

On July 15, 1980, around 9:30 a.m., the Fremont 911 emergency operator received a call from a male voice which stated his mother had fallen and needed a rescue squad at 2145 North I Street, the residence of both the victim and the defendant in this case. When the rescue squad arrived, they discovered the victim had been shot rather than had fallen. It appeared, because of the presence of broken glass at the front door, as though forcible entry had been made into the home. It was learned a neighbor had seen the victim's son, William, around the house that morning. The neighbor had been alerted by the victim, Donna Boyer, to call Donna at work if William should show up. The neighbor did so. In light of this information, the police issued a broadcast over local radio announcing they were seeking William Boyer for purposes of questioning. Around 1:15 p.m. that same day the defendant voluntarily appeared at the Fremont Police Department. After being put in the captain's office, he was greeted by Detective Tellatin and led to an interview room where he was promptly arrested and read his *Miranda* rights. Defendant answered various questions revealing that he understood each of his rights, knew any statement he made could be used against him, and waived all his rights, including the right to have an attorney present. Immediately following, Boyer confessed to the crime. He consented to having his car searched and told the police the shotgun he used was in the back seat of his car. The car was searched, and a weapon was found.

The evidence reveals the defendant had an argument with his parents the evening prior to the murder and had spent the night sleeping in his car. He was outside that morning when his mother ar-

rived home after receiving a phone call at work. She told him not to go into the house. In spite of her warning, he ran into the house, into his bedroom, and locked the bedroom door behind him. He got a shotgun out of his closet and loaded it. Mrs. Boyer knocked on the door, demanding entrance. The defendant opened the door, at which time the victim told him to pack his suitcase and leave the house. At that time the defendant retrieved the gun from under his bed and shot her.

As part of the defendant's first assignment of error, he contends he was arrested illegally, without probable cause, and as such his confession should be excluded as "fruit of the poisonous tree." The police did not have an arrest warrant at the time of arrest. A warrantless arrest can be made only if there exists reasonable cause to believe a felony has been committed and the person to be arrested is guilty of the offense. *State v. Coleman,* 197 Neb. 186, 247 N.W.2d 627 (1976). Obviously, the discovery of a gunshot victim indicates a felony was committed. In addition to that, the Boyers had two children, a son and a daughter. In light of the fact the 911 call was made by a male voice referring to the victim as his mother, the inference it was the defendant who called was a strong one. After checking with neighbors, the police learned that one of them, a Mary Pollock, had talked to the victim on the morning of her murder. Mrs. Boyer had told her neighbor that her son, the defendant, was not to be around the house, and if he should appear, she, the victim, was to be called at work. The defendant did appear, and the neighbor did call as instructed. The neighbor thought Mrs. Boyer indicated she was coming home. Further, broken glass in the front door indicated forcible entry and points to defendant. Lastly, the 911 caller left the house after making the call. These facts in combination provide adequate probable cause to arrest defendant. There was

no "fruit of the poisonous tree."

As part of the first assignment of error, the defendant also argues his confession was involuntary. To be admissible in evidence, a confession must be freely and voluntarily given. It cannot be induced by promises, or coerced by threats. *State v. Muenchau and Brown,* 209 Neb. 552, 308 N.W.2d 824 (1981). *State v. McDonald,* 195 Neb. 625, 240 N.W.2d 8 (1976). The defendant argues that the shock of his mother's death, his arrest, his previous history of psychiatric problems, and the influence of amphetamines combined to render him unable to make a knowing and voluntary confession. A "totality of the circumstances" test is followed in which factors such as age, mental condition, education, the atmosphere in which the interrogation is conducted, and any other factor which may bear on the question are considered in determining "knowing voluntariness." *State v. Smith,* 203 Neb. 64, 277 N.W.2d 441 (1979); *State v. Stewart,* 197 Neb. 497, 250 N.W.2d 849 (1977). See, also, *Wilson v. Sigler,* 333 F. Supp. 594 (D. Neb. 1971), *aff'd* 449 F.2d 1352 (8th Cir. 1971).

The Supreme Court of the United States has held a person under the influence of drugs may be unable to knowingly and voluntarily make a valid, useful confession. *Mincey v. Arizona,* 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Beecher v. Alabama,* 408 U.S. 234, 92 S. Ct. 2282, 33 L. Ed. 2d 317 (1972); *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). In each of these three cases cited by the defendant, the confessor was under the influence of some type of painkiller to relieve the pain of police gunshot wounds. The drugs were either administered by the police or hospital personnel. Therefore, no doubt existed as to whether the defendant in those cases was actually under the influence of the drug, unlike the situation at bar where the defendant alleges self-ingested amphetamines.

The record reflects that though the defendant appeared somewhat nervous, and at one point appeared as though he were going to cry, he nonetheless maintained good composure under the circumstances. He understood the questions, the questions were not leading, he was in control of his responses, he was not confused, and his answers had a logical nexus to the questions. There is nothing to suggest that the illness he suffered from ingesting insecticide some 3 years earlier affected his answers. The defendant was promised nothing for his confession, nor was he threatened. The record establishes he fully understood his rights.

A finding by the trial court that a statement made by the accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979). The trial court's decision that the confession was voluntary is amply supported by the evidence.

The defendant next alleges the court erred in failing to grant a change of venue because of extensive local pretrial publicity. In this state, a motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. *State v. Anderson and Hochstein,* 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Williams, supra.*

The record clearly establishes that any venireman who indicated a preconceived notion of defendant's guilt because of media coverage such that he or she could not decide the case based solely on the evidence and instructions of the court was excused. Although the court and defense counsel disagreed concerning one venireman's impartiality, she did not serve on the jury. Even if the court were to have erred in overruling a challenge as to her for cause, such error would not warrant reversal in the ab-

sence of a showing that the objectionable juror was forced upon the challenging party and sat on the jury because such party had exhausted his peremptory challenges. *Bufford v. State,* 148 Neb. 38, 26 N.W.2d 383 (1947). The trial court did not abuse its discretion in denying a change of venue.

In the course of trial, the State called to the stand the 911 dispatcher who allegedly received the call from a male voice requesting a rescue squad to the home of the victim. The defense moved to have the testimony, as well as the tape recording of the call, suppressed. The trial court sustained the motion, as the State had failed to produce this evidence as required by the discovery order. The jury had heard that a call by a male voice came on the morning of the murder requesting an ambulance to the victim's home, and included the words, "My mother fell." The appellant claims this evidence came as a surprise and denied him the opportunity of proper preparation. He also claims the jury was prejudiced, although it was instructed to disregard the testimony. See *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), stating that the state's suppression of evidence favorable to and requested by an accused violates due process where the evidence is material, irrespective of the good or bad faith of the prosecution.

The failure of a party to comply with discovery procedures is addressed in Neb. Rev. Stat. § 29-1919 (Reissue 1979), which provides: "If, at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of sections 29-1912 to 29-1921 or an order issued pursuant to the provisions of sections 29-1912 to 29-1921, the court may:

"(1) Order such party to permit the discovery or inspection of materials not previously disclosed;

"(2) Grant a continuance;

"(3) Prohibit the party from calling a witness not

disclosed or introducing in evidence the material not disclosed; or

"(4) Enter such other order as it deems just under the circumstances."

The appellant relies primarily upon *State v. Mason,* 408 A.2d 1269 (Me. 1979), which arises under a statutory discovery scheme similar to Nebraska's. In *Mason,* an alleged accomplice to a burglary made an oral statement to the police which was not revealed upon discovery. The trial court nonetheless admitted the statement into evidence. The Supreme Judicial Court of Maine vacated the judgment because the trial court failed to make any determination as to whether the defense's ability to prepare was hampered. After the court pointed out the purpose of the discovery procedure was to " 'make the result of criminal trials depend upon the merits of the case rather than on the demerits of the lawyer performance on one side or the other,' " it held: "Defendant had the right, when confronted at trial for the first time with evidence that the State was duty-bound to disclose before trial, to have the trial Justice exercise his discretion under Rule 16(d). [Maine Rules of Criminal Procedure similar to § 29-1919.] The Court was obligated to consider whether, in the furtherance of justice, an appropriate sanction should be imposed. This he did not do. For this reason we sustain defendant's appeal." *Id.* at 1273.

In order that the State's suppression of evidence be constitutionally violative, the following must exist: (1) Suppression by the prosecution after request by the defense; (2) A favorable character of the evidence to the defense; and (3) Materiality of the evidence. See *Ogden v. Wolff,* 522 F.2d 816, 820 (8th Cir. 1975), citing *Moore v. Illinois,* 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972). *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), holds the proper standard of materiality is

constitutionally violated if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. *Agurs* found no such error where the prosecutor did not volunteer the victim's prior assault record in a murder trial where self-defense was an issue. *Mason, supra,* does not apply to the case under consideration because here the trial court excluded the evidence, exactly as defendant requested. Under our statute, the defendant could have sought a continuance and further discovery if he felt he needed more preparation or that the evidence might have been helpful. Defendant's claimed lack of ability to prepare is further eroded by the fact that the defense was well aware of the existence of the phone call, as well as some of its general substantive content, at the time of the hearing on a motion to suppress evidence, which was exactly 1 month before the trial.

In *State v. Seger,* 191 Neb. 760, 217 N.W.2d 828 (1974), the defendant was convicted of the offense of having carnal knowledge of a female child under age 15. Shortly after the rape, the girl was given a polygraph examination. The attorney for the defense knew of the polygraph and claimed he was told the girl "passed" the examination. He made no attempt to further view the results or make an investigation of the test or test administrator through discovery procedures. Consequently, he was unaware a written transcript of the test existed. The county attorney testified he informed the defense that a polygraph had been administered and that there was a problem with penetration. After being convicted, the defendant found a written transcript existed and based his motion for new trial upon that "newly discovered evidence." We rejected the defendant's argument, saying: "The newly discovered evidence must be competent, material, credible, and which might have changed the result of trial and which by the exercise of due diligence could not have been

discovered and produced at the trial. Duffey v. State, 124 Neb. 23, 245 N.W. 1 (1932). The evidence in this case shows that defense counsel was notified of the report; that no discovery of the written report was attempted; and that there was no attempt made to subpoena the polygraph examiner prior to trial. It is clear that the polygraph report was not newly discovered evidence and that the defendant could have secured it on request. For this reason alone, the contention of the defendant must be rejected." *Id.* at 763, 217 N.W.2d at 830. As stated in *Ogden v. Wolff, supra,* a companion case to *Seger, supra,* " '[S]uppression' means non-disclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence." 522 F.2d at 820.

Lastly, defendant assigns as error a lack of evidence to support a first degree murder instruction. He relies on *Whitehead v. State,* 115 Neb. 143, 212 N.W. 35 (1927), wherein Whitehead, in the course of a not so serious argument, struck the victim on the head with a pitchfork. He then immediately rendered and sought aid for the victim. Since premeditation and malice could not be inferred from the facts, we reversed the conviction which was based on a second degree murder instruction. That case has no application to the facts at hand where evidence certainly exists by which the jury could conclude the defendant was lying in wait and therefore planned to kill his mother. The defendant had previously fought with his parents and had once threatened his father. He had locked himself in his room, got the unloaded gun from a closet, loaded the gun, placed it under his bed, unlocked the door for his mother, and then shot her. A jury could properly conclude the defendant acted "purposely and with deliberate and premeditated malice." Neb. Rev. Stat. § 28-303 (Reissue 1979). Where different conclusions may be drawn from the evidence, the court does not commit error in submitting different

degrees under proper instructions for the jury's determination. *State v. Ellis,* 208 Neb. 379, 303 N.W.2d 741 (1981); *State v. Johnson,* 200 Neb. 760, 266 N.W.2d 193 (1978).

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

DOROTHY SANDEL, APPELLEE, V.
PACKAGING COMPANY OF AMERICA, APPELLANT.
317 N.W.2d 910

Filed April 2, 1982. No. 44388.

1. **Workmen's Compensation: Appeal and Error.** In reviewing workmen's compensation cases the Supreme Court is not free to weigh the facts anew. The Supreme Court's standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. _____: _____. An order of the compensation court may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can be drawn therefrom. Such findings on rehearing will not be set aside on appeal unless clearly wrong.
3. **Workmen's Compensation: Words and Phrases.** The exertion "greater than nonemployment life" test is to be applied by the Supreme Court only in cases involving heart attacks allegedly caused by the activities or stress of employment.
4. _____: _____. The "objective symptoms" requirement of the Nebraska Workmen's Compensation Act is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause.
5. _____: _____. For purposes of the Nebraska Workmen's Compensation Act, "suddenly and violently" does not mean "instantaneously and with force," but rather the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment.
6. **Workmen's Compensation: Attorney Fees.** Where an employee's injury, which previously was diagnosed as continuing, attains

maximum healing so that on further hearing a definite permanent award can be made, the employer is not deemed to have obtained a reduction in the award so as to deprive the employee of a statutory right to an attorney fee.

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

Theodore J. Stouffer and Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Betty L. Egan and J. Joseph McQuillan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

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

KRIVOSHA, C.J.

The appellant, Packaging Company of America (PCA), the employer of Dorothy Sandel (Sandel), appeals from an order entered by a three-judge Workmen's Compensation Court upon rehearing which found that Sandel had sustained a compensable accident for which she was entitled to receive workmen's compensation benefits. The principal error assigned by PCA is that the three-judge compensation court erred in finding that Sandel had sustained an accident within the meaning of the Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 to 48-1,109 (Reissue 1978). We affirm.

PCA, a manufacturer of cardboard boxes, has employed Sandel since 1967. Her first work for PCA involved operating a semiautomatic labeling machine. In 1970 she became an airhammer operator. Her work involved making creases in a load of cartons and removing excess material off of the boxes. Sometime between 1970 and 1973 Sandel developed a "radial humeral bursitis" in her right arm. She was required to be away from her work for approximately 3 to 4 weeks and to receive medical treat-

ment by Dr. Joseph Gross. Following the treatment, she returned to work and continued as an airhammer operator for approximately 1 more year. During that time she experienced no difficulty with her arm. In 1974 or 1975 PCA transferred Sandel from her position as an airhammer operator to that of a forklift driver, where again she experienced no difficulty with her right arm.

In November of 1979 Sandel was assigned the job of running a "slitter-scorer" machine. This machine takes, cuts, and creases pieces of cardboard. To perform her task, Sandel would stand by her machine at which a pile of corrugated sheets would be set. She would put her arm underneath the sheets of cardboard, pick them up, turn them over, and put them on top of the machine, usually three at a time. The sheets varied in size, but were ordinarily 80 x 97 inches, though they could be as large as 120 inches. Each sheet weighed 6 to 8 pounds. When Sandel had placed approximately 10 sheets on the machine, she would feed the pieces through the machine one at a time. She would have to give each piece of cardboard a shove to get it into the machine. Once the pieces came out of the other side of the machine, Sandel would take the pieces of cardboard off the machine with the same lifting, turning motion she used to place them on the machine. In a single shift, Sandel would process approximately 300 sheets.

According to her own testimony, Sandel began to experience physical discomfort when she transferred from her job as a forklift driver to that of operating the slitter-scorer machine. In December of 1979 or January of 1980 she began to have problems with her left arm. At that time she consulted a physician but missed no work. In March of 1980 Sandel first began to notice pain in her right elbow which gradually became worse until May of 1980 when she was unable to continue work. Specifically,

on the morning of May 29, 1980, at 11:30 a.m., she noticed that her arm had begun swelling and that the pain had increased severely. She reported to the first aid station and a doctor's appointment was arranged for her. Ultimately, the first physician referred her to Dr. Timothy Fitzgibbons who first saw Sandel on June 12, 1980. Dr. Fitzgibbons diagnosed her condition as "lateral epicondylitis"—an inflammation of the lateral epicondyle, the bony prominence by the elbow. This condition is commonly referred to as "tennis elbow."

Dr. Fitzgibbons testified that in his medical opinion, based upon the objective symptoms and Sandel's history, her condition was the result of repetitive flexion-extension of her hand and wrist due to her employment. Dr. Fitzgibbons further testified that when a condition had remained dormant for a long period of time and then reoccurred, he would be reasonably certain that the reoccurrence was due to the most recent trauma experienced. Dr. Fitzgibbons further testified that while bursitis or tennis elbow is a fairly common affliction of life, it generally arises because of specific activities which require repeated flexion and extension of the arm over a substantial period of time. In this regard, Sandel testified that her off-work habits did not require her to engage in any repeated flexion-extension activity over long periods of time. The evidence indicated that the only time she engaged in repetitive flexion-extension activity was in the course of her employment.

At the first hearing the single-judge Workmen's Compensation Court found that Sandel had sustained a compensable accident and entered an award of temporary total disability, as well as the payment of various medical expenses incurred in connection with her treatment. On rehearing, a majority of the three-judge court affirmed the finding of the single-judge court but modified the award to the extent

that Sandel receive the sum of $158.13 per week from June 4, 1980, to January 23, 1981, and thereafter, and in addition thereto, the sum of $158.13 per week for 21.5 weeks for 10 percent permanent partial disability to her right arm. Sandel was further awarded an attorney fee in the amount of $500 for the services of her attorney in the rehearing. It is from that award that PCA appeals to this court, principally contending that the compensation court erred in finding that Sandel had sustained an accident within the meaning of the Nebraska Workmen's Compensation Act.

Specifically, PCA's argument is to the effect that the evidence in this case fails to disclose the requisites of a compensable injury under the act, to wit, (1) an external cause of accidental character, whether a single traumatic event or a combination of traumatic events, or an internal effect which was unexpected or unforeseen, (2) either of which occurs suddenly and violently, and (3) which produces at the time objective symptoms of injury.

Furthermore, PCA argues that where the disability is caused by both a personal risk and employment exertion, the employee must prove that the employment exertion is greater than the exertion of an average person's nonoccupational life and that the employment exertion materially and substantially contributed to the resultant disability.

In proceeding to review an appeal from a three-judge Workmen's Compensation Court, we are limited in what independent action we may take. In *Davis v. Western Electric,* 210 Neb. 771, 778, 317 N.W.2d 68, 72 (1982), we again pointed out the oft-cited rules to the effect that "[i]n reviewing workmen's compensation cases this court . . . ' "is not free . . . to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly

wrong.'' ' '' See, also, *Erving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982). Furthermore, in *Davis, supra* at 778, 317 N.W.2d at 72, we said: ''[T]he order of the compensation court ' ''may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can be drawn therefrom . . . . Such findings on rehearing will not be set aside on appeal unless clearly wrong.'' ' '' See, also, *Mack v. Dale Electronics, Inc.,* 209 Neb. 367, 307 N.W.2d 814 (1981). Therefore, unless we can find that as a matter of law the compensation court was in error, we are required to affirm their decision even though, had we been making the factual decision in the first instance, we might have reached a contrary conclusion.

We turn then first to PCA's argument that before Sandel can recover, she must prove that her employment exertion was greater than an average person's nonoccupational life and that the employment exertion therefore materially and substantially contributed to her disability. We believe that our decision in *Engel v. Nebraska Methodist Hospital,* 209 Neb. 878, 312 N.W.2d 281 (1981), adequately answers that contention. In *Engel, supra* at 882-83, 312 N.W.2d at 285, we said: ''The exertion 'greater than nonemployment life' test has been applied by this court *only* in cases involving heart attacks allegedly caused by the activities or stress of employment. *Chrisman v. Greyhound Bus Lines, Inc., supra; Sellens v. Allen Products Co., Inc., supra; Hyatt v. Kay Windsor, Inc.,* 198 Neb. 580, 254 N.W.2d 92 (1977); *Newbanks v. Foursome Package & Bar, Inc.,* 201 Neb. 818, 272 N.W.2d 372 (1978); *Beck v. State,* 184 Neb. 477, 168 N.W.2d 532 (1969); *Brokaw v.*

Robinson, 183 Neb. 760, 164 N.W.2d 461 (1969).

"The rationale for the rule is discussed at some length in *Sellens, supra* at 509-11. Where a person suffers from a preexisting condition which he claims is aggravated by his employment, he has an increased burden of proving causation. The exertion 'greater than nonemployment life' test is simply an application of the increased burden of proof required in preexisting condition cases to the unique problems of proving causation of a myocardial infarction. We find no reason to extend the rule to other cases where the proof of causation is not usually as complex." (Emphasis supplied.)

While it may be true that because of Sandel's previous history with bursitis, she bears a greater burden of proving that her present condition is as a result of an accident arising out of and in the course of her employment, she does not have the burden of proving that her employment exertion was greater than her nonemployment life exertion. As we note in *Engel,* that is limited only to heart attack cases and is not extended to other cases.

The basic question which we must then answer is whether the compensation court was in error in finding that the injury suffered by Sandel was indeed caused by an accident arising out of and in the course of her employment, and was, as found by the compensation court, controlled by our decision in *Crosby v. American Stores,* 207 Neb. 251, 298 N.W.2d 157 (1980). The essence of PCA's argument may best be understood by examining the language of its brief, when it says at 14-15: "[PCA] does not argue *Crosby* was erroneously decided or should be overturned. [PCA] does not argue there is no medical evidence in this case which relates [Sandel's] employment activities to her tennis elbow and resultant disability. The evidence in this case establishes [Sandel] developed, over a period of time, bursitis or tennis elbow at least in part as a result of her activities at work.

"However, [PCA] does submit *Crosby* does not control the result in the instant case. The requirements of the Compensation Act and *Crosby* as to the elements necessary to prove an 'accident' have not been met."

PCA maintains that the record in this case will not disclose even a single traumatic injury or a series of traumatic injuries sufficient to constitute an accident. It is that question which we therefore must address.

Under the provisions of the Nebraska Workmen's Compensation Act, an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151(2). The statutory definition of accident therefore consists of three separate elements which must be established in order for an employee to recover. The first element is that the injury must be "unexpected or unforeseen." The second element is that the accident must happen "suddenly and violently." And, third, the accident must produce "at the time objective symptoms of an injury." While the language of the act is quite precise and clear, the realities of life do not always provide us with such clear-cut recorded events from which we may decide whether an accident, as defined by the Workmen's Compensation Act, has occurred. Nevertheless, an examination of the cases decided by this court over the years does, in our view, sustain the action taken by the three-judge compensation court in this case.

Regarding the first element, that the injury must be unexpected or unforeseen, we have said that the unexpected or unforeseen requirement of the Nebraska Workmen's Compensation Act is satisfied if *either* the cause was of an accidental character or if the effect was unexpected or unforeseen. See, *Eliker v. D. H. Merritt & Sons,* 195 Neb. 154, 237

N.W.2d 130 (1975); *Brokaw v. Robinson,* 183 Neb. 760, 164 N.W.2d 461 (1969). One simply cannot say that the compensation court was in error in finding that the resultant injury in this case was either unexpected or unforeseen. Certainly there is not any evidence to indicate that the action taken by Sandel was intentional in the sense that she continued to bend her elbow in order to cause injury or that a reasonable person would know or understand that by performing the duties of one's work in accordance with instructions given by the employer one could expect or foresee that disabling bursitis would develop. It would appear that the compensation court was correct in concluding that at least the first element of a statutory accident had been met.

With regard, then, to the third element, that the accident must produce objective symptoms at the time of the injury, we likewise believe that the requirement has been met. This court has quite often said that the objective symptoms requirement of the Nebraska Workmen's Compensation Act is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause. *Wolfe v. American Community Stores,* 205 Neb. 763, 290 N.W.2d 195 (1980); *Salinas v. Cyprus Industrial Minerals Co.,* 197 Neb. 198, 247 N.W.2d 451 (1976); *Harrington v. Missouri Valley Constr. Co.,* 182 Neb. 434, 155 N.W.2d 355 (1967); *Schoenrock v. School Dist. of Nebraska City,* 179 Neb. 621, 139 N.W.2d 547 (1966). " 'We are of the opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.' " *Harrington v. Missouri Valley Constr. Co., supra* at 441, 155 N.W.2d at 359.

No serious dispute can be raised in this case that there were not objective symptoms. Sandel felt pain in her arm upon changing jobs and the pain steadily increased until it effectively prevented her from doing her job. Additionally, she testified that her arm became swollen just prior to her leaving work on May 29, 1980. No one can reasonably argue that a swollen arm and the inability to move the arm so as to be able to perform one's work, together with apparent signs of pain and discomfort requiring medical attention, are not objective symptoms of an injury.

This then leaves us with the sole element that the accident must happen "suddenly and violently." While there appears to be few, if any, cases in Nebraska which have directly addressed this problem, there are cases from which we may glean the meaning of "suddenly and violently." It is clear that, for purposes of the Nebraska Workmen's Compensation Act, "suddenly and violently" does not mean "instantaneously and with force," but rather the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. In the case of *Hayes v. McMullen,* 128 Neb. 432, 259 N.W. 165 (1935), a workman sought to recover under the Workmen's Compensation Act for snow blindness which he had suffered after being exposed to ultraviolet rays from the sun which were reflected off the snow. Although the definition of accident in 1935 included the word "event" rather than the current word "injury," the language of *Hayes* is nevertheless applicable to our examination of what is meant by "suddenly and violently" within the meaning of the Nebraska Workmen's Compensation Act. In *Hayes, supra* at 436, 259 N.W. at 167, we said: "The evidence in this case indicates that the condition of plaintiff was produced by 'snow blindness' or 'snow opththalmia,' which is rare in this climate,

and therefore we conclude that it was unexpected and unforeseen. There is no dispute upon the question of there being a burning in snow blindness, so therefore the attack upon the eyes of plaintiff was violent and the violence was to the physical structures of plaintiff's body. Was the injury brought about suddenly? If by 'sudden' is meant instantaneous or practically so, then it was not suddenly produced. The condition complained of was the reflection of ultra violet rays of sunlight off of bright snow, which condition would have to continue for several hours before it would manifest itself or become known to the person exposed. The condition of plaintiff manifested itself the same day. Therefore, it would appear that the reasoning applied in *Taylor v. Evarts,* 261 Mich. 558, and *Dove v. Alpena Hide & Leather Co.,* 198 Mich. 132, should be made to apply herein in the interpretation of the word 'suddenly.'

"We are therefore of the opinion that in a case of 'snow blindness,' which is a condition that requires several hours to manifest itself and is an unusual occurrence in this climate, and which, as in this case, did manifest itself by visible irritations during the day of exposure, is an accident, unexpected, unforeseen, happening suddenly and violently, and producing objective symptoms of injury to physical structures, within the meaning of the workmen's compensation law of Nebraska."

In *Hayes, supra,* therefore, we concluded that "suddenly and violently" did not mean in a moment, but could occur over a period of hours.

In *Brokaw v. Robinson,* 183 Neb. 760, 164 N.W.2d 461 (1969), we extended the concept of "suddenly and violently" to recognize the realities of life and the fact that an accident, within the meaning of the Nebraska Workmen's Compensation Act, could be caused by a series of repeated traumas, each of which acting individually may not be sufficient in force to produce a sudden and violent accident but

which ultimately produces such a result, and none of which may be observable until disability occurs. In *Brokaw, supra,* the employer suffered a cerebral vascular accident with paralysis of the right arm and leg, and facial paralysis. We said in *Brokaw, supra* at 763, 164 N.W.2d at 464: "The defendant contends that mere exertion ordinarily incident to the employment cannot constitute an accidental injury and that exertion combined with a preexisting disease or condition does not constitute a compensable injury. We cannot agree.

. . . .

"The change in the workmen's compensation statute clearly removes the necessity of finding a single traumatic event as the cause of an injury."

In *Brokaw* we recognized that the nature of the human body being such that it is, not all injuries to the body are caused instantaneously and with force, but may indeed be nevertheless suddenly and violently, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment.

In *Crosby v. American Stores,* 207 Neb. 251, 298 N.W.2d 157 (1980), relied upon by the compensation court, we recognized the difficulty of attempting to place every injury into a clear category. We said in *Crosby, supra* at 254-55, 298 N.W.2d at 159: "Part of the difficulty in this case is that the plaintiff's injury has some of the characteristics of both an accidental injury and an occupational disease.

"The plaintiff's use of her hands to strike the pallets and boxes caused an injury which produced objective symptoms at the time. Each striking was a sudden and violent event. Although no one blow produced an injury severe enough to be compensable by itself, the cumulative effect of the repeated trauma resulted in an injury which produced disability. Most jurisdictions regard the time of acci-

dent as sufficently definite if either the cause is reasonably limited in time *or the result materializes at an identifiable point.* 1B Larson, Workmen's Compensation Law § 39.00 (1980). The facts in this case satisfied both tests. The plaintiff's difficulty with her hands commenced immediately after she was transferred to stack and record. In that respect, this case may be distinguished from cases involving chronic conditions which develop over a period of many years where the injury cannot be traced to a particular job or activity of the workman." (Emphasis supplied.)

We concluded in *Crosby* that the requirement that an accident must be caused "suddenly and violently" was satisfied if, as a result of repeated injury to the body, an identifiable disability at a point in time occurred, even though the employee failed to recognize what was happening each time she struck her hand.

We reached a similar conclusion for a similar reason in *Erving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982). The noted workmen's compensation authority, Larson, in his recognized work in this area, supports the view suggested here. In 1B Larson, Workmen's Compensation Law § 39.40 (1980), Larson suggests that the occurrence of pain and the need for medical attention is sufficient to designate the occurring of an accident "suddenly and violently" even though the initial effect of the pain and the subsequent injury may have been much earlier and simply continued to build until it reached the point at which the employee could no longer perform the required work.

Several other jurisdictions with statutes identical to ours have reached similar conclusions. In *Scanlan v. Bernard Lbr. Co., Inc.,* 365 So. 2d 39 (La. App. 1978), the employee had undergone a laminectomy but his recovery was good and he resumed full-time employment as a mill superintendent. Fol-

lowing his return to work the employees of the company went on strike, with the result that management and supervisory personnel had to run the mill. At this point plaintiff's job involved heavy manual labor, whereas his regular job as superintendent did not involve such duties. After several days of this heavy labor, plaintiff's back began to suffer from pain and he was unable to return to work. The medical evidence confirmed that the heavy work caused his disability, but there was no evidence as to a single traumatic event which precipitated his condition. The court, nevertheless, found that even though there was no impact-type accident or trauma or no single accident, the plaintiff had suffered a series of accidents each time he picked up a piece of timber and loaded it on a truck or fed it into a planer or shaper. The court concluded that when, on June 16, 1976, he was no longer able to work, his accident was "sudden and violent."

Likewise, in *Consolidated Gas Utilities Corp. v. Jeter,* 205 Okla. 471, 238 P.2d 804 (1951), the Oklahoma Supreme Court permitted an employee to recover for injury to her hands which rendered them useless even though there was no evidence of a specific traumatic event occurring suddenly and violently. The evidence disclosed that the difficulty ultimately experienced by the employee occurred over a period of a year and was caused by reason of her operating a keypunch machine. In affirming the recovery for the employee, the Oklahoma court took the position that the date on which the employee notified her employer that she was suffering this great difficulty and was no longer able to work was sufficient to establish a sudden and violent accident within the meaning of a statute similar to ours.

Likewise, the evidence in the instant case would seem to support the compensation court's conclusion that the holding in *Crosby* was controlling and that the instant injury was caused "suddenly and vio-

lently." Dr. Fitzgibbons specifically testified that, in his opinion, it was the work done by Sandel on the slitter-scorer machine which caused the bursitis. He testified that her current injury could be traced to this particular job or activity because no other job which she had held during this time period required her to constantly move and bend her wrist and arm, and, secondly, because she testified that she did not do any kind of repetitive motion of this nature while at home. Nor did she experience any pain or disability until she started her last job.

While the medical fact of the matter is that the injury was occurring repeatedly over a period of time, it is clear that on May 29, 1980, at 11:30 a.m., Sandel suffered a sudden and violent injury in that she was unable, because of the pain and swelling, to continue her employment, and from that moment on was unemployed as a result of, according to the medical testimony, an injury caused by her employment.

Trauma to the body may be caused by actions other than direct blows. It is fair to conclude from the evidence in this case that each movement by Sandel constituted a traumatic event experienced by her arm and wrist even though no blow could be observed because the trauma was occurring inside the skin covering rather than on the outside. On the basis of those facts, we believe it can be said that all of the elements of an accident under the Workmen's Compensation Act were met. We cannot say as a matter of law that the compensation court was in error in concluding that indeed an accident within the meaning of the Nebraska Workmen's Compensation Act had occurred. We believe that we are therefore required to affirm the findings of the compensation court in granting to Sandel the award it made.

PCA raises one further issue. It maintains that the compensation court was in error in awarding

Sandel attorney fees on rehearing because PCA had succeeded in obtaining a reduction in the award. We do not believe that to be the case. We believe, again, that the compensation court on rehearing was correct. In the order originally entered by the single judge, Sandel was awarded temporary total disability for as long as total disability continues. That was necessary apparently because at the time of the hearing before the single judge, Sandel had not yet attained maximum healing and it was impossible at that time to determine how much longer she would be temporarily totally disabled. The sole issue on rehearing was whether or not the injury was compensable at all under the Workmen's Compensation Act. No issue was ever raised as to the amount of recovery, nor did PCA ever contend that the amount of the disability should be certain rather than continuing. It was only because the court, on rehearing, found that by the time the rehearing was held before them, Sandel had reached maximum healing of her injury, and therefore the temporary total disability need not continue indefinitely but could be fixed at a time certain, that any modification was made. This is not a reduction in the amount of the award as contemplated by the statute. Where an employee's injury, which previously was diagnosed as continuing, attains maximum healing so that on further hearing a definite permanent award can be made, the employer is not deemed to have obtained a reduction in the award so as to deprive the employee of a statutory right to an attorney fee. The compensation court was correct in awarding an attorney fee.

The judgment of the three-judge compensation court is therefore affirmed in all respects. Appellee Sandel is awarded a fee of $1,000 in this court.

AFFIRMED.

CAPORALE, J., dissenting.

I must respectfully dissent, for I fear the members

of the majority have this day cast aside their judicial robes and donned the mantle of legislators.

Our Legislature has seen fit to require that an injury, to be compensable under our Workmen's Compensation Act, result from an "accident." One of the elements of an accident, as defined in that statute, is "an . . . injury happening suddenly and violently . . . ." Neb. Rev. Stat. § 48-151(2) (Reissue 1978).

The majority opinion traces the history of certain of our decisions interpreting the sudden and violent requirement. However, the indispensable fact which satisfied the requirement in each of the cases allowing recovery, namely, trauma, is lacking in the case at hand. In *Hayes v. McMullen,* 128 Neb. 432, 295 N.W. 165 (1935), it was the burning of the eyes by reflected sunlight; in *Brokaw v. Robinson,* 183 Neb. 760, 164 N.W.2d 461 (1969), it was the breaking of a body structure; in *Crosby v. American Stores,* 207 Neb. 251, 298 N.W.2d 157 (1980), it was the repeated striking of items; and in *Erving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982), it was the repeated application of pressure. Here, there was nothing. Though the condition manifested itself while plaintiff was at work, it came on not suddenly and violently, but gradually. Compensation is allowed merely because the employment required repeated movement of plaintiff's arm and hand. This result so attenuates the requirement of "an . . . injury happening suddenly and violently" as to have virtually written it out of the act. Is the arthritic hip of the deliveryman gradually caused by the repeated movement of the leg and foot in walking, and which causes objective symptoms during a moment at work, to be compensable?

Even if the coverage extended by the majority were indeed to be considered the more desirable policy, that determination should be made by those elected to do so after an opportunity to study and

debate the economic and other issues involved.

I submit, as did dissenting Judge Novicoff of the Workmen's Compensation Court, that this case is controlled by *Eliker v. D. H. Merritt & Sons,* 195 Neb. 154, 237 N.W.2d 130 (1975), which denied compensation on the ground an accident was not established merely by proving the employment required a great deal of bending, stooping, and twisting of the body in picking up and moving 100-pound sacks of sand, plaster, and cement. I would reverse and dismiss.

CLINTON and HASTINGS, JJ., join in this dissent.

EVELYN M. BROWERS, APPELLEE, V.
HAROLD E. BROWERS, APPELLANT.
317 N.W.2d 789

Filed April 2, 1982. No. 44432.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

Richard E. Gee, for appellant.

Cronin, Shamberg & Wolf, for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

ROBERT G. HEIMSOTH, APPELLEE, V.
KELLWOOD COMPANY, APPELLEE, AND
JOHN R. HANLON, COMMISSIONER OF LABOR, APPELLANT.

318 N.W.2d 1

Filed April 2, 1982. No. 44461.

1. **Employer and Employee: Appeal and Error: Case Overruled.** Appeals under the Employment Security Law are reviewed de novo on the record from the District Court and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. To the extent that *Bristol v. Hanlon*, 210 Neb. 37, 312 N.W.2d 694 (1981), is inconsistent with this opinion, it is overruled.
2. **Employer and Employee: Termination of Employment.** An individual who leaves work voluntarily without good cause shall be subject to the benefit disqualification period specified by statute.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Reversed.

Pamela A. Mattson, for appellant.

Noel S. Dekalb and Marsha E. Fangmeyer, for appellee Heimsoth.

No appearance for appellee Kellwood.

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

PER CURIAM.

Robert G. Heimsoth, the claimant-appellee herein, filed for unemployment compensation benefits under the Nebraska Employment Security Law. The claims deputy, and on appeal the Nebraska Department of Labor Appeal Tribunal, determined that the claimant voluntarily left his employment as of September 16, 1980, without good cause and disqualified him for unemployment benefits for the week ending September 20, 1980, through November 8, 1980, with a subsequent additional 7-week reduction in maximum benefits if claimant were to file for such benefits after the above period, assuming him to be

otherwise eligible therefor. On appeal to the District Court of Nebraska in and for Jefferson County, Nebraska, the decision of the tribunal was reversed, from which judgment the state Commissioner of Labor now appeals to this court.

The commissioner's various assignments of error can be summarized into a single one, namely, the District Court erred in finding that Heimsoth left his employment voluntarily with good cause for medical reasons. We agree with the commissioner and reverse the judgment of the District Court.

We first address the scope of review in this court, concerning which we have made conflicting statements.

In *A. Borchman Sons v. Carpenter,* 166 Neb. 322, 89 N.W.2d 123 (1958), we held that appeals under the provisions of the Employment Security Law, see Neb. Rev. Stat. §§ 48-638 and 48-639 (Reissue 1978), must be heard by the District Court de novo on the record, although either party may offer additional evidence after proper notice, and that this court also considers such appeals de novo on the record. See, also, *Beecham v. Falstaff Brewing Corporation,* 150 Neb. 792, 36 N.W.2d 233 (1949); *Deshler Broom Factory v. Kinney,* 140 Neb. 889, 2 N.W.2d 332 (1942). In *Glionna v. Chizek,* 204 Neb. 37, 281 N.W.2d 220 (1979), we reaffirmed that standard of review and observed it is our duty to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. In *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981), we stated that de novo review in this court is limited to and governed by the standards of the Administrative Procedures Act. However, in *Walker Mfg. Co. v. Pogreba,* 210 Neb. 619, 316 N.W.2d 315 (1982), we reaffirmed that our review is de novo on the record.

The pertinent statute, Neb. Rev. Stat. § 48-640 (Reissue 1978), provides: "An appeal may be taken from the decision of the district court to the Su-

preme Court of Nebraska in the same manner, but not inconsistent with the provisions of sections 48-601 to 48-668, as is provided in cases arising under the workmen's compensation law." Section 48-639 provides in pertinent part: "In any judicial proceeding under sections 48-638 to 48-640 the court shall consider the matter de novo upon the record. . . ." We conclude that § 48-640 contemplates a de novo review on the record in this court; therefore, our statement in *Bristol v. Hanlon, supra,* that our review in these appeals is limited by the Administrative Procedures Act was incorrect. The scope of review is de novo on the record from the District Court and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. To the extent *Bristol v. Hanlon, supra,* is inconsistent with this opinion, it is overruled.

We find that Heimsoth was employed in the shipping department of the Fairbury, Nebraska, division of Kellwood Company on July 9, 1979. Kellwood Company is a manufacturer of coats and other items of wearing apparel. The claimant's duties as a laborer in the Kellwood shipping department included the tagging, packing, bagging, and strapping of the apparel items prior to their shipment by carrier. Heimsoth continued in his duties with Kellwood until January 9, 1980, when he was required to take a medical leave of absence for back surgery. Heimsoth underwent surgery on January 15, 1980, and was hospitalized for approximately 28 days.

During the period of his recovery, Heimsoth sought unemployment benefits. He was contacted by the personnel manager for Kellwood and told his employment would have to be terminated in order for him to qualify for such benefits. The personnel manager indicated that a clerical position was being held open for claimant in the Kellwood shipping office. The duties of a shipping clerk are generally

less physical than those of a shipping laborer and require less standing, pushing of garments, and climbing.

As claimant did not desire to terminate his employment, he obtained a medical release from his physician with the understanding that he would be doing clerical work rather than the physical labor required in the shipping department. Upon the presentation of the medical release, Heimsoth was allowed to return to work at Kellwood. Although the medical release was without restriction, it is clear that Heimsoth had discussed his recent surgery and prior back problems with his supervisors and they agreed to accommodate him as much as possible so that he could work in a seated position. Upon his return to work in June of 1980, Heimsoth was assigned to his former duties as a shipping laborer and provided a piece of board to put across a chair so he could perform such duties while seated. After a period of about 2 months Heimsoth was moved to the shipping office where he worked as a shipping clerk. About a month later he was again assigned the duties of a shipping laborer. He volunteered to work a 12-hour shift, but protested to his supervisor that he had been hired to do clerical work.

The voluntary resignation signed by claimant on September 22, 1980, recited that he terminated for "medical reasons." He testified before the Nebraska Department of Labor Appeal Tribunal that he "knew that if I continued working the type of work that I was being asked to do, that it could eventually create a problem. But there was no problem created as yet." He further testified before the tribunal that he felt fine, that medical reasons were not a major factor in leaving his employment, and that he terminated principally because he did not see a way to work in the shipping office. Before the District Court he testified that his back was "hurting terribly" when he clocked out his last day of work and

that the labor involved caused him physical discomfort.

Neb. Rev. Stat. § 48-628 (Reissue 1978) provides in pertinent part: "An individual shall be disqualified for benefits: (a) For the week in which he has left work voluntarily *without good cause,* if so found by the Commissioner of Labor, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case . . . ." (Emphasis supplied.)

On appeal, the commissioner contends that Heimsoth did not present sufficient evidence to substantiate that he left his employment with good cause. The commissioner contends that the sole reason for Heimsoth's departure from Kellwood Company was his disappointment in not being able "to sit at a desk eight hours a day." We agree.

In *Glionna v. Chizek,* 204 Neb. 37, 40, 281 N.W.2d 220, 223 (1979), this court cited *Fannon v. Federal Cartridge Corp.,* 219 Minn. 306, 18 N.W.2d 249 (1945), which stated: " '* * * where factors or circumstances directly connected with employment result in illness or disease to an employee and make it impossible for him to continue therein because of serious danger to his health, termination of employment for this reason may correctly be said to be involuntary and for "good cause attributable to the employer," even though the employer be free from all negligence or wrongdoing in connection therewith.' " We then found that Glionna's workload, in good faith and through no fault or deficiency on her part, became an increasingly unreasonable burden, as the result of which her health and sense of well-being were affected. We held that under such circumstances her voluntary termination had a justifiably reasonable connection with or relation to the conditions of her employment and therefore was for good cause. The instant matter is not such a case.

We find that although Heimsoth may have anticipated a health problem, none was present to the degree that it was the cause of his voluntary termination. He terminated his employment because he was disgruntled at not being assigned the duties of a shipping clerk. The question therefore becomes whether, under the circumstances of this case, that disappointment constitutes good cause. We find it does not.

Heimsoth was correctly told when he first applied for benefits that he would have to be unemployed in order to qualify. It appears he was not told, however, that he would remain ineligible for unemployment benefits unless, in addition to being unemployed, he was in fact able to and available for work. Neb. Rev. Stat. § 48-627 (Reissue 1978). Nonetheless, the fact remains that Heimsoth did not wish to terminate at that time, he did not terminate, he returned to the job he had before undergoing surgery, and he was able to perform that job without adverse medical consequences. Moreover, Kellwood offered to find other work for Heimsoth, but he elected to quit. Under such circumstances it cannot be said he terminated with good cause. See *White v. Review Board of Indiana, etc.*, 114 Ind. App. 383, 52 N.E.2d 500 (1944), holding that a bandsaw operator who quit work because he was disgruntled by the employer's rule as to docking late employees, wanted a guard on the saw, which was old but not dangerous, replaced, and whom the employer was ready to take back had terminated without good cause.

For the reasons herein stated, the judgment of the District Court is reversed and the determination of the Nebraska Department of Labor Appeal Tribunal reinstated.

REVERSED.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from that

portion of the majority opinion which finds that the appellee, Robert Heimsoth, left his work voluntarily, without good cause, thereby subjecting himself to the benefit disqualification period specified by statute. I believe that we have improperly analyzed what "good cause" under the Nebraska Employment Security Law means. The issue is not whether the employee had sufficient cause which, absent the statute, might have entitled him to sue for breach of contract but, rather, whether he left his employment without any basis except his own personal desires. The law is clear that what we are concerned with here is not the fault of the employer but, rather, the right of the employee. The employer may be totally without fault. If the employee, however, has "good cause" for leaving, the employee does not thereby become disqualified from receiving unemployment benefits immediately. In the instant case the employee was promised a particular job which, admittedly, he was not given. Medical reasons set aside, when an employee is promised a particular type of job and not given that job, can it be said that his leaving is without "good cause"?

In *Glionna v. Chizek,* 204 Neb. 37, 40, 281 N.W.2d 220, 223 (1979), we said: "[I]f the reason for leaving, voluntarily though it may appear, has some justifiably reasonable connection with or relation to the conditions of employment, it cannot be said that the leaving is 'voluntarily without good cause.' "

As noted by the majority, the commissioner contends that the sole reason for Heimsoth's departure from Kellwood Company was his disappointment in not being able "to sit at a desk eight hours a day." That disappointment arises, however, by reason of a promise made by the employer. It occurs to me that a broken promise is good cause, though it may indeed fall short of a legal cause. I would have found that Heimsoth left his employment for "good

cause" and was therefore entitled to unemployment benefits immediately.

I am authorized to advise that White, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
CHARLES WEIBLE, APPELLANT.
317 N.W.2d 920

Filed April 2, 1982. No. 81-637.

1. **Indictments and Informations.** The court, before trial, may in its discretion permit amendment of a criminal information, provided that the amendment does not change the nature or identity of the offense charged or charge a crime other than the one on which the accused has his preliminary examination.
2. **Search and Seizure.** Searches and seizures inside a home without a warrant are presumptively unreasonable; a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable unless the police can show that it falls within one of the carefully designated exceptions based on the presence of "exigent circumstances."
3. **Search and Seizure: Arrests.** An arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may also search the area within the arrestee's immediate control.
4. _____: _____. Absent exigent circumstances, government agents have no right to search a dwelling when the arrest is effectuated outside it.

Appeal from the District Court for Wayne County: RICHARD P. GARDEN, Judge. Affirmed.

Vince Kirby, for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

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

CAPORALE, J.

The defendant-appellant, Charles Weible, was

charged in an information filed in the District Court for Wayne County on February 17, 1981, with knowingly and intentionally possessing cocaine with the intent to deliver (count I), possessing marijuana with the intent to deliver (count II), and with possession of cocaine (count III). A trial in this matter was held commencing on June 22, 1981, and the jury found the appellant guilty as charged. Weible was sentenced to terms of 5 to 8 years for possession of cocaine with the intent to deliver; 2 to 5 years for possession of marijuana with the intent to deliver, said sentence to be served consecutively with the sentence imposed in count I; and 1 to 3 years for the possession of cocaine, said sentence to be served concurrent with the sentences imposed in count I and count II.

The appellant's principal assignments of error can be summarized as follows: (1) Whether the complaint filed in the county court was properly amended; (2) Whether the entry of the police into appellant's residence after his arrest was in violation of defendant's constitutional rights; (3) Whether a complete chain of custody of the exhibits seized from the Busskohl residence was established; and (4) Whether the sentences imposed were excessive.

The record reveals that on December 18, 1980, at 10:30 a.m., Officer Robert Wilber, a special agent with the Bureau of Alcohol, Tobacco and Firearms, learned from an informant that one Dale Busskohl was willing to sell a quantity of cocaine and marijuana to Wilber and Officer Randy Bruncknorst, an undercover investigator with the Nebraska State Patrol. The officers made arrangements with the informant to meet with Busskohl at 9:30 p.m. that evening at a cafe located in Norfolk, Nebraska. Upon their arrival at the cafe, Wilber and Bruncknorst were told by Busskohl that he did not have the drugs with him and stated that the officers should contact him at 11:30 p.m. at his residence in Win-

side, Nebraska. It appears that prior to their departure to the Busskohl residence, the officers arranged a surveillance of the purchase of the controlled substances.

At approximately 11:30 p.m., the officers arrived in Winside and went to the Busskohl residence which was occupied by Busskohl, his girl friend, and several small children. At midnight, Busskohl left the residence and returned 20 minutes later with three bags of a white powder which was subsequently identified as cocaine. It appears that the officers had arranged to purchase 4 ounces of cocaine and 50 pounds of marijuana from Busskohl, and they informed him that no payments would be made for the drugs until after the marijuana had arrived. Thereafter, Brunckhorst agreed to drive Busskohl to another residence in Winside so that Busskohl could check to see if the marijuana had arrived. This residence was subsequently identified to be that owned by the appellant. Busskohl entered the house alone for a brief period before returning to Brunckhorst who had remained in the car. The men returned to the Busskohl residence at 12:45 a.m. the early morning of December 19, 1980. At 1 a.m. Busskohl requested another ride to the appellant's house from Brunckhorst, and as they drove by the house they observed the arrival of a pickup truck and two individuals walking toward the Weible house. According to Brunckhorst, Busskohl told him that these men had the marijuana and that the officer was not to stop at the house. The two men returned to the Busskohl residence; however, at 1:15 a.m. Busskohl left the house alone, allegedly to return to appellant's house to check on the drug deal.

Busskohl subsequently returned to his house at 1:40 a.m. in the company of the appellant and one Vernon Sarha. Busskohl and Sarha were carrying large boxes which contained garbage bags filled with blocks of marijuana weighing approximately

50 pounds, and the appellant carried a scale. The marijuana was taken into the kitchen and Busskohl retrieved the three bags of cocaine which he had placed in a bedroom. The officers had $16,000 in cash, which they placed on the kitchen table, and Brunckhorst performed a field test on the cocaine while the marijuana was being weighed. Brunckhorst asked Busskohl if the cocaine was still for sale at $2,400 an ounce, at which time Busskohl turned to the appellant, who nodded his head, whereupon Busskohl answered affirmatively. The total price for the substances in the house was computed to be $23,450; however, the officers informed Busskohl that they did not have enough money to purchase all of the drugs. Upon being informed of this Busskohl, Sarha, and the appellant went into the nearby living room to discuss how the purchase of the drugs was to be made. While the three men were in the living room, Officer Brunckhorst left the kitchen and went outside to his car and signaled to the surveillance team to go into the house. As the police entered into the Busskohl residence, the appellant attempted to escape by running from the house; however, he was apprehended by several officers. Before he could be secured, appellant reached into a pocket and threw a package containing a white powder, subsequently identified as cocaine, under a nearby police van. An additional bag of cocaine and a snorting device was found on the appellant during a search of his person after his arrest.

After the arrest of the appellant at 2 a.m. on the morning of December 19, 1980, Officer Brunckhorst directed several law enforcement agents to secure the Weible house while he proceeded to Wayne, Nebraska, to obtain a search warrant for the premises. The record reveals that the officers sent to the Weible house entered the residence and conducted a protective sweep, examining the rooms to determine whether anyone was in the house. The police found

three individuals at the residence; however, they appeared to have had no connection with the instant drug dealing, and they were allowed to leave. The officers remained in the residence until 4:45 a.m., when Officers Brunckhorst and Wilber returned with the search warrant. The officers contend that they conducted the search of the Weible house after the delivery of the warrant; however, there is testimony on the part of the Wayne County attorney and associate county judge that the search warrant was not delivered to the law enforcement officers until 5 a.m. on December 19, 1980.

In count I and count III of the complaint filed against the appellant in the county court on January 12, 1981, reference is made to cocaine being a controlled substance derived from "cocoa." Upon observing that the word coca had been misspelled in both counts, counsel for the appellant moved that the counts be dismissed. The State, however, made a motion for leave to amend instanter by interlineation to correct the spelling error, which motion was sustained by the court. Thereafter, appellant's counsel moved that the complaint be dismissed for want of reverification, which motion was overruled and which appellant contends was error.

It is well established in this jurisdiction that the court, before trial, may in its discretion permit amendment of a criminal information, provided that the amendment does not change the nature or identity of the offense charged or charge a crime other than the one on which the accused has his preliminary examination. *State v. Costello,* 199 Neb. 43, 256 N.W.2d 97 (1977); *State v. Gascoigen,* 191 Neb. 15, 213 N.W.2d 452 (1973). In the present case, the amendment of the complaint was made for the sole purpose of correcting the misspelling of the word coca. The remainder of the complaint clearly charges the appellant with knowingly and intentionally possessing or possessing with the intent to de-

liver the controlled substance of cocaine. There has been no showing on the part of the appellant that he was in any way prejudiced by the amendment or that it changed the nature of the offense with which he was charged. Rather, the record clearly shows that counsel for appellant admitted he had not been misled by the misspelling appearing in the complaint. We conclude that the correction of the complaint was one of form which did not in any way alter the substance of the offenses with which appellant was charged. See Annot., 17 A.L.R.3d 1181 (1968). The appellant's contention is without merit.

The appellant also contends that the search of his house by the law enforcement agents was unlawful and that the admission of evidence discovered at the time of the search was error.

It is a basic principle of fourth amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable, and that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable unless the police can show that it falls within one of the carefully designated exceptions based on the presence of "exigent circumstances." *Payton v. New York,* 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). See, also, *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). However, an arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may also search the area *within the arrestee's immediate control. Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). Absent exigent circumstances, government agents have no right to search a dwelling when the arrest is effectuated outside it. *Vale v. Louisiana,* 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970). In *Vale v. Louisiana* at 34-35, the Supreme Court stated: "But

entirely apart from that point, our past decisions make clear that only in 'a few specifically established and well-delineated' situations, *Katz v. United States,* 389 U.S. 347, 357 [88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)], may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. *The burden rests on the State to show the existence of such an exceptional situation. Chimel v. California, supra,* at 762 [89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)]; *United States v. Jeffers,* 342 U.S. 48, 51 [72 S. Ct. 93, 96 L. Ed. 59 (1951)]; *McDonald v. United States,* 335 U.S. 451, 456 [69 S. Ct. 191, 93 L. Ed. 153 (1948)]. And the record before us discloses none.

"There is no suggestion that anyone consented to the search. Cf. *Zap v. United States,* 328 U.S. 624, 628 [66 S. Ct. 1277, 90 L. Ed. 1477 (1946)]. The officers were not responding to an emergency. *United States v. Jeffers, supra,* at 52; *McDonald v. United States, supra,* at 454. They were not in hot pursuit of a fleeing felon. *Warden v. Hayden,* 387 U.S. 294, 298-299 [87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967)]; *Chapman v. United States,* 365 U.S. 610, 615 [81 S. Ct. 776, 5 L. Ed. 2d 828 (1961)]; *Johnson v. United States,* 333 U.S. 10, 15 [68 S. Ct. 367, 92 L. Ed. 436 (1948)]. The goods ultimately seized were not in the process of destruction. *Schmerber v. California,* 384 U.S. 757, 770-771 [86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)]; *United States v. Jeffers, supra; McDonald v. United States, supra,* at 455. Nor were they about to be removed from the jurisdiction. *Chapman v. United States, supra; Johnson v. United States, supra; United States v. Jeffers, supra.*" (Emphasis supplied.)

The record clearly demonstrates that the law enforcement agents had arrested the appellant at the Busskohl residence prior to their subsequent entry into his house for the purpose of securing it. The arrest of the appellant did not provide exigent cir-

cumstances justifying the warrantless search of this house. Furthermore, the State has not sustained its burden of establishing the existence of any exceptional circumstances dictating the necessity of the search without a warrant. For these reasons, we must determine that the warrantless protective search of Weible's residence was in violation of the fourth amendment to the U.S. Constitution. See, *United States v. Anthon,* 648 F.2d 669 (10th Cir. 1981); *United States v. Kinney,* 638 F.2d 941 (6th Cir. 1981). The evidence seized as a result of the *search of appellant's residence* should not have been admitted at trial.

However, we determine the admission of the evidence discovered in the search of appellant's residence to have been harmless error beyond a reasonable doubt. The jury's verdict is amply supported by overwhelming evidence which was not tainted by the warrantless search. *Chambers v. Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), *rehearing denied* 400 U.S. 856, 91 S. Ct. 23, 27 L. Ed. 2d 94; *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *United States v. Russo,* 527 F.2d 1051 (10th Cir. 1975), *cert. denied* 426 U.S. 906, 96 S. Ct. 2226, 48 L. Ed. 2d 831 (1976). The evidence seized at appellant's residence consisted of some drug-use paraphernalia and items used to weigh and cut drugs. These items pale into insignificance when weighed against the evidence which was properly seized at the Busskohl residence at the time of the arrests. The evidence in this case clearly establishes that, at the time of his arrest, the appellant was in possession of several packages of cocaine. Furthermore, the evidence is sufficient to establish that Weible was in actual or constructive possession of the marijuana and cocaine which was offered for sale to the law enforcement agents. In this regard, we note the testimony of Vernon Sarha who stated that he received several phone calls from the appel-

lant on December 18, 1980, and was told to bring 50 pounds of marijuana that evening to Weible's house at Winside. In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Stickelman,* 207 Neb. 429, 299 N.W.2d 520 (1980); *State v. Carter,* 205 Neb. 407, 288 N.W.2d 35 (1980).

The appellant also objects to the admission of the evidence by the trial court for the reasons that the State failed to establish a proper foundation and chain of custody. In *State v. Apker,* 204 Neb. 577, 284 N.W.2d 14 (1979), we held that an exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been. We have carefully examined the testimony of Officer Brunckhorst who took possession of the evidence seized at the Busskohl home. He testified that the evidence was tagged and marked by him while at the Busskohl home, and then placed into the police van under the custody of Officer Pettijohn. Pettijohn testified that he maintained custody of the evidence until it was returned to Brunckhorst after the search of the appellant's house. Thereafter, Brunckhorst took the evidence to Omaha to be placed into storage at the State Patrol evidence locker. Darrell Koci, custodian of the evidence locker, testified that he stored the evidence received from Brunckhorst on December 19, 1980.

The evidence was subsequently checked out of the evidence locker on several occasions by Officer Brunckhorst, once to be consolidated with the evidence seized from the Weible house, and at other times to be taken to chemical laboratories for analysis. We are satisfied that the testimony of the witnesses into whose hands the evidence passed clearly identified the evidence and established a continuous chain of custody from the time it had been seized. The method of storing the evidence eliminated any reasonable likelihood that it had been tampered with by intermeddlers. The rule is well established that a trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for a clear abuse of discretion. *State v. Torrence,* 192 Neb. 720, 224 N.W.2d 177 (1974); *State v. Stickelman, supra.* The court did not err in finding that there was sufficient foundation to admit the exhibits into evidence.

Finally, we turn to appellant's allegation that the sentences imposed by the trial court were excessive. In support of his contention, appellant compares his sentences to those imposed on Busskohl, Sarha, and Coyle as evidence of an abuse of discretion by the trial court. After a review of the records and sentences imposed on the codefendants, we are unable to agree with the appellant that the trial judge abused his discretion. The record indicates that the appellant was the organizer in the drug transaction which led to his arrest, and he coordinated the sale of the cocaine and marijuana to the undercover investigators. Busskohl was charged with possession of cocaine with the intent to deliver and with possession of marijuana with the intent to deliver. Pursuant to a plea bargain, the second of the two charges was dropped and he pled guilty to possessing cocaine with the intent to deliver. He was sentenced to a term of 2 to 5 years' imprisonment. Coyle was originally charged with possession of

marijuana of less than one ounce, possession of marijuana with the intent to deliver, and possession of cocaine with the intent to deliver. The record indicates that the third count was dismissed after the county court preliminary hearing and the second count was dismissed on motion of the State for lack of evidence. Coyle pled guilty to possession of marijuana and was fined $100. Sarha was charged with possession of marijuana with intent to deliver, which was amended to possession of more than 1 pound of marijuana, to which he pled guilty. The record indicates that Sarha cooperated with the law enforcement officials during the appellant's trial. Sarha was sentenced to imprisonment in the Pierce County jail for 300 days.

The record of the trial court at the time of sentencing the appellant clearly shows that the court considered the many factors for determining the degree of punishment to be imposed which this court outlined in *State v. Etchison,* 188 Neb. 134, 195 N.W.2d 498 (1972). Our conclusion is that the sentences imposed on the appellant were not excessive and the court did not abuse its discretion.

We have considered appellant's other assignments of error and find them likewise to be without merit. The jury's verdict and the judgment and sentences of the trial court are affirmed.

AFFIRMED.

EMPIRE STATE BUILDING COMPANY, APPELLANT, V. JOSEPH C. BRYDE, APPELLEE.

318 N.W.2d 65

Filed April 9, 1982. No. 43951.

1. **Trial: Proof.** It is elemental law that the burden of proof is upon the plaintiff to prove those things which constitute the necessary elements of his cause of action, and the defendant bears the burden

of proving those things which constitute affirmative defenses.

2. _____: _____. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.

3. **Trial: Jury Instructions.** A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for a new trial.

Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellant.

Michael A. Fortune and James B. Cavanagh of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

Heard before KRIVOSHA, C.J., and HASTINGS, J., and COADY and FAHRNBRUCH, D. JJ., and RONIN, D.J., Retired.

KRIVOSHA, C.J.

The appellant, Empire State Building Company (Empire), appeals from a jury verdict rendered in the District Court for Douglas County, Nebraska. The jury found for the appellee, Joseph C. Bryde (Bryde), and against Empire on Empire's claim for damages caused by the alleged negligence of Bryde. For reasons more fully set out hereafter, we reverse and remand for new trial.

Empire is the owner of a commercial building in downtown Omaha, Nebraska. Bryde, one of Empire's tenants, operated a Quik Print shop in space located on the street level of Empire's building. In addition to occupying the street-level storeroom, Bryde also leased and used the basement located directly below the street-level storeroom. On December 25, 1976, at approximately 11:30 p.m., a fire was discovered in the basement area leased by Bryde which resulted in damage to the entire Empire

building. Empire then sued Bryde, maintaining that Bryde had negligently stored plastic trash bags containing paper and other debris, as well as flammable fluids, in the basement of the building and that the negligent storing of these plastic bags was the proximate cause of the fire which damaged Empire's building.

It is undisputed that it was Bryde's practice to take the trash accumulated from the daily operation of his business and place it in plastic garbage bags which were then clipped shut and piled in the basement area. The contents of the plastic bags consisted of shredded paper, plates used in the cameras, blotter stock paper used to clean the presses, smoking material, cotton swabs, and generally the trash from a normal business day.

Bryde stored the plastic bags in the basement until he felt there was a sufficient number to justify having them hauled away. At the time of the fire, there were at least 30 of such bags stacked in the basement of the Quik Print shop.

Vernon Trapp, chief of the arson bureau of the Omaha Fire Division, testified that the cause of the fire was the accumulation of trash in the basement of the Quik Print shop. A second witness for Empire supported this view. Both witnesses testified that "but for" the storing of the trash, the fire would not have occurred.

The first assignment of error we consider, and the one material to our decision herein, concerns the instruction given by the trial court to the jury over the objection of Empire. The trial court first instructed the jury regarding the pleadings filed by Empire. In its instruction, the trial court advised the jury: "The plaintiff alleges in its Second Amended Petition that the defendant was negligent in the following respects:

"1. In stacking discarded trash in plastic bags containing paper and other debris and leaving same

in the premises occupied by the defendant;

"2. In permitting flammable fluids to be discarded in plastic bags with paper therein and leaving same in the premises occupied by defendant;

"3. In permitting plastic bags containing discarded cigarettes and other refuse to be stacked in the basement of the premises occupied by the defendant along with paper and other refuse."

The trial court then instructed the jury: "Plaintiff further alleges that the aforementioned negligence of the defendant was the sole and proximate cause of the fire, doing damage to the building of the plaintiff . . . ." The trial court then properly instructed the jury that plaintiff further alleged "said fire . . . started in the discarded trash by reason of the ignition of the fluids and paper contained in the plastic bags referred to in the foregoing specifications of negligence, either by ignition caused by a cigarette or by spontaneous combustion of the papers and fluid contained in said plastic bags." Indeed, there was no error in this portion of the instruction, for the court properly advised the jury what it was that the plaintiff had alleged.

However, in a subsequent instruction, the trial court instructed the jury as follows: "Before the plaintiff can recover, the burden is upon the plaintiff to prove, by a preponderance of the evidence, each and all of the following elements or propositions:

"1. That the defendant was negligent in one or more of the elements or particulars numbered and stated in Instruction No. 2.

"2. That said negligence, if any, of the defendant was the proximate cause, or a proximately contributing cause, of the fire.

"3. That as the direct and proximate result of said negligence of the defendant and resultant occurrence the plaintiff sustained damages.

"4. The amount in money of the damages thus sustained."

That portion of the instruction was indeed correct and properly instructed the jury as to the burden assumed by Empire in order for it to recover from Bryde. The trial court, however, further instructed the jury, over objection of Empire, as follows: "If the plaintiff has established, by a preponderance of the evidence, all of the above-numbered propositions *and that the ignition source of the fire was either a cigarette butt which was placed in the trash in plastic bags through the negligence of the defendant, Joseph Bryde, or his employees, or by spontaneous combustion within the trash in the plastic bags,* then your verdict will be for the plaintiff and against the defendant in the amount of such damages. If the plaintiff has failed to establish any one or more of the foregoing above numbered propositions *and the ignition source of the fire,* by a preponderance of the evidence, your verdict will be for the defendant." (Emphasis supplied.)

It is in this regard we believe that the trial court was in error. The authorities have made it clear that there really are several different and distinct causes of action relating to fires. One, of course, is the negligent setting of a fire. Another, however, is the negligent storing of combustible material without regard to how the fire started. In 35 Am. Jur. 2d *Fires* § 27 at 607 (1967), the author notes: "Liability for damage caused by the spread of fire from defendant's premises may be predicated on his negligence in keeping his premises in such a condition that such a result was likely. So, where one negligently stores combustible material on his property in such a way that it is reasonably foreseeable that fires will start thereon and spread to the property of another, he may be held liable for damage caused when this occurs, although the fire starts accidentally. . . ."

Two decisions, among many, supporting this view are *Quaker Oats Co. v. Grice*, 195 F. 441 (1912), and

T. & N. O. R. R. Co. v. Bellar, 51 Tex. Civ. App. 154, 112 S.W. 323 (1908). In *Quaker Oats Co., supra* at 444, the court noted: "If premises are allowed to become unsafe because they are filled with dust which would explode on the application of spark or flame, and the exercise of reasonable care would have prevented the premises from becoming thus unsafe, the person whose neglect brought about such a dangerous condition would not be excused because the actual spark which fired the train was produced by some intruder undertaking to light his pipe." Likewise, in *T. & N. O. R. R. Co., supra* at 157, 112 S.W. at 325-26, the court said: "The fact that the fire might have started from some cause other than through an act of the railroad company does not exculpate the defendant. It may be that the defendant was in no wise responsible for the origin of the fire, and the evidence does not show that it was, but it was responsible for the part its negligence performed. That negligence consisted in bringing about a condition which subjected the plaintiffs' property to a danger which resulted in its destruction, which did not theretofore exist, and which danger and result was reasonably apparent to and should have been foreseen by a person of ordinary prudence. It is true that the oil of itself did not create the danger, and that the danger therefrom did not arise until some other act was performed, namely, the kindling of the fire which ignited the oil. Neither would the kindling of the fire at a point near or remote from the property have created the danger but for the presence of the oil. It is not always the last act of cause or nearest act to the injury that is the proximate cause, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circum-

stances." See, also, *Prince v. Chehalis Sav. & Loan Ass'n,* 186 Wash. 372, 58 P.2d 290 (1936).

We are unable to find any case in Nebraska which has directly addressed this point. Cases from other jurisdictions, as already noted, have made it clear that liability for damages caused by a fire are not limited only to those who actually ignited the fire but may also extend to those who so negligently maintain their premises that it can be said that the resulting damages from the fire were proximately caused by the negligent manner in which the defendant's premises were maintained, regardless of the source of ignition.

In the case of *Arneil v. Schnitzer,* 173 Or. 179, 206-07, 144 P.2d 707, 717-18 (1944), the court said: "We know of no decision which holds that one who maintains his property so negligently that it menaces his neighbors, is liable for the destruction of their premises by a fire which started upon his, only in the event that he himself applied the match. To the contrary, we are satisfied that the owner's negligence is the proximate cause of the damage to the neighbor, even if a stranger communicated the spark; unless the circumstances are such that no prudent person would have anticipated the stranger's act. Of course, inflammable material, such as lay upon the defendants' property, does not ignite spontaneously; an Ellis Miller is generally required. But this Ellis Miller would not have succeeded in starting this conflagration had it not been for the defendants' negligent conduct. The duty to refrain from littering one's premises with inflammable material is imposed for the protection of the neighbors, and a person who breaches that duty thereby creates a causal connection between his negligent act and his neighbor's loss if a fire starts among the debris. One who suspends a sword of Damocles over the head of his neighbor must respond in damages for the consequences if another, allured by the

temptation, cuts the tender cord." See, also, *Ford v. Jeffries,* 474 Pa. 588, 379 A.2d 111 (1977); *B. W. King, Inc. v. West New York,* 49 N.J. 318, 230 A.2d 133 (1967); *Menth v. Breeze Corporation, Inc.,* 4 N.J. 428, 73 A.2d 183 (1950).

The cause of action involved herein, as alleged by Empire, was not the negligent starting of a fire, but the negligent maintaining of the premises which, when confronted by fire, proximately caused the damages to Empire and which, but for the negligent maintaining of the premises, would not have resulted in the damages. The cause of action, therefore, is not for negligently starting a fire but, rather, for negligently storing combustible material on the premises.

The question that must therefore be answered is what is the burden of proof imposed upon one who seeks to recover damages for another's negligently maintaining a premise which proximately causes damages to the plaintiff. To answer that question we must examine what it means to have "the burden of proof" in a particular cause of action.

It is elemental that the plaintiff is only required to assume the burden of proof of those elements necessary to establish his cause of action even if he unnecessarily pleads matters which are not necessary elements of the cause of action. In *Carlson v. Nelson,* 204 Neb. 765, 773, 285 N.W.2d 505, 509-10 (1979), we noted: "It is elemental law that the burden of proof is upon the plaintiff to prove those things which constitute the necessary elements of his cause of action and the defendant bears the burden of proving those things which constitute affirmative defenses. Another way of stating the principle is that he who has the burden of pleading a fact must prove it." And in *Davis v. Landis Outboard Motor Co.,* 179 Neb. 391, 396, 138 N.W.2d 474, 479 (1965), we said: " 'The burden of proof means the duty resting on one party or the other to establish by a preponder-

ance of the evidence an issue essential to recovery.' " And in 29 Am. Jur. 2d *Evidence* § 127 at 160-61 (1967), it is noted: "Nor, in order to recover, need a party prove allegations which are immaterial as a matter of pleading."

In the instant case, the cause of action was founded upon the negligent storing of the material, as opposed to the negligent starting of a fire. Therefore, how the fire started was of no moment insofar as plaintiff's cause of action was concerned.

While it is true that Empire invited some of its difficulty by pleading a matter which it was not required to plead, that does not permit the court to instruct the jury on that matter, particularly where an objection is raised. We noted in *Bezdek v. Patrick,* 167 Neb. 754, 761, 94 N.W.2d 482, 489 (1959): " 'A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict.' " See, also, *Rogers v. Navajo Freight Lines, Inc.,* 186 Neb. 502, 184 N.W.2d 623 (1971). We believe that the trial court was in error when it went beyond its initial instructions on burden of proof, as contained in instruction No. 2, and advised the jury that not only was it necessary for Empire to establish "by a preponderance of the evidence all of the above-numbered propositions" but also that Empire must establish "that the ignition source of the fire was either a cigarette butt which was placed in the trash in plastic bags *through the negligence* of the defendant . . . or by spontaneous combustion," and that if Empire failed to establish the source of the fire, even though it proved all of the "above-numbered propositions," the jury's verdict must be for the defendant. Empire may not be able to establish that the proximate cause of its damages was the storing of the trash. That is for the jury to decide. All we determine here is the extent of Empire's burden. The origin of

the fire is not included in the cause of action as pleaded by Empire.

Several other errors are assigned by Empire. In view, however, of the action we take herein, we deem those errors not necessary for our consideration at this time. The judgment is reversed and the case remanded with instructions to grant a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

DENNIS HEMENWAY, APPELLEE, V. MFA LIFE INSURANCE COMPANY, APPELLANT.

318 N.W.2d 70

Filed April 9, 1982. No. 44084.

1. **Declaratory Judgments.** A suit for declaratory judgment is an action sui generis and may involve questions of both law and equity.
2. **Declaratory Judgments: Appeal and Error.** A judgment on a fact issue tried to the court alone has the effect of a jury verdict and will not be set aside unless clearly wrong.
3. **Judgments: Appeal and Error.** In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
4. **Insurance: Liability.** In determining whether coverage is afforded under a particular conditional receipt, the specific language of the receipt must be taken into account. Liability of the insurer, if any, is dependent upon the language of the receipt, the facts of the particular case, and the intention of the parties.
5. **Insurance.** A conditional receipt may give rise to insurance coverage, even though the policy has not been issued, provided that the conditions for such coverage are met under the terms of the receipts.
6. **Insurance: Contracts.** Insurance policies should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning.
7. _____: _____. An insurance contract will be interpreted in ac-

cordance with the reasonable expectations of the insured at the time of the contract and, in case of doubt, the policy will be liberally construed in favor of the insured.

8. **Attorney Fees.** Such attorney fee as may be awarded under the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1978) must be solely and only for services actually rendered in the preparation and trial of the litigation on the policy in question.

Appeal from the District Court for Antelope County: RICHARD P. GARDEN, Judge. Affirmed as modified and remanded with directions.

Richard E. Mueting of Mueting & DeLay, for appellant.

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

Heard before KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MURPHY and WHITEHEAD, D. JJ.

CAPORALE, J.

Dennis C. Hemenway, plaintiff-appellee, commenced this action for a declaratory judgment to determine whether a policy of health insurance issued by MFA Life Insurance Company (MFA), the defendant-appellant, provided coverage for a heart condition which manifested itself on or about March 13, 1978. The District Court of Nebraska in and for Antelope County entered a judgment against MFA, together with an award of attorney fees in favor of the plaintiff in the amount of $5,010.17 and costs.

MFA alleges, in summary, that the trial court erred in (1) finding the effective date of the policy in question to have been February 9, 1978; (2) finding that all conditions precedent had been met by Hemenway; (3) admitting evidence of conversations concerning policy limitations had between plaintiff and MFA's agent at the time the application for insurance was executed; and (4) awarding an attorney fee. We find the assignments, except as to the attorney fee, to be without merit and affirm as modified hereinafter.

A suit for declaratory judgment is an action sui

generis and may involve questions of both law and equity. The particular decision from which this appeal is taken involves, at the outset, questions of fact. As such, the parties were entitled to a jury trial. Neb. Rev. Stat. § 25-21,157 (Reissue 1979); *MFA Ins. Companies v. Mendenhall,* 205 Neb. 430, 288 N.W.2d 270 (1980); *State Farm Mutual Automobile Ins. Co. v. Kersey,* 171 Neb. 212, 106 N.W.2d 31 (1960). A jury having been waived, the judgment of the trial court on a fact issue has the effect of a jury verdict and will not be set aside unless clearly wrong. *MFA Ins. Companies v. Mendenhall, supra.* In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Crawford v. Ham,* 209 Neb. 802, 311 N.W.2d 896 (1981); *Fabricators, Inc. v. Farmers Elevator, Inc.,* 203 Neb. 150, 277 N.W.2d 676 (1979); *State Farm Mutual Automobile Ins. Co. v. Kersey, supra.*

With the foregoing scope of review in mind, the record reveals that on February 9, 1978, as a result of a contact by the plaintiff, Loren Johnson, an insurance salesman for MFA, and Benny Rowe, district sales manager for MFA, arrived at the Hemenway residence to discuss possible health insurance coverage. The plaintiff selected a policy of insurance and Rowe assisted in filling out the application. The application indicates that plaintiff selected benefit schedules "F" and "G," which provided for $50 as maximum daily hospital room allowance and $500 as the maximum allowed under the surgical schedule. In the course of filling out the application, plaintiff mentioned to Rowe that he had received prior medical treatments for hernias, a fact which was noted in the application. After the application

was completed, the amount of the premium was determined to be $182.52, which was paid to MFA's agents with a check issued by the plaintiff's wife. This payment covered the premiums for the first 2 months for the health insurance policy purchased. Rowe also issued the Hemenways a "Conditional Coverage Receipt" which provided in part: "[V]oid if altered or modified or if draft or check given in payment is not honored. NO INSURANCE SHALL BE EFFECTIVE BEFORE POLICY DELIVERY TO OWNER UNLESS ALL THE CONDITIONS ON THE OTHER SIDE OF THIS RECEIPT ARE FULFILLED EXACTLY." The language on the other side of the receipt states: "CONDITIONS PRECEDENT

"Condition No. 1. Payment of Premium. Full payment of initial premium on selected mode must be made to an authorized agent of MFA Life Insurance Company on date of application.

"Condition No. 2. Insurability. MFA Life Insurance Company at its Home Office must determine to its satisfaction, according to its rules and practices, that as of the later date of the application or medical examination form, if required, the persons proposed for insurance were insurable for the plans and amounts applied for and at the rate of initial premium paid.

"Effective Date of Insurance. If above conditions are met, insurance shall be effective, subject to the provisions in the policies applied for, as of the later date of the application or medical examination form, if required."

We note that at no time prior to the issuance of the health policy was the plaintiff required to undergo any physical or medical examination.

Approximately 3 weeks after the application and check for payment were submitted to MFA's agents, Dennis Hemenway began to experience episodes of shortness of breath and dizziness. On March 13,

1978, plaintiff was examined by a physician in Omaha and was hospitalized to receive a series of tests to determine the cause of his illness. On March 25, 1978, plaintiff was informed that his shortness of breath was due to a blockage in the arteries leading away from his heart. Plaintiff subsequently, on March 29, 1978, underwent a triple coronary heart bypass operation.

On March 25, 1978, MFA issued health insurance policy No. D-031720 to the plaintiff which recites an effective date of March 16, 1978. On April 30, 1978, the plaintiff submitted a claim to MFA for payment of the medical expenses incurred in receiving treatment for his heart condition. MFA has denied all heart-related claims on the ground that the heart condition commenced prior to the March 16, 1978, effective date of the policy.

MFA contends that the application for insurance submitted by plaintiff did not contain any request to exclude coverage for inguinal hernias, and therefore the policy issued March 25, 1978, should be considered a counteroffer for insurance exempting coverage for inguinal hernias. Hemenway argues that he has met all conditions required by the conditional receipt to be afforded coverage as of February 9, 1978; that the policy issued conforms in all respects with the insurance for which he applied; and, therefore, the health insurance policy issued by MFA should not be considered a counteroffer.

The major issue before this court is the determination of when the health insurance policy became effective, February 9, 1978, as claimed by plaintiff, or March 16, 1978, as claimed by MFA.

We begin our analysis by reviewing the pertinent law which has developed in regard to "conditional" or "binding" receipts which are utilized by insurance companies, and which afford coverage to an applicant between the date of application and the actual issuance of the policy. In determining whether

coverage is afforded under a particular receipt, the specific language of the receipt must be taken into account. Liability of the insurer, if any, is dependent upon the language of the receipt, the facts of the particular case, and the intention of the parties. *Vernon v. Provident Life & Acc. Ins. Co.*, 266 S.C. 208, 222 S.E.2d 501 (1976).

Conditional receipts, as issued by MFA in this case, have been the subject of abundant litigation. See, Annot., 2 A.L.R.2d 943 (1948); 1 Couch on Insurance §§ 14:39 to 14:46 (2d ed. 1959); Comment, *Life Insurance Receipts: The Mystery of the Non-Binding Binder,* 63 Yale L.J. 523 (1953-54); Comment, *"Binding Receipts" in California,* 7 Stan. L. Rev. 292 (1954-55). The use of such receipts has developed into a common practice among insurance companies and results from the fact that an application for insurance is simply an offer, revocable at any time prior to acceptance. "In order to protect themselves from an applicant's change of mind, which often leads to financial losses due to the insurance company's expenditures on investigating the applicant, the companies developed prepayment policies. [Citations omitted.] The terms of the application suggesting that early payment of the premium accelerates the date of effective coverage serve to induce applicants to accept this option. Obviously, by so doing, the applicant is under the impression that some advantage accrues to him. As the court in *Hart v. Travelers Ins. Co.*, 236 App. Div. 309, 258 N.Y.S. 711, aff'd, 261 N.Y. 563, 185 N.E. 739, noted (p. 315): '[The applicant] did not believe that by furnishing this premium in full in advance he was doing something to his disadvantage—paying money for a period when he was not insured at all.' " *Simses v. North American Co. for Life & Health Ins.*, 175 Conn. 77, 83, 394 A.2d 710, 713 (1978). See, also, 43 Am. Jur. 2d *Insurance* §§ 216 to 218 (1969); 12A Appleman, *Insurance Law and Practice* § 7237

(1981). There is little question but that a conditional receipt may give rise to insurance coverage, even though the policy has not been issued, provided that the conditions for such coverage are met under the terms of the receipt. See, *Braman v. Mutual Life Ins. Co.*, 73 F.2d 391 (8th Cir. 1934); *Mofrad v. New York Life Ins. Co.*, 206 F.2d 491 (10th Cir. 1953); *Damm v. National Insurance Company of America*, 200 N.W.2d 616 (N.D. 1972); *Dunford v. United of Omaha*, 95 Idaho 282, 506 P.2d 1355 (1973); *Puritan Life Ins. Co. v. Guess*, 598 P.2d 900 (Alaska 1979).

In construing contracts of insurance in this jurisdiction, we have held that insurance policies should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning. *Dairyland Ins. Co. v. Esterling*, 205 Neb. 750, 290 N.W.2d 209 (1980); *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964). It is also well established that an insurance contract will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract and, in case of doubt, the policy will be liberally construed in favor of the insured. *Dairyland Ins. Co. v. Esterling, supra; Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (1979); *Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co.*, 200 Neb. 46, 262 N.W.2d 183 (1978); *Neal v. St. Paul Fire & Marine Ins. Co.*, 197 Neb. 718, 250 N.W.2d 648 (1977); *Wyatt v. Woodmen Acc. & Life Co.*, 194 Neb. 614, 234 N.W.2d 217 (1975); *Bracy v. American Family Mut. Ins. Co.*, 189 Neb. 631, 204 N.W.2d 174 (1973). This rule appears to rest upon the ground that the drafting of the language found in insurance policies or receipts is in the hands of the insurance company.

In the present case, the conditional coverage receipt issued by MFA to the plaintiff clearly specifies that no insurance shall be effective prior to the de-

livery of the policy *unless* certain conditions are complied with. The first condition requires full payment of the initial premium on the date the application for insurance is made. That this condition was met is not disputed. On the contrary, the record clearly establishes that full payment of 2 months' premiums was made by the Hemenways on February 9, 1978, when the application for insurance was submitted to Rowe, district sales manager for MFA. The Hemenways were in full compliance with condition No. 1 as set out in the conditional receipt.

The second condition provides that MFA must determine that the applicant is insurable "according to its rules and practices" as of the later of the date of application or of a medical examination, if required. No medical examination was required; however, it is defendant's contention that Hemenway was not insurable on the date of application according to MFA's rules and practices. MFA alleges that the health insurance applied for by plaintiff contained no exclusion for inguinal hernias and that they made a counteroffer of insurance with the policy dated March 25, 1978, which contained an endorsement excluding inguinal hernias.

The problem with the quoted language of the receipt, as has been noted in numerous cases, is that it appears to lodge the insurance company with an almost arbitrary power to decide whether the applicant was insurable on February 9, 1978. Whether this language sets up a subjective or an objective standard of insurability is not clear, but the language as to plans and amounts applied for, benefits, and premium rates does suggest the existence of some ascertainable standard of insurability. In this regard, we note that the cases dealing with this language in conditional receipts have applied an objective test of insurability to determine the effective date of coverage. As stated by the Maryland Court of Appeals in *Simpson v. Prudential Ins. Co.*, 227

Md. 393, 406, 177 A.2d 417, 425 (1962): "We think that the clause means that the applicant must meet an objective standard of insurability, and that this standard is the company's own standard for the plan, the amount and the benefits applied for, and at the rate applied for. Honest satisfaction is the standard usually applied under contracts calling for the satisfaction of a party, in the absence of some clear indication to the contrary. Somewhat by analogy, we think that in life insurance 'satisfaction' premium receipts an objective standard of satisfaction to comply with a condition should be applied, if such would be its fair meaning to an ordinary person not versed in the niceties of life insurance to whom such a receipt might be offered. [Citations omitted.] We think that at least an ambiguity is presented and that in accordance with the established rule it should be resolved against the party whose language it is—that is, against the insurance company. [Citations omitted.]" Or as stated by Judge Hand in *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947): "[I]nsurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion."

As is pointed out in 12A Appleman, *Insurance Law and Practice* § 2739 (1981), the determination of insurability is a question of fact to be determined by the trier of fact. The record shows that the trial court resolved this issue in favor of the plaintiff. The insurance policy issued to the plaintiff clearly conformed in amount of coverage applied for, the benefit schedules applied for, and the premium rate charged the plaintiff at the time the application was submitted. As the plaintiff was not required to take a medical examination, it is clear that he was insurable as of February 9, 1978.

We must also reject MFA's contention that the policy of insurance issued on March 25, 1978, consti-

tuted a counteroffer of insurance to that applied for by the plaintiff. The application submitted by the plaintiff clearly reveals that he selected health insurance which included coverage under benefit schedule "G." This schedule, which provides for surgical and in-hospital treatment coverage, contains the following exclusion: *"EXCLUSIONS: . . . (a) hernia of any kind . . . ."* (Emphasis supplied.) Since the policy of health insurance applied for by plaintiff provided for the exclusion of hernia coverage of any kind, the addition of the inguinal hernia endorsement by MFA does not vary the terms of the insurance applied for by plaintiff and cannot constitute a counteroffer of insurance.

In view of the foregoing analysis, it is immaterial whether the trial court improperly admitted parol evidence, which we do not decide, of such conversations as Hemenway may have had with MFA's agent. The trial court's finding that the policy issued by MFA was effective February 9, 1978, is compelled by the record without regard to those conversations.

Neb. Rev. Stat. § 44-359 (Reissue 1978) provides that one such as Hemenway who brings an action on a policy of insurance (with certain exceptions not material here) shall, upon obtaining judgment, be awarded a reasonable attorney fee, to be taxed as a part of the costs. The form of the action is not controlling. See, *State Farm Fire & Cas. Co. v. Muth,* 190 Neb. 248, 207 N.W.2d 364 (1973), holding that an insured who prevails is entitled to an attorney fee where the insurer brings a declaratory judgment action to determine coverage. MFA argues that since there was no evidence as to the amount of Hemenway's potential ultimate recovery from MFA, the trial court lacked an indispensable fact and thus could make no award. It is unquestionably true that one of the relevant considerations in determining a reasonable attorney fee is the amount involved in

the controversy. *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979); *Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co.*, 197 Neb. 605, 250 N.W.2d 239 (1977); *Schmer v. Hawkeye-Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975). It cannot be said, however, that in the context of this case, evidence as to the amount of Hemenway's ultimate potential recovery was indispensable to the court's determination.

Lastly, MFA complains that the amount of the fee awarded, $4,923.75 together with certain otherwise nontaxable costs, is excessive because it includes time for services rendered in connection with third-party claims against plaintiff as a consequence of his inability to pay certain bills incurred as a result of the treatment of his heart condition. The record reflects the fee awarded includes 4½ hours at counsel's customary and reasonable charge of $65 per hour for such services. The inclusion of the amount of $292.50 in the award for services rendered in connection with the third-party claims is clearly erroneous. Such attorney fee as may be awarded under the provisions of § 44-359 must be solely and only for services actually rendered in the preparation and trial of the litigation on the policy in question. *Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (1979); *Herrera v. American Standard Ins. Co., supra.* The fee awarded is otherwise well within the trial court's discretion, *Herrera v. American Standard Ins. Co., supra.*

The judgment of the trial court should therefore be modified by reducing the amount of the attorney fee and otherwise nontaxable costs awarded to $4,717.67. The cause is remanded with directions to enter judgment in accordance with this opinion. Plaintiff-appellee is awarded the sum of $750 as an attorney fee to apply toward the services of his lawyer in this court.

AFFIRMED AS MODIFIED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
JAMES QUARRELS, APPELLANT.

318 N.W.2d 76

Filed April 9, 1982. No. 44152.

1. **Mental Competency: Trial.** The test of mental competency to stand trial is whether the defendant has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
2. _____: _____. The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court.
3. **Mental Competency: Appeal and Error.** The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings.
4. **Mental Competency: Pleas.** The test of mental capacity to plead or stand trial is the same.

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

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

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

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

MCCOWN, J.

The defendant was charged on one count of first degree sexual assault and one count of using a knife in the commission of a felony. A pretrial hearing was held to determine the defendant's competency to stand trial, and the court found the defendant competent to stand trial. The defendant then pleaded guilty to the forcible sexual assault count and the second count was dismissed. After presentence investigation the District Court sentenced the defendant to a term of 6 to 10 years' imprisonment and also found that the defendant was a treatable mentally disordered sex offender and ordered him

committed to the Lincoln Regional Center. The issue on appeal involves the competency of the defendant to stand trial and to plead guilty to the charge.

The record establishes that on August 29, 1980, the defendant committed a first degree sexual assault on a female victim and used a knife in the commission of the offense. The defendant was born September 2, 1954, and quit school when he was in the ninth grade.

At the competency hearing held prior to the entry of the guilty plea, three medical witnesses testified. A psychiatrist, Dr. Tweddle, and a clinical psychologist, Dr. Mitchell, both connected with Creighton University School of Medicine, testified on behalf of the defendant. In their opinion, the defendant was incompetent to stand trial. Dr. Woytassek, a psychiatrist and chief of the security service at the Lincoln Regional Center, testified for the State that the defendant was competent to stand trial. Staff reports of Regional Center doctors supported his opinion.

The expert witnesses agreed that the defendant was mildly mentally retarded, which classification includes persons with an IQ of 55 to 69. The defendant's verbal IQ was 55, his performance IQ 69, and his full-scale IQ 59.

Dr. Tweddle interviewed the defendant on two occasions. In October 1980 she saw the defendant for about 20 minutes, and in November 1980 she saw him, together with Dr. Mitchell and the defendant's attorney, for a period of approximately 1½ hours. Dr. Tweddle testified that this was the first time she had evaluated a person in the defendant's level of mental retardation as to competency to stand trial, and also testified that defendant's mental retardation was a permanent condition and would not improve. Dr. Tweddle found nothing in the defendant's condition that qualified as a mental illness as

that term is used by the Board of Mental Health.

Dr. Mitchell essentially agreed with Dr. Tweddle's conclusions. Dr. Mitchell had first interviewed and tested the defendant in 1976 in connection with a former sexual assault charge, and at that time had also concluded that the defendant was not competent to stand trial. He examined the defendant in connection with this case on October 20, 1980, and November 5, 1980, for a total time of approximately 4 hours. Dr. Mitchell noted that the IQ test results in 1980 were consistent with the IQ tests of 1976. Dr. Mitchell was of the opinion that the defendant was not competent to stand trial in 1980, and that the basis for defendant's lack of competence appeared to be mental retardation. He also agreed with Dr. Tweddle that it was unlikely that the defendant could become competent in the future.

Dr. Woytassek, as psychiatrist at the Lincoln Regional Center, had also examined the defendant in 1976 in connection with the former sexual assault charge and concluded at that time that the defendant was incompetent to stand trial. As a result, the defendant was confined in the Regional Center from 1976 until sometime early in 1979. During that period of about 3 years Dr. Woytassek saw the defendant on almost a daily basis. In 1979 Dr. Woytassek reported to the District Court in the previous case that he and the staff believed the defendant was competent to stand trial in that case. The defendant then left the Regional Center. In December 1980 Dr. Woytassek saw the defendant again when the defendant was readmitted to the Regional Center for evaluation regarding his competency to stand trial in this case. During the month of December 1980 Dr. Woytassek and the staff observed and examined the defendant. In Dr. Woytassek's opinion the defendant's mental condition was better than it had been when the defendant left the Regional Center in 1979. In Dr. Woytassek's opinion the defendant's

mental abilities were somewhat higher than those reflected by the IQ tests, and Dr. Woytassek's opinion was that the defendant had the mental capability to stand trial. The staff reports of the Regional Center doctors supported his opinion.

The defendant's counsel also testified at the competency hearing that he found it very difficult to communicate with the defendant in regard to the particular case and that, in his opinion, the defendant could not intelligently and knowingly waive any rights in a trial.

At the conclusion of the competency hearing the District Court found that the defendant was mentally competent to stand trial. Thereafter, on January 30, 1981, the defendant was arraigned and withdrew his previous plea of not guilty and entered a plea of guilty to the charge of sexual assault. After an extensive examination of the defendant by the court with respect to the defendant's knowledge and understanding of the plea, including extensive inquiries into the understanding and competence of the defendant, the District Court found that the defendant had voluntarily, knowingly, and intelligently entered his plea of guilty to count I only and adjudged him to be guilty as charged. Count II was dismissed. After a presentence investigation the defendant was sentenced.

The defendant contends on appeal that he was not competent to stand trial and that he was not competent to enter a plea of guilty, and that a different rule should be applied in determining mental competency to plead guilty than is applied in determining competency to stand trial.

The test of mental competency to stand trial is whether the defendant has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. *State v. Guatney,* 207 Neb. 501, 299 N.W.2d 538 (1980).

The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court. *State v. Crenshaw,* 189 Neb. 780, 205 N.W.2d 517 (1973); *State v. Guatney, supra.*

The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings. *State v. Klatt,* 187 Neb. 274, 188 N.W.2d 821 (1971). Although the testimony was in conflict in the present case, the trial court saw and heard the witnesses and there was sufficient evidence to support the findings.

The defendant urges this court to adopt a separate and higher standard of competency to enter a plea of guilty than the standard of competency required to stand trial. To accept the defendant's argument would necessarily create a category of criminal defendants who were competent to stand trial but incompetent to plead guilty.

In the few decisions which have required a higher standard for pleading guilty, the only reason given to support the distinction is that in pleading guilty a defendant waives certain constitutional rights, while in standing trial he does not. That position assumes that a decision to waive or to exercise a constitutional right requires a different degree of competency depending upon what decision is made. It also assumes that a decision to stand trial does not involve any further decisions or possible waivers of constitutional rights, such as the decision of whether to be tried by a jury or the court or whether to testify or refuse to testify. The issue does not turn on whether a decision was made to waive rather than to exercise a constitutional right, but on whether the decision, whichever it was, was knowingly and voluntarily made.

This court has very recently held that the test of mental capacity to plead or stand trial is the same.

Marteney v. State, 210 Neb. 172, 313 N.W.2d 449 (1981). The majority of federal courts follows the same rule. See *Allard v. Helgemoe,* 572 F.2d 1 (1st Cir. 1978), *cert. denied* 439 U.S. 858, 99 S. Ct. 175, 58 L. Ed. 2d 166.

The defendant also contends that his sentence was excessive. The statutory penalty for first degree sexual assault is imprisonment for not less than 1 nor more than 50 years. The defendant was sentenced to not less than 6 nor more than 10 years' imprisonment. The defendant had a previous sexual assault record, was found to be a treatable mentally disordered sex offender, and the sentence was well within the statutory range. There was no abuse of discretion.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE and CAPORALE, JJ., concur in the result.

IN RE INTEREST OF HASTINGS.
STATE OF NEBRASKA, APPELLEE, V.
DAWN HASTINGS AND ROBERT HASTINGS, APPELLANTS.
318 N.W.2d 80

Filed April 9, 1982. No. 44314.

Parental Rights. When the natural parents cannot be rehabilitated within a reasonable time, the best interests of the child require that a final disposition be made without delay.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Thomas F. Dowd of Dowd & Fahey, for appellant Robert.

Deborah Cunningham, for appellant Dawn.

Donald L. Knowles, Douglas County Attorney, and W. Mark Ashford, for appellee.

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

BOSLAUGH, J.

Dawn Hastings and Robert Hastings, parents of a boy born May 7, 1978, appeal from an order of the separate juvenile court terminating their parental rights to their child.

Reports which appear in the record show that the child had been placed in a foster home after a "police pick-up." The child, who at that time was less than 1 year old, had been taken to the University of Nebraska Medical Center because he had been beaten. At that time the "left side of his face was swollen and bruised. His left eye was swollen completely closed and the white of the eye was bloody." His "left front tooth was knocked out and his mouth was cut and swollen. He was also bleeding from the gums."

A petition filed in the juvenile court on April 27, 1979, alleged, among other things, that the child had been observed suffering from injuries indicating that he had been physically abused. The petition prayed that appropriate orders for the care and custody of the child be made and that the parental rights of the appellants be terminated. At a hearing on May 22, 1979, at which the parents appeared in person and by counsel, the parents admitted the allegations referred to above. Other similar allegations referring to four previous occasions, and indicating abuse and neglect, were dismissed by the county attorney. The juvenile court continued the temporary custody of the child in Douglas County Social Services.

Dawn Hastings had been admitted to the Nebraska Psychiatric Institute on June 5, 1978, apparently suffering from schizophrenia. On the way to the hospital, she had attempted to jump out of a vehicle moving 30 miles per hour while holding the baby in

her arms. She was released on August 10, 1978, but readmitted on August 13, 1978. Prior to the readmission, the father discovered Dawn tumbling the baby in her arms and almost dropping him. She was transferred to day care on October 4, 1978, and has not been hospitalized full time since that date, but remains under commitment by the board of mental health.

Following a disposition hearing on July 26, 1979, the juvenile court ordered the parents to "comply with a plan designed to eliminate the conditions leading to the findings made in this matter." The plan established by the court required therapy for Dawn Hastings at the Nebraska Psychiatric Institute; conjoint therapy for Robert Hastings; attendance at Parents Anonymous; and cooperation with the court and Douglas County Social Services.

After a review hearing on February 4, 1980, the juvenile court ordered the parents to continue marriage counseling through the Nebraska Psychiatric Institute; to continue to attend the Positive Parenting group and become involved in the child development class offered by the American Red Cross; maintain regular visitation with the child; maintain employment or vocational training; pay child support as ordered by the court; maintain clean housing for themselves and the child; and continue to cooperate with the welfare authorities.

After a review hearing on May 28, 1980, visitation in the home of the parents for 3 hours per week was authorized, with a provision for weekly overnight visits if the visitation previously authorized proved to be satisfactory.

On September 5, 1980, extended visitation not exceeding 3 days at a time was authorized. The court also ordered that observation of interaction between the child and the parents by a child development specialist be arranged. A further review hearing was held on November 10, 1980, and visitation in the

parents' home from Friday morning until Monday morning was authorized. The matter was scheduled for review again in 3 months.

On January 30, 1981, on the motion of the guardian ad litem for the child, the juvenile court suspended visitation in the home of the parents, but permitted "ordinary visitation rights" for the father to continue. Prior to the hearing on this motion, counsel who had represented both parents was permitted to withdraw as counsel for the mother.

The record shows that the visitation in the home of the parents with the natural mother proved to be disastrous. The reports which were received in evidence at this hearing, together with reports received at the preceding hearings, demonstrated that the situation had deteriorated. The evidence indicated the child had been abused and neglected during visitation in the parents' home. The father stated to the social workers that it was unsafe for the child to be alone at home with the mother. The parents had not attended all of the parenting sessions as ordered by the court, and they had made but very little progress in developing the necessary skills and understanding to be able to care for the child.

Three reports by the guardian ad litem, dated January 15, January 26, and January 27, 1981, were received in evidence at the January 30, 1981, hearing. The guardian ad litem, who was present at the hearing, stated the reports were based on information he had gathered firsthand.

The January 15, 1981, report concerned a conference on January 7, 1981, at the home of the foster parents, attended by the guardian ad litem and Elise Wagoner, the foster care caseworker. This report stated in part: "The foster parents report that [the child] still comes home after extended visitations with his natural parents tired and cranky and hungry. He has on some occasions returned home with cuts and bruises. The Hastings have never admitted

any intentional harmful physical contact. The foster parents further state that [the child] repeats profane language and derogatory comments that he hears at the home of his natural parents. Further, that since the period of visitation has been extended, [the child] returns to the foster home with very poor deportment and is almost uncontrollable at times, and that it takes a day or longer to return him to the reasonable discipline that the foster parents have tried to instill in [the child] since their relationship began."

Attached to this report was a three-page report by the foster parents, detailing the problems encountered after the child had made visitations in the parents' home between November 14, 1980, and January 5, 1981. Following these visitations, the child would be returned to the foster parents dirty and frequently ill. The child would be tired, cranky, and very difficult to control for the first day or two after a visitation.

Evidence of physical abuse during these visitations consisted of puncture marks on his face and bruises on his stomach, right knee, right upper thigh, and under his right eye. After a visitation the child would "hold his hands up to his head, as if he is expecting to get hit in the head" after doing something wrong. He exhibited increasing resistance to being taken to his parents' home for the visitations.

The report of January 26, 1981, detailed the result of a meeting on January 24, 1981, at the home of the mother of the child's father. According to this report, the father stated in the presence of the guardian ad litem, the Child Protective Services caseworker, and his mother that "he wanted he and Dawn to never have the child back and that it was dangerous for [the child] to be there when he is not because Dawn does not properly care for him. He said that she rarely, if ever, left the house without him (Bob); that she keeps the drapes and shades

drawn all day long and exercises very little discipline over [the child] except when she is excessively angry or irritated with him. He said she sleeps alot [sic] during the day, leaving [the child] unattended or forcing him to sleep as well. She stays up until between 2:00 and 4:00 a.m., nightly watching television and is not responding to Bob in a way he thinks a wife should.

"He said the meals prepared for himself and [the child] are not well balanced but are single item meals. She rarely fixes meals which forces Bob to prepare the evening meal and most breakfasts which he does not feel should be part of his duties on a regular basis.

"He related that Dawn gets exceptionally irritated with [the child]; uses foul language in denouncing him and has very little control over him. Dawn has apparently stated on many occasions that she wished she did not have to put up with Bob at all and that [the child] was an unbearable problem. (These are not the exact words but is an accurate accounting of what was said).

"Mr. Hastings does not intend to continue the marriage and believes Dawn is not capable of properly caring for [the child]. He understands that the foster family is having serious disciplinary problems with [the child] and recognizes that [the child] goes back to the foster family, on some occasions, not clean, hungry and tired. He believes that it is not in the best interests to even let [the child] be returned to the Hastings home for any kind of visitation.

"Bob requested that a meeting be set up as soon as possible with Judge Moylan to relate to him, personally, what he has said to us . . . ."

The report of January 27, 1981, stated as follows: "On this date I received a call from Joan Muehling during which she related that when [the child] came back from visitation with the natural parents, she [sic] said 'Mommy-Dawn slapped me.' He also

said that Dawn had spanked him. He rubbed his behind indicating that it was tender and sore.

"Upon removing his trousers Joan saw the imprint of a hand on the buttock, on the left side. She said she had taken a picture of it but it was not yet developed.

"When Joan was undressing [the child] for sleep, as she was removing his belt, [the child] became very animated and afraid of the belt; and asked that he not be spanked. Joan called Elise Wagoner to report the incident but Elise Wagoner was out of the office, sick, but a message was left.

"Further, Joan relates that last week [the child] was sick during the time he was with his natural mother. He had cold symptoms and flu symptoms. When Dawn Hastings brought [the child] back to the foster parents, his hair was wet and he was not properly clothed for the prevailing weather."

The situation was further complicated by a deterioration in the relationship between the parents themselves. Their conduct toward each other was characterized by verbal and physical violence and the father was considering divorce.

A report of the guardian ad litem, received at the hearing on November 10, 1980, described some of the conduct of the child's parents in their home. The report, which was based on a telephone interview on November 7, 1980, with a neighbor of the parents, stated: "Pam told me that she did not wish to become a witness in the above captioned matter and would get a medical excuse if necessary to avoid having to testify. She did, however, say that during the entire time that Bob and Dawn lived above her, they were constantly fighting—both verbally and physically. She stated that they had always used extremely foul language directed at each other and there were many times when the screaming became so intense and the sounds of body contact against the walls and floor that she could not take it and had to

leave. She stated further that she sought medical attention for a nervous condition caused by the antics above described and that her problem had in fact been diagnosed to be caused thereby. She stated that she actually had to leave town because Bob and Dawn had personally threatened her with physical harm for talking to court appointed personnel relating to the matter involved herein. She stated that when she returned after Bob and Dawn had moved away that she became much better almost immediately.

"She stated that she had at least one very long conversation with Bob Hastings early in the year of 1980, at which time he confided in her his fear of staying in the marriage and his knowledge that it is unsafe for [the child] to stay in such an environment. She could not help over hearing the content of many of the arguments between Bob and Dawn. She overheard Bob telling Dawn on many occasions that he would leave her; that he had another woman; and that he couldn't stand her any longer. Pam Willert states that these arguments and similar words were heard up to and including the date on which Bob and Dawn moved to their present home."

At the final hearing on March 24, 1981, the parental rights of both parents were terminated. A four-page report of the court service officer, received at this hearing, summarized the developments in the case since April 27, 1979, and contained the following conclusion and recommendation: "This case was filed on April 27, 1979. Although numerous services have been made available to Mr. and Mrs. Hastings, the situation has not changed. Recent events during extended home visits have shown that [the child] is still in danger in his natural parents home and further that the parents ability to care for their child has not improved. Further evidence of this unchanged situation was clearly indicated during my conversation with Mrs. Hastings on

March 6, 1981, at which time she totally denied that there were any marks or bruises on [the child] when he left the home on the last extended weekend visit of January 24th and 25th.

"[The child] has been in foster care for twenty-two months and is two and a half years old. It is extremely important that permanent plans be made for [the child] and that he is given the opportunity to live in a safe, secure and stable environment. Therefore it is this Service Officer's recommendation that the parental rights of Dawn and Bob Hastings over [the child] be terminated."

A report of the Child Protective Services worker, dated February 10, 1981, received at this hearing, stated in part: "Child Protective Services has maintained contact with Dawn, Robert and [the child] for the purpose of supervising the weekend visits arranged by foster care. My visits took place on 11/6/80, 11/29/80, 12/4/80, 12/6/80, 12/19/80, 1/3/81, 1/10/81, 1/23/81 and 1/24/81.

"During these visits I found Dawn's behavior inappropriate when interacting with myself. Some examples are her leaving the room and going to take a nap, and her continuous playing with the television set. On all visits Dawn was not willing to talk with me in regards to any problems she may be having with [the child]. Dawn rarely spoke with me other than a response to a direct question. Dawn's responses were either 'fine', 'it's none of your business because it doesn't pertain to the court order', or 'I will have to talk to my attorney'.

"According to Robert, everything was not fine and they were still having serious marriage problems and some problems with [the child]. Robert explained to me on the visit on 1/10, that it was hard trying to talk with me about their home problems around Dawn and wanted to talk with me privately. On 1/24/81, he arranged for me to meet with him and his mother, Mrs. Gunn, at her home. Also present

was the Guardian-ad-litem, Mark Trustin. Robert stated at this visit that nothing has changed between him and Dawn. They were still having serious marital problems and he was preparing for a divorce. He had not seen any change in Dawn in regard to her responsibilities as a wife or mother. Examples are: 1) Her not preparing balanced meals, which forces Robert to prepare the evening and most of the breakfast meals, which he feels shouldn't be his regular responsibility; 2) Dawn will rarely leave the house without him and she keeps the drapes and shades drawn all day; 3) Dawn sleeps mostly during the day, leaving [the child] unattended or forcing him to sleep also. Robert also stated at this visit that Dawn gets very irritated with [the child] during the weekend visits. She uses foul language and has very little control over [the child's] behavior. She makes statements like she wishes she didn't have to put up with Robert, or [the child] was just a problem. During this visit, Mrs. Gunn related an incident that happened on December 14, 1980. See attached letter signed by Mrs. Gunn." (The letter referred to and attached to the report related an incident during which the mother continually referred to the child as "you f------ kid.")

"The court is aware of the abuse of [the child] which led to the supervision of Dawn's visits with [the child]. On 2/10/81, I had a telephone conversation with Robert Hastings regarding the incident on the weekend of January 23rd. Robert stated that on Saturday or Sunday about 4:30 p.m., Dawn hit [the child] with her hand on his 'rear' because he wouldn't eat. He said that he was in the living room watching T.V. when the incident happened.

"The Child Protective Services staff has been intensively involved with the Hastings family since July of 1978. [The child] has been in foster care since April of 1979 (22 months). This worker has been involved with this family since August 27, 1979

(18 months). Numerous services have been made available to the Hastings to aid them in improving their parenting skills. Recent events have shown that [the child] is still in danger in his natural mother's care. Mr. Hastings recognizes the situation but has failed to establish a safe environment for [the child]. Permanent plans need to be made as soon as possible in [the child's] behalf. I'm recommending that [the child] remain in foster care and therefore recommending that parental rights be terminated so that a permanent situation can be established for this child."

A later report of the Child Protective Services worker stated: "I have not had any face-to-face contact with the Hastings since January 30, 1981, when Dawn's visitation with [the child] was suspended. A home visit was attempted on February 19, 1981 without success. I've had two separate phone conversations with both Dawn and Robert Hastings.

"On three different occasions (February 10th, February 17th, and February 27, 1981) Dr. Ann Taylor, Mark Trustin, and myself attempted to have a conference with Robert Hastings. Robert never showed up for any of the scheduled appointments. Robert has made no attempts to visit with [the child] since the hearing on January 31, 1981.

"My recommendations remain the same as stated on my prior report to the court dated February 10, 1981."

The report of the foster care worker, received at this hearing, made the following recommendation: "[The child] has been in foster care for twenty-two months. Since his placement, Child Protective Services, the court and foster care have attempted to work with his parents to aid them in their parenting skills, including weekend visits. However, after the weekend of January 25, 1981, when [the child] returned with bruises and other marks, it would ap-

pear that few, if any, positive changes have been made. As [the child] is now two and a half years old, it is important that permanent plans be made for him and that he be given the opportunity to live in a safe, stable environment. Therefore, I recommend that [the child] remain in foster care and that the parental rights of Robert and Dawn Hastings be terminated so that [the child] may have a stable, secure and safe environment."

The reports of the child psychiatrist, received at this hearing, indicated the child exhibited significant behavioral problems, showed the effects of "poor socialization and disruptive care" during the past 2 years, and now required therapy. The letter to Judge Moylan, dated February 17, 1981, stated in part: "At this time my recommendations would be: 1) To attempt to get the father to relinquish his parental rights on [the child], which would allow [the child] to be adopted. 2) To continue to work with [the child]. [The child] shows a lot of effects of poor socialization and disruptive care over the past two years, and whether he is returned to the parents or remains in foster care, [the child] is going to need some play therpay [sic] to help remedy these problems. The foster mother does report a lot of the disruptive behavior in their home. 3) To allow [the child] to have a stable environment. At this time I think that Dawn should show significant changes on her own and allow [the child] to stay in long term foster care before any consideration be given to [the child] being returned to her."

The letter of March 19, 1981, to the guardian ad litem stated as follows: "This letter is in regard to [the child]. I hope that you will get it to the proper person. [The child] was evaluated in my office along with his parents in regards to visitation and termination of rights. As I have worked with [the child], there are several concerns I have. He is confused. The chaos that [the child] has been put

through in the last couple of years is showing up in significant behavioral problems with [the child]. I feel that [the child] could benefit from some individual therapy and coordinating this with seeing the foster family. I do feel that [the child] has some inappropriate ways of relating to adults and other people. He does need some help with his inappropriate behaviors like soiling his pants when he is upset. [The child] does not trust anybody.

"Diagnosis: Undersocialized aggressive reaction of childhood.

"My recommendations for [the child] would be individual therapy until we can work through some of the behavioral adjustments. Even if the rights are terminated with the parents, [the child] should have therapy."

The report of the guardian ad litem, received at this hearing, stated in part: "Three meetings in the office of Ann Taylor, psychiatrist, were scheduled with Kathy Jones and Bob Hastings. Bob Hastings did not appear on any occasion, although he had received notice and his attorney had been alerted.

"I spoke this date with Mrs. Muehling, foster mother. She advises that since January 30, 1981, the date of the hearing when the Court suspended visitation by the natural mother, Dawn Hastings, there has been marked improvement in [the child's] behavior and general emotional state. She stated that since the time of the last visitation prior to the hearing of January 30, 1981, [the child] had experienced nightmares almost on a nightly basis which lasted until approximately March 9, 1981. The nightmares relate directly to [the child's] fear that he would be pinched or struck with a belt. Mrs. Muehling said that she, on these occasions, had to comfort [the child] and stay with him most of the rest of each night. Mrs. Muehling said that she has been trying to reinforce a more secure feeling in [the child]; that she and her husband would never pinch or strike

him. [The child] recently told her that he knows that she would not hurt him, that it was Dawn who pinched him.

"She further relates that [the child] does what he is told more regularly and no longer relieves himself in his clothes, and does not use fowl [sic] language nearly as much since visitation was suspended. Mrs. Muehling talked with Ann Taylor who suggested that [the child] begin some therapy treatments with her for proper socialization training.

"Mrs. Muehling says that [the child] does not mention Bob or Dawn, anymore.

"I have received a copy of the psychiatric report from Ann Taylor, dated February 17, 1981. Note particularly that, in her estimation, Dawn is not 'capable of making any significant changes.' That she further has not seen Dr. Stan Moore for evaluation that was suggested at the outset. Further, that it is her belief that [the child] should be adopted outside of the natural parents and that [the child] needs further therapy. Although Ms. Taylor suggests a possibility that Dawn may yet make significant changes in the last paragraph of her report, she told me in her office in the presence of Kathy Jones that she does not believe Dawn Hastings has the inherent ability, nor any other skills, which would enable her to become a proper or appropriate mother for [the child]. She stated that it is her belief, based on her examinations and study that [the child] should not be returned to the family home either on a visitation basis or a permanent basis.

"Since the hearing of January 30, 1981, the natural father, Bob Hastings, has not made any effort to make contact with [the child]."

The record as a whole establishes that the best interests of the child required that the parental rights of both parents be terminated. The child had been in foster care for nearly 2 years and was almost 3

years of age. Instead of improving, the situation had deteriorated.

Three members of the court are of the opinion that the judgment of the juvenile court should be reversed. The effect would be to condemn the child to indefinite foster care. There is no substantial evidence from which it could be concluded that either parent will ever be able to care for the child.

It is the rule in this state that foster care is a temporary measure to be utilized only for the purpose of maintaining the child until a permanent disposition can be made.

In *State v. Tibbs,* 197 Neb. 236, 243, 248 N.W.2d 330, 334 (1976), we said: "Although the appellant would like additional time to demonstrate his ability to properly care for his children, we point out that this litigation has been pending for approximately 2 years, and the best interests of the children require that it be brought to final conclusion without further delay."

In *In re Interest of McKee,* 208 Neb. 623, 629, 304 N.W.2d 918, 921 (1981), we said: "The rule is well established that when natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child require that a final disposition be made without delay." See, also, *In re Interest of Farmer,* 210 Neb. 500, 315 N.W.2d 454 (1982); *In re Interest of Levey, ante* p. 66, 317 N.W.2d 760 (1982).

In the *Levey* case, we said at 72, 317 N.W.2d at 764: "We agree with the juvenile court that the children's status cannot remain in limbo forever."

In *State v. Souza-Spittler,* 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979), we quoted with approval from an opinion of the Iowa court as follows: "As stated by the Iowa Supreme Court: '* * * we will not gamble with the child's future; she cannot be made to await uncertain parental maturity.' Long v. Long, 255 N.W.2d 140 (Iowa, 1977). Here, after 2

years, the objectionable conditions persisted."

As we stated in the *Levey* case, a child needs some sort of permanence in his life before it is too late. It is time to provide a stable home for the child involved in this case.

The parents in this case were given all assistance that was possible. Extended visitation was attempted, with disastrous results. The mother is incapable of caring for the child. The father has failed to demonstrate that he could care for the child by himself and has not suggested any plan or arrangement which would permit the child to remain in his care alone. Under these circumstances, the juvenile court had no alternative but to terminate the parental rights of the parents. The judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must once again regrettably dissent from the majority. My basis for dissenting is not that I am unconcerned about the welfare of a child but, rather, that I am compelled to recognize the limited role a court can play in making the world a perfect place in which to live. There is no question, as noted by the majority, that the child in this case was not blessed with perfect parents. Quite to the contrary, it is apparent that the child is a product of parents who themselves will undoubtedly have difficulty making their way through life. But the unfortunate truth of the matter is that they are not unlike scores of parents whose parental rights are not terminated.

As I have on previous occasions, I do not suggest for a moment that the parents here be granted unsupervised custody or control of the child. Indeed, I believe that the child must remain under the custody of the State. It is simply with the final step of terminating parental rights with which I disagree.

While it is true that the child has been in foster

care for several years, it is likewise true, as reflected by the court record, that at each hearing up until the hearing of January 30, 1981, the parents were praised for their sincere efforts in attempting to correct the situation. They were given extended rights of visitation and commended for their dedication and efforts. Yet, based upon the affidavits of the guardian ad litem dated January 30, 1981, indicating that the child had been spanked on his bottom and was inclined to use words which, while usually not uttered in court, are now found regularly in most movies and in almost all books, the parental rights are thereafter terminated on March 24, 1981.

The action taken by the court with regard to the mother seems better supported by the record, although the evidence is scant as to whether the mother's condition is not likely to improve in the future. But evidence regarding the father sufficient to terminate his rights is totally lacking. We are offered no evidence to support our terminating his rights.

The precipitating action in this case was the fact that the father was contemplating obtaining a divorce. While, to be sure, that in and of itself causes further instability to the family relationship and may prolong the time when the child may return to one or both of the natural parents, it does not occur to me to be sufficient to terminate parental rights, particularly that of the father, in this case. We have repeatedly held that the evidence necessary to justify parental termination must be clear and convincing. *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). Yet the record in this case is neither clear nor convincing. The record is simply that everyone is growing tired of the effort which must be exerted if success is ever to be realized. In my view, all of the alternatives have not yet been sufficiently exhausted and the parental rights of at

least the father should not have been terminated. In view of that fact, which would make the child ineligible for adoption at this time, I likewise see no purpose in terminating the mother's parental rights. I would have continued the foster care program at least until I could determine what the situation between the parents would be and what indeed would be in the best legal interests of the child.

WHITE and CAPORALE, JJ., join in this dissent.

GEORGE TODSEN ET AL., APPELLEES, V.
DAROLD RUNGE ET AL., APPELLEES,
ST. PAUL NATIONAL BANK, A CORPORATION, APPELLANT.
318 N.W.2d 88

Filed April 9, 1982. No. 44380.

1. **Uniform Commercial Code: Security Interests.** Neb. U.C.C. § 9-104(b) (Reissue 1980) applies only to statutory landlords' liens.
2. _____: _____. A contractual landlord's lien must comply with the filing requirements of Neb. U.C.C. art. 9 (Reissue 1980) in order to perfect a security interest.
3. _____: _____. Neb. U.C.C. § 9-312(5) (Reissue 1980) is a "pure race" type statute and a secured party who was first to perfect or file his security interest will have priority over all unperfected security interests even though he had actual or constructive knowledge of a prior unperfected security interest.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed.

Earl D. Ahlschwede of Ahlschwede & Truell, for appellant.

Ronald S. Depue of McDermott, Depue, McDermott & McDermott, for appellees Todsen.

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

WHITE, J.

Plaintiffs, George and Sarah Todsen, filed this ac-

tion in the District Court for Hall County, Nebraska, claiming a first lien on corn harvested by the defendant Darold Runge on property owned by the plaintiffs. The District Court held that the plaintiffs were entitled to a first lien on the corn grown on the land they leased to Runge. Defendant St. Paul National Bank appeals, claiming a prior perfected security interest in the crops. We reverse.

Plaintiffs owned and leased approximately 160 acres of farmland in Hall County, Nebraska, to the defendant Darold Runge. Plaintiffs and defendant Runge entered into a written lease on December 15, 1978. The lease agreement contained the following language: "The lessors will have a lien on the crops raised on the premises until the final cash payment is made on October 1, 1979." The lease agreement was filed on December 5, 1979, in the office of the register of deeds of Hall County and not in the office of the county clerk as required by Neb. U.C.C. § 9-401 (Reissue 1980). The defendant St. Paul National Bank loaned defendant Runge money to operate his farming operation and received financing statements and security agreements pledging the crops raised on the real estate leased from plaintiffs to the bank as security for the loan. The financing statements received by the bank were filed with the Hall County clerk on May 22, 1979, and with the Nebraska Public Service Commission on May 29, 1979.

Runge harvested the corn crop from plaintiffs' land and delivered it to the defendant Farmers Union Cooperative Elevator Company between October 2 and October 11, 1979. Thereafter, Runge failed to make the final rental payment and also failed to make the loan payments to the bank. Runge filed bankruptcy and the court ordered the corn involved in the case sold. This action involves the priorities between the plaintiffs and the defendant St. Paul National Bank as to the distribution of the proceeds from the sale of the corn.

After trial the court found that St. Paul National Bank had constructive notice of the provisions of plaintiffs' lease and that the security agreement and financing statement given by the defendant Runge to the bank were invalid so far as they pertained to the plaintiffs' interest in the corn.

Defendant St. Paul National Bank assigns as errors: (1) The court erred in finding that the St. Paul National Bank had constructive notice of the lien in the plaintiffs' lease; (2) The court erred in finding that the bank's security agreement and financing statements were inferior to the plaintiffs' interest in the corn grown by defendant Runge on their land; and (3) The court erred in finding that the plaintiffs' lease to defendant Runge created a lien past October 1, 1979.

The first question to be resolved is whether a landlord's lien arising out of a contract is subject to article 9 filing and recording requirements. Neb. U.C.C. § 9-102(1)(a) and (2) (Reissue 1980) provides: "(1) Except as otherwise provided in section 9-104 on excluded transactions, this article applies (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property . . . (2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in section 9-310."

Neb. U.C.C. § 9-104(b) (Reissue 1980) provides: "This article does not apply . . . to a landlord's lien."

The principal test as to whether a transaction falls within article 9 is whether the transaction was intended to have effect as security. Comment 1 to § 9-102. The question of whether a landlord's lien

arising out of contract is subject to article 9 has not been previously addressed by this court. However, several other states have addressed the issue.

In *In re Florio,* 24 U.C.C. Rptr. 415 (D. R.I. 1978), the court held the exclusion under § 9-104(b) applies only to those landlords' liens which are statutory or which otherwise arise by operation of law. The court held that contractual landlords' liens must meet the filing and recording requirements under article 9.

In *United States (Treasury Dept., I.R.S.) v. Globe Corp.,* 113 Ariz. 44, 546 P.2d 11 (1976), Lee Wong Farms, Inc., leased land from Globe Corporation to grow cotton. When the farmer ran into financial difficulty, both the United States and Globe laid claim to the cotton proceeds, the United States by way of tax liens filed in June and July 1970. Globe claimed the proceeds by way of statutory lien under the laws of Arizona and a contractual lien in the rental agreement dated December 29, 1966. The Supreme Court found Globe's statutory lien had no priority over the tax liens for reasons irrelevant to the case at bar, as no statutory lien exists in Nebraska.

As concerns the contractual lien, the United States admitted that if the contractual lien had been properly recorded, it would have held priority over the tax liens. However, the contractual lien was recorded only in the lease index, and not the index for secured transactions. As such, the lien was not properly recorded as a security interest. Globe claimed landlords' liens were exempt from U.C.C. filing requirements under § 9-104(b). The Arizona court said, "We, however, are of the opinion that *contractual* landlord's liens are not excluded from the filing requirements of the Uniform Commercial Code."

"The principal test as to whether a transaction falls within Article 9 of the Uniform Commercial Code is whether the transaction was intended to

have effect as security. Official Comment 1 to U.C.C. § 9-102 (A.R.S. § 44-3102). Excluded are security interests that arise by statute or common law and not by the consent of the parties. Those cases which have considered the landlord's lien exclusion have concluded that landlord's liens arising out of contract are not excluded from the filing requirements. . . . While statutory liens and liens arising from operation of law are excluded from filing by A.R.S. § 44-3104(2), a lien granted a lessor by contract is not excluded by the Uniform Commercial Code. Since the Code's filing requirements apply, Globe's contractual landlord's lien must have been properly filed to have priority." *Id.* at 50, 546 P.2d at 17.

In *In re Leckie Freeburn Coal Company,* 405 F.2d 1043 (6th Cir. 1969), Leckie Freeburn Coal Company was granted the right to mine coal by the appellants in a lease dated August 1, 1961. The lease provided that all the mining equipment was subject to a lien to secure rent and royalties. The lease was filed in the deed book in the county of the mine's location, but neither it nor a related financing statement was filed as directed by the Uniform Commercial Code. In 1966 Leckie Freeburn went bankrupt and the trustee in bankruptcy and the appellants each claimed priority over each other's liens. The Sixth Circuit held that the Uniform Commercial Code required the separate filing of a financing statement in order to perfect the security interest. If the interest was unperfected at the time of the filing of the petition for bankruptcy, then the trustee's lien would take priority.

The appellants further urged that the filing of the lease provided constructive notice of the lien and a security interest. But the court held one of the purposes of the Uniform Commercial Code's filing requirements was to insure subsequent bona fide purchasers of unencumbered titles, and to allow the

constructive notice argument to stand would frustrate that purpose. Parties searching the financing statements for encumbrances would not be successful and would incur losses if the constructive notice argument stood.

Griggs Road Company leased business premises to King Furniture City, Inc., in the case of *In re King Furniture City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965). As part of the lease agreement, King Furniture City gave Griggs Road Company a lien on all inventory placed on the property to secure payment of the rent. The lease was filed in the real estate records, but was not filed under the Uniform Commercial Code's provisions. King encountered financial problems and fell behind in its rent payments. On June 10, 1964, Griggs sought to foreclose its lien. Pursuant to a consent decree entered on June 17, 1964, Griggs was to have a lien upon the proceeds from the sale of certain merchandise. The proceeds from the sales were to be placed in a joint account at a bank naming Griggs and King as owners of the account. The intent of the decree was to have funds paid into the court once all the customers' checks had cleared. While the proceeds were still held by the bank, King declared voluntary bankruptcy and the proceeds were transferred to the trustee in bankruptcy. There was a dispute between Griggs and the trustee as to which lien took priority. The Arkansas federal District Court awarded priority to the trustee, saying at 456-57: "In the alternative, the petitioner contends that the lien retained by it in its lease is excluded from the provisions of the Uniform Commercial Code by Ark. Stats. § 85-9-104(b), supra, which recites, 'This article does not apply * * * to a landlord's lien.' The Trustee counters this contention by taking the position that Ark. Stats. § 85-9-104(b) refers to a statutory landlord's lien—that is, that the words 'Landlord's Lien' are always interpreted as referring to

the lien given landlords by statute just as the expressions 'Mechanics' Liens' and 'Laborers' Liens' are universally ascribed to the liens awarded by law to creditors in these categories.

"This issue can also be stated in another way—that is, does a lien set out in a lease become a 'landlord's lien' under Ark. Stats. § 85-9-104(b) by virtue of the fact that the relationship of landlord and tenant exists between the parties thereto? This Court thinks not, for to permit a lien created by contract in such a manner to be excluded from the requirements of the Uniform Commercial Code would, in many instances, greatly restrict the benefits expected to be obtained from the Uniform Commercial Code in connection with the financing of inventories and lending against accounts receivables. . . . From this viewpoint it also appears that the term 'landlord's lien' as used in the statute must be interpreted as referring to liens created by statute, for the matter of liens on property such as here involved is obviously considered by all of the remainder of the Code as fitting into a general commercial statute."

The case of *Music House v. Theaters,* 10 N.C. App. 242, 178 S.E.2d 124 (1970), also holds that a contractual landlord's lien was not exempt from the Uniform Commercial Code's filing requirements.

In *Bank of North America v. Kruger,* 551 S.W.2d 63 (Tex. Civ. App. 1977), the court held that a perfected security interest was superior to a prior unrecorded contractual lien of a landlord in the same property. In that case the bank had actual knowledge of the lessor's interest in the lessee's property at the time it extended credit and requested the lessor to subordinate his interest. The court ruled that unless the bank showed some lack of "good faith" as defined in the statute, actual knowledge had no bearing on the decision.

We are in accord with these cases insofar as they interpret § 9-104(b) of the Uniform Commercial Code

as applying only to statutory landlords' liens. Since the plaintiffs claim a contractual landlord's lien, they were required to comply with the filing requirements of article 9 in order to perfect a security interest.

If we assume that the plaintiffs have complied with the provisions of article 9, the next question is which of the security interests, plaintiffs' or defendant bank's, has priority?

Neb. U.C.C. § 9-312 (Reissue 1980) contains the rules of priority between conflicting security interests in the same collateral. Section 9-312(5)(a) provides in part: "Conflicting security interests rank according to priority in time of filing or perfection. . . ."

Section 9-312(5) is a "pure race" type statute. That is, the one who wins the "race" to the courthouse to file is superior without regard to the state of his knowledge. See White & Summers, Uniform Commercial Code § 25-4 (2d ed. 1980). Section 9-312(5) says nothing about lack of knowledge of a prior unrecorded security interest as a prerequisite for its operation. Under this section, the secured party who is first to perfect or file will have priority over all unperfected security interests even though he had actual or constructive knowledge of a prior unperfected security interest.

Several commentators take the view that knowledge is relevant and that the courts should read a knowledge element into § 9-312(5). See Nickles, *Rethinking Some U.C.C. Article 9 Problems - Subrogation; Equitable Liens; Actual Knowledge; Waiver of Security Interests; Secured Party Liability for Conversion under Part 5,* 34 Ark. L. Rev. 79 (1980-81); Comment, *Knowledge and Priorities under Article Nine: A Proposed Rule Change in the "Race of Diligent Creditors,"* 47 U. Colo. L. Rev. 467 (1975-76); Felsenfeld, *Knowledge as a Factor in Determining Priorities Under the Uniform Commercial*

Code, 42 N.Y.U. L. Rev. 246 (1967).

The arguments for a knowledge factor center around three points: First, precode law for determining priorities between secured creditors provided that where a later encumbrancer knew of an earlier attached but unperfected interest at the time he gave value and took a security interest, he could not subordinate that earlier interest by filing first. The second argument advanced is that Neb. U.C.C. § 1-203 (Reissue 1980) imposes an obligation of good faith in all commercial transactions and a subsequent encumbrancer is not acting in good faith when he takes a security interest in collateral that he knows is already pledged as security to another. The third argument is that § 9-401(2), which provides that a filing made in good faith in an improper place or not in all the required places is effective against anyone who claims a security interest in the same collateral and knew of the contents of the financing statement of the prior misfiled interest, should be applied to persons who do not file at all.

It is alleged under the first argument that the drafters' silence on the knowledge factor in § 9-312(5) was unintentional; therefore, it is up to the courts to read in a knowledge factor so precode law will not be silently overruled. First, it is not up to the courts to legislate through their decisions. Second, the Comments to Neb. U.C.C. § 9-312(5), although not law, suggest that knowledge is irrelevant. Example 1 under Comment 5 states: "It makes no difference whether or not A knew of B's interest when he made his advance." Example 2 under the same Comment states: "Whichever secured party first perfects his interest (by taking possession of the collateral or by filing) takes priority and it makes no difference whether or not he knows of the other interest at the time he perfects his own." Example 5 states: "A has priority over B both as to the February 1 and as to the April 1 advance and it

makes no difference whether or not A knows of B's intervening advance when he makes his second advance."

As to the third argument, we agree that it makes no difference if a secured party files in the wrong place or not at all. In either situation, no notice is given to a subsequent encumbrancer who looks in the correct filing office. However, the Legislature, in its wisdom, chose to award a secured party who exercises some diligence in perfecting his interest, even though he files in the wrong place. Again, the statute, on its face, is clear. We will not read in an interpretation that is not warranted.

The second argument advanced stands on the best ground. This question is basically a factual one. It would be very difficult for this court to set a standard upon which it could be determined whether a creditor acted in good faith. There is a fine line between acting in good faith and exercising good business judgment in many of these situations. Granted the principles of law and equity shall supplement the provisions of the Uniform Commercial Code under Neb. U.C.C. § 1-103 (Reissue 1980), we are reminded that § 1-102(1) provides: "This act shall be liberally construed and applied to promote its underlying purposes and policies." Those purposes and policies as enunciated in § 1-102(2) are "(a) to simplify, clarify and modernize the law governing commercial transactions; . . . (c) to make uniform the law among the various jurisdictions." We are unwilling at this time to saddle a good faith requirement on § 9-312(5). If the drafters wanted a good faith requirement in the statute, they would have put it there. Further, to do so would bring on unwarranted lawsuits by disappointed secured parties and would do nothing to promote certainty in commercial transactions.

Several courts in other jurisdictions have previously passed on the knowledge issue. *In re Smith,*

326 F. Supp. 1311 (D. Minn. 1971); *First Nat. Bank & T. Co. of Vinita, Okl. v. Atlas Credit Corp.*, 417 F.2d 1081 (10th Cir. 1969); *National Bank of Sarasota v. Dugger*, 335 So. 2d 859 (Fla. App. 1976); *Madison Nat'l Bank v. Newrath*, 261 Md. 321, 275 A.2d 495 (1971); *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967); *Noble Co. v. Mack Fin. Corp.*, 107 R.I. 12, 264 A.2d 325 (1970); *Shallcross v. Community State Bank & Trust*, 180 N.J. Super. 273, 434 A.2d 671 (1981); *In re Gunderson*, 4 U.C.C. Rptr. 358 (S.D. Ill. 1967); *Production Credit Ass'n of Minot v. Melland*, 278 N.W.2d 780 (N.D. 1979); *Berga v. Amit Intern. Trade, Ltd.*, 511 F. Supp. 432 (E.D. Pa. 1981). All of these jurisdictions adopt the position that knowledge is irrelevant to the operation of § 9-312(5).

The circumstances of this case do not warrant adopting the good faith position taken in *General Ins. Co. of America v. Lowry*, 412 F. Supp. 12 (S.D. Ohio 1976), *aff'd* 570 F.2d 120 (6th Cir. 1978), *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969), and *In re Davidoff*, 351 F. Supp. 440 (S.D. N.Y. 1972).

We believe the statute is clear. Section 9-312(5) was adopted to promote certainty in commercial transactions by placing reliance on the filing records. This statute requires a secured party to take the diligence to perfect his security interest. If he fails to perfect, then he runs the risk of having his interest subordinated.

Accordingly, we find that the defendant St. Paul National Bank's security interest in the crops has priority over plaintiffs' contractual landlord's lien.

The judgment of the District Court is reversed.

REVERSED.

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

318 N.W.2d 94

Filed April 9, 1982. No. 44512.

1. **Criminal Law: Evidence.** Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court.
2. _____: _____. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. 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.
3. **Criminal Law: Appeal and Error.** In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. The verdict of a jury 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: PAUL J. HICKMAN, Judge. Affirmed.

James E. Schaefer, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

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

WHITE, J.

This is an appeal from a jury verdict finding the defendant, Robert E. Scott, guilty of burglary in violation of Neb. Rev. Stat. § 28-507 (Reissue 1979). The defendant was also found to be an habitual criminal

as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1979). After overruling a motion for new trial, the court sentenced the defendant to an indeterminate sentence of not less than 10 years nor more than 20 years at hard labor in the Nebraska Penal and Correctional Complex. Defendant has appealed to this court and we affirm.

The defendant assigns the following errors: (1) The trial court committed reversible error in allowing the State to obtain a conviction based on evidence which was irrelevant and/or highly prejudicial; and (2) The trial court erred in overruling defendant's motion to dismiss based on the insufficiency of the evidence.

On April 3, 1981, Expressions by Tober's, a dress shop located in the Park Drive Shopping Center in Omaha, Nebraska, was burglarized. Officer Robert Wolf, a detective in the burglary unit of the Omaha Police Department, was called to Tober's at approximately 3 a.m. to investigate the burglary. While en route to Tober's, Officer Wolf observed an automobile with clothing stacked on the back seat. The vehicle entered Interstate 80 eastbound from 84th Street. Officer Wolf followed the vehicle to the 60th Street exit. The vehicle left the Interstate at the 60th Street exit and proceeded north on 60th Street. Officer John Car, Jr., a uniformed patrolman responding to a call for assistance by Wolf, intercepted the vehicle on 60th Street and attempted to stop it. The vehicle sped up and Officer Car gave chase. In the area of 60th and Hickory Streets, the vehicle slowed and the driver and passenger jumped out, running in opposite directions. Officer Car stopped his vehicle and chased the passenger. Officer Wolf followed the moving vehicle for another 3 blocks where it came to rest after striking a street sign. Approximately ½ hour later, Officer Car observed the passenger standing behind some bushes next to a house. The passenger was arrested and identified

as Beverly Gandy Turner. The driver was never located.

At trial there was extensive testimony by the officers involved in the investigation as to the condition of the burglary scene and the identification of the automobile and clothing. The manager of Tober's also testified as to the condition of the store after the burglary and the identification of the stolen clothes found in the vehicle.

The most damaging testimony to the defendant was elicited from Ms. Turner. Ms. Turner testified that she lived at 4123 D Street with the defendant and that she had known him for many years. Ms. Turner had been convicted of a felony and several misdemeanors and was a known prostitute. Turner testified that on April 2, 1981, she had been in the hospital after having her tonsils removed and she was picked up by the defendant and a friend at the hospital in the automobile involved in the Tober's burglary. She was taken to her home. At approximately 11 p.m., she left with the defendant, dressed in the same surgical pants and top and leather jacket she was arrested in. Turner testified that she and the defendant drove to the Bel Air Plaza in West Omaha where the defendant got out of the car and looked at Genie's Dress Shop, which was closed. Defendant looked around and then got back in the automobile and went to the Bel Air Fashions for Men in the same shopping center. From there they went to Krug Men and Boys Shop on Pacific Street. After looking around there they proceeded to Crandell's and then proceeded to the Park Drive Shopping Center on 84th Street. The automobile was parked and they both went to sleep for a short time.

Turner testified that when she awoke, defendant pulled the automobile over in front of Tober's and lifted the hood. He went over to the front door of Tober's and broke the glass out with a tire iron. He then went into the shop three times and brought out

clothes each time, laying them on the back seat of the automobile. She then testified that after he got back into the automobile they proceeded north to Interstate 80 and then headed eastbound on Interstate 80. Turner related the same events regarding the chase as the officers did. She also testified that she had been with the defendant on one other occasion when he had broken the window of the Bel Air Fashions for Men and stolen some clothes.

At the trial there was also testimony by Officer Patrick Kuhl and Officer Richard J. Mahoney as to the condition of the license plates on the automobile on prior occasions. On the occasion that Officer Kuhl observed the same vehicle, the defendant was also driving.

Six witnesses testified on behalf of the defendant. Debra Wilson testified that she was the defendant's girl friend, and that she, along with defendant's sister, Caroline Scott, and the defendant, went to Rita Smith's house on April 2, 1981, for a birthday party. Wilson testified that they arrived at 9:30 p.m. and stayed until 3 a.m., at which time they went to Perkins restaurant for breakfast. She also testified that the defendant was with her until 8 a.m. the morning of April 3, 1981. Wilson also testified to the fact that she had only told the defense about the birthday party the week before the trial.

Rita Smith testified that her birthday was on April 9, but that she celebrated it on April 2. She, along with the other defense witnesses, testified that they were with the defendant at her birthday party at the time of the crime.

Defendant contends that the testimony by Ms. Turner of other occasions she had been with the defendant when he burglarized clothing stores was irrelevant and highly prejudicial. 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 is that of Ms. Turner's when she testified that she had been with the defendant on other occasions when he drove up to clothing stores that were closed and burglarized them, and testimony of Ms. Turner regarding the casing of other clothing stores prior to the break-in of Tober's.

The evidence of "other crimes" was introduced to show the plan or scheme or modus operandi of the defendant.

In *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979), it was said that the responsibility for maintaining delicate balance between the probative and prejudicial effect of evidence lies largely within the discretion of the trial court. The evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. See, *State v. Hitt,* 207 Neb. 746, 301 N.W.2d 96 (1981); *State v. Nielsen,* 203 Neb. 847, 280 N.W.2d 904 (1979).

This court has also held that evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. 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. See, *State v. Hitt, supra; State v. Nielsen, supra; State v. Williams, supra.*

In the present case the evidence elicited from Ms. Turner regarding other occasions in which she had been with the defendant when he had burglarized clothing stores, and the evidence regarding the casing of other clothing stores the same night as the burglary of Tober's, shows a continuous pattern of conduct by the defendant and establishes his motive, opportunity, intent, preparation, plan, knowledge, and modus operandi. The District Court did not abuse its discretion in admitting this evidence.

The defendant also contends that the evidence adduced at trial was insufficient to convict him of burglary. In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Pankey,* 202 Neb. 595, 276 N.W.2d 233 (1979).

In the present case there was ample evidence for the jury to find the defendant guilty of the offense charged. It heard the witnesses, passed upon their credibility, and resolved the conflicts in the evidence against the defendant. Its verdict should stand. The judgment and sentence upon a jury verdict finding the defendant guilty are hereby affirmed.

AFFIRMED.

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

I concur in the result reached in this case because I believe that the direct evidence concerning Scott's involvement in the charged offense was overwhelming.

For reasons, however, more particularly set out in my dissent in *State v. Ellis,* 208 Neb. 379, 303 N.W.2d 741 (1981), I must disagree with that portion of the majority's opinion which finds that it was proper for the witness Turner to be permitted to testify that she had been with the defendant on one other occasion when he had broken the window of the Bel Air Fashions for Men and stolen some clothes. It is not sufficient for the prosecution to simply offer evidence of other crimes on the general claim that in some manner it is offered for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, *and* modus operandi. In fact, it must be offered for a specific purpose and the prosecution must be able to establish in advance what that purpose is. To take any other position is to simply repeal the first portion of Neb. Rev. Stat. § 27-404(2) (Reissue 1979), which provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

STELLA DELORES ALMAREZ, APPELLANT, V. KLAUS HARTMANN, M.D., SUPERINTENDENT, LINCOLN REGIONAL CENTER, APPELLEE.

318 N.W.2d 98

Filed April 9, 1982. No. 81-602.

1. **Demurrer.** For the purpose of determining on demurrer whether a petition should be dismissed, the District Court and this court are obligated to accept a petitioner's well-pleaded facts as true.
2. **Habeas Corpus.** In a habeas corpus action, the petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is illegally restrained of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint consists.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

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

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

WHITE, J.

Petitioner, Stella Delores Almarez, brought an action pursuant to Neb. Rev. Stat. §§ 29-2801 (Reissue 1979) and 83-1066(9) (Reissue 1976) for a writ of habeas corpus. In her petition, petitioner alleged: "1. Petitioner is unlawfully deprived of her liberty by respondent; 2. On January 9, 1981, petitioner was committed to the Lincoln Regional Center by the Mental Health Board for Madison County, Nebraska; 3. Respondent and those persons under his supervision prepared a discharge plan which was to be effective on March 20, 1981; 4. As of the filing of this petition, a discharge plan has not been implemented; 5. No good and sufficient reason exists for a failure to implement the discharge plan as it relates to petitioner; 6. The discharge plan prepared by respondent represents a less restrictive infringement upon the liberty interest of the petitioner; and 7. Petetioner is entitled to the least restrictive alternative which is available, as a matter of law." The District Court ordered the respondent to show cause why the writ should not be issued. In response to the order to show cause, respondent filed a pleading, entitled "Motion," which, in essence, was a demurrer, requesting that the petition for habeas corpus be dismissed on the ground that the petitioner's allegations, even if proven true, were wholly insufficient to support a writ of habeas corpus. The trial court sustained the respondent's motion and dismissed the petition. Petitioner appeals. We affirm.

Section 83-1066(9) states in pertinent part: "Subjects in custody or receiving treatment under this act shall have the right: . . . (9) To file, either personally or by counsel, petitions or applications for writs of habeas corpus for the purpose of challenging the legality of such subject's custody or treatment." Petitioner makes only one assignment of error and that is that the trial court erred in sustaining respondent's motion. For the purpose of determining respondent's demurrer, the District Court and this court are obligated to accept the petitioner's well-pleaded facts, as distinguished from conclusions, as true. *Sedlacek v. Hann,* 156 Neb. 340, 56 N.W.2d 138 (1952); *McAvoy v. Jones,* 149 Neb. 613, 31 N.W.2d 740 (1948).

The petitioner is not attacking the legality of the commitment process itself, since in paragraph 2 she alleges only that the petitioner was committed. No facts were alleged on which the court could conclude that a question exists as to the legality of the commitment. Under the plain terms of the petition, we are asked to determine whether the petitioner states sufficient facts to challenge the legality of her custody.

Fairly considered, the theory on which the petition is drafted seems to suggest that a "discharge plan" was prepared which suggested that the petitioner would be released on March 20, 1981. The petitioner alleges that she has not been released according to the discharge plan, that no reason exists for the failure to implement the plan, and that the implementation of the plan provides a least restrictive alternative. The petition does not allege that the petitioner is no longer a mentally ill and dangerous person, except by inference in paragraphs 5 and 7. In paragraph 5 she suggests that no good and sufficient reason exists for a failure to implement the plan, and in paragraph 7 she alleges that she is entitled to the least restrictive alternative which

is available, as a matter of law.

The petition fails to allege that the petitioner is not, in fact, being treated or that she is being treated in an illegal manner at the Regional Center. At oral argument, petitioner's counsel disclaimed any implication that the petition alleged a contract theory between the treating authorities and the petitioner whereby petitioner would be entitled to release on the date set forth in the discharge plan. The petition does not disclose, other than by the use of the words, what exactly a "discharge plan" is. The allegation in paragraph 5 simply fails to allege any facts from which a court could infer that there exists a legitimate treatment alternative less restrictive on the petitioner's liberty interest than she is currently undergoing; in other words, that she is not, in fact, mentally ill and dangerous and should receive treatment in a less restricted setting. The recitation of conclusory statements and the absence of facts is fatal to the petition. " 'The petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is illegally restrained of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint consists.' " *In re Application of Tail, Tail v. Olson,* 145 Neb. 268, 271, 16 N.W.2d 161, 163 (1944).

In view of our disposition of the case, we do not rule on the respondent's contention that habeas corpus is not available in this case since there is another adequate remedy. Neb. Rev. Stat. § 83-1046 (Reissue 1976) provides: "Whenever it shall be shown, by any person, to the satisfaction of the mental health board that either cause no longer exists for the care or treatment or a less restrictive alternative exists for a person committed as a mentally ill dangerous person, the mental health board shall order the immediate discharge of that person or change the treatment disposition. When a change in disposition is in issue, due process protec-

tions afforded under this act shall attach to the subject."

The judgment of dismissal is affirmed.

AFFIRMED.

ESTHER LARSON, E. HENRIETTA REDFERN AND BILL REDFERN, AND THELMA ADAMSON AND HARVEY ADAMSON, APPELLEES, V. RICHARD A. BEDKE AND HELEN K. BEDKE, APPELLANTS.

318 N.W.2d 253

Filed April 16, 1982. No. 43655.

1. **Judgments.** It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though the order actually rendered was not the order the court intended to render.
2. _____. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it as it was originally intended or made, nor can it be employed where the fault in the original judgment is that it is wrong as a matter of law or to allow the court to review and reverse its action with respect to what it formerly refused to do or assent to.
3. _____. A court of record has inherent authority to amend its records so as to make them conform to the facts. It is proper for a court to make an entry nunc pro tunc so that its records will speak the truth. Such an order is proper to correct the record of a judgment, but not to correct the judgment itself. Clerical errors may be corrected by an order nunc pro tunc but judicial errors may not.
4. _____. It is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court.
5. _____. A court may not, under the guise of an amendment of its records, revise or change the judgment in substance and have such amended judgment entered nunc pro tunc. The nunc pro tunc order must conform to and be no broader in its terms than the judgment originally rendered.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and vacated.

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

Jacobsen, Orr & Nelson and Moller R. Johnson, for appellees.

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

BRODKEY, J., Retired.

This case involves a dispute between adjoining neighbors over the use of a common driveway between their properties, and also their rights with respect to a double garage located at the rear of their lots at the end of said driveway. Richard A. Bedke and Helen K. Bedke, the defendants below and appellants in this court on appeal, are the record owners of Lot 1, Block 5, Sherman Addition to Ravenna, Buffalo County, Nebraska. Esther Larson, E. Henrietta Redfern and Bill Redfern, and Thelma Adamson and Harvey Adamson, the plaintiffs below and appellees in this court, were the record owners of Lot 2, Block 5, Sherman Addition to Ravenna, Buffalo County, Nebraska. They will from time to time be referred to in this opinion as "Larson." The Bedke property adjoins the Larson property on the north thereof, and the common driveway between the properties runs from the street on the east end of said lots in a westerly direction toward the garage located on the west end of the lots. The driveway in question is situated entirely on Lot 1, Block 5, the property owned by the Bedkes, but was, as claimed by Larson, sufficiently used by them to establish an easement over the driveway. The double-car garage, situated on the west end of the driveway, is situated on both lots, but the larger portion of the garage is situated on Lot 1, Block 5, the Bedke property.

On March 13, 1979, Esther Larson and her coplaintiffs filed an action against the Bedkes in the District Court of Buffalo County, alleging interference by the Bedkes with plaintiffs' right to use such driveway for ingress and egress, as well as their use

of the garage on said premises, and praying for relief as follows:

"1. During the pendency of this action, a temporary injunction be issued restraining the Defendants and each of them from interfering in any manner with Plaintiffs use of the said double garage and driveway.

"2. Enter an Order making the temporary injunction permanent upon final hearing.

"3. Enter an Order finding and determining that Plaintiffs have a prescriptive easement over said driveway and in the use of said double garage.

"4. For such other and further relief in the premises as may be just and equitable."

We note that nothing in the prayer of the petition as set out above specifically requests that the court find that the plaintiffs have acquired title by adverse possession to any part of the property of the defendants located in the south half of the garage. However, in the pretrial conference report entered by the court on July 25, 1979, it is stated: "Plaintiffs allege prescriptive easement for joint use of driveway on the south portion of Lot 1, Block 5, Sherman Addition and for a determination that the plaintiffs are the owners by prescriptive use of the south half of the garage. Plaintiffs further pray for an order preventing defendants from obstructing plaintiffs' use and access." On November 27, 1979, following trial of the case, the court entered its journal entry setting forth its findings of fact and judgment, hereinafter referred to as "original judgment." Among the findings contained in said judgment are the following: "From the evidence the Court finds that the south 7½ feet of Lot 1 in Block 5 of the Sherman Addition to Ravenna, Buffalo County, Nebraska, is subject to easement in favor of Lot 2 in Block 5, Sherman Addition to the City of Ravenna, Buffalo County, Nebraska, for joint driveway purposes and remains so until this date. . . .

. . . .

"The Court finds that the plaintiffs are entitled to an injunction to prevent the defendants from interferring [sic] with plaintiffs' right of use of the joint driveway to the extent of their easement.

"IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendants and each of them are enjoined from and in any way obstructing the south 7.5 feet of Lot 1, Block 5, Sherman Addition to Ravenna, Buffalo County, Nebraska, in such a way as to interfere with the joint use of said property by the plaintiffs and the defendants.

"THE COURT FURTHER FINDS that the remaining portion of the driveway lying to the north thereof is the sole property of the defendants, but in the absence of any evidence that the plaintiffs have trespassed or used any portion of such driveway, no restraining order or injunction should be granted."

On December 6, 1979, the Bedkes filed their motion for new trial and a motion for a modified journal entry. On December 21, 1979, after proper notice to all parties, the court entered its order overruling the Bedkes' motion for a new trial but sustained in its entirety their motion for the modification of the journal entry, finding, among other things, that Esther Larson had occupied the property in 1937 and that at that time there was a driveway approximately 7½ feet in width located upon and part of Lot 1, which they then described by metes and bounds as "Tract A" and "Tract B." The court also found that "[a]t the west end of the driveway there was a garage with two doors facing to the east. The South 7.85 feet of the garage was located upon Lot 2. The North 16.35 feet of the garage was located on Lot 1. From 1937 until 1949, the occupants of the two adjoining lots used the driveway as a joint driveway and each occupied their one-half of the driveway.

. . . .

"From the evidence the Court finds that TRACT A

and TRACT B described above, of Lot 1, Block 5, Sherman Addition to Ravenna, Buffalo County, Nebraska, are subject to an easement in favor of Lot 2, Block 5, Sherman Addition to the City of Ravenna, Buffalo County, Nebraska, for joint driveway purposes, and remains so until this date." The court also found that both the plaintiffs and the defendants were entitled to an injunction to prevent the other from interfering with their respective rights of use of the joint driveway, and did so enjoin them from such interference. In all other material respects, the modified order was the same as the original judgment entered.

It is to be noted, however, that both the original judgment and modified journal entry entered by the court refer solely to the granting of an easement to the use of the driveway in question, and no mention or reference therein is made to the quieting of title to any portion of the garage by prescriptive use or adverse possession. It should also be noted that the term of the District Court during which the judgment and modified journal entry were rendered ended on March 17, 1980. Thereafter, on April 17, 1980, the plaintiffs filed a motion for entry of an order nunc pro tunc, to which the Bedkes filed a demurrer and objection. Following a hearing on the matter, on May 20, 1980, the District Court entered its order and judgment nunc pro tunc, and we quote from the findings and judgment in that nunc pro tunc order: "On this twentieth day of May, 1980, upon consideration of the evidence, the Court finds that the modified journal entry is incorrect and does not reflect the judgment of the Court as to the legal description of the joint and mutual driveway for the reason that it does not exclude from the premises described as the driveway the garage on the west end of both properties and for the further reason *that it does not quiet title in the plaintiffs to the real property which they have occupied as their half of*

the joint garage for such period of time as to acquire legal title to that portion of Lot 1 upon which their half of the garage is situated.

"The Court therefore finds that the original journal entry and the modified journal entry should be corrected by this order nunc pro tunc to conform to the evidence, and to eliminate the error in legal description contained in the modified journal entry.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment and journal entry of November 27, 1979, is *corrected and amended* nunc pro tunc to read as follows: . . ." (Emphasis supplied.) The remainder of the order, in general, follows the wording of the original order, with the following notable exceptions: "From 1937 until 1949, the occupants of the two adjoining lots used the driveway as a joint driveway and each occupied their one-half of the garage.

. . . .

"Plaintiffs also pray for a determination that the plaintiffs are owners by prescriptive use of the south half of the garage, which is interpreted by the Court for a quiet title in their favor for that real estate occupied by their south half of the garage. The Court finds that the plaintiffs have occupied their half of the garage for more than ten years and have acquired title by adverse possession to the real estate upon which their half of the garage is situated.

. . . .

"The Court finds that the plaintiffs are entitled to an injunction to prevent the defendants from interfering with the plaintiffs' right of use of the joint driveway to the extent of their easement and the defendants are entitled to an injunction to prevent the plaintiffs from interfering with the defendants's [sic] right of use of the joint driveway to the extent of their rights therein.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs have acquired title

by adverse possession to the south 4.35 feet of the west 22 feet of Lot 1, Block 5, Sherman Addition to Ravenna, Buffalo County, Nebraska, by adverse possession and title to said real estate is quieted in the plaintiffs, E. Henrietta Redfern and Thelma Adamson subject to the life estate of Esther Larson.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants and each of them and that the plaintiffs and each of them are permanently enjoined from in any way obstructing, preventing, or interfering with the other's joint use of the joint driveway located on the south 7.5 feet of Lot 1 in Block 5, Sherman Addition to Ravenna, Buffalo County, Nebraska, except the west 22 feet thereof.

"THE COURT FURTHER FINDS that the remaining portion of the driveway lying north of the south 7.5 feet of Lot 1, Block 5, Sherman Addition to Ravenna, Buffalo County, Nebraska, except the west 22 feet thereof is the sole property of the defendants, but in the absence of any evidence that the plaintiffs have trespassed or used any portion of such driveway, no restraining order or injunction should be granted."

On May 27, 1980, the Bedkes filed their motion for a new hearing on motion for entry of order nunc pro tunc, which order was overruled by the court. The record reveals, however, that at the hearing on the motion for a new hearing the trial judge stated: "I'm going to leave the order nunc pro tunc stand on the basis that I think it expresses what we desired or at least I desired to express with regard to the easement rights on the driveway and the permanent right of ownership and possession as to the garage. . . . There may be a procedural problem as to the nunc pro tunc as to the garage, but overall I think we at least have solved what the problem — solved the problem so far as the rights of the ownership . . . ."

Following the overruling of the motion for a new hearing, the Bedkes perfected their appeal to this court, making the following assignments of error in their brief: "1. The trial court erred in finding that the order and judgment nunc pro tunc entered on May 20, 1980, truly recorded the judgment actually rendered which through some inadvertence or mistake had not been truly recorded. 2. The trial court erred in entering its order and judgment nunc pro tunc when said order and judgment corrected, enlarged, broadened, changed and modified the judgment originally rendered by supplying a judicial omission and affirmative action not originally taken by the Court."

The issue in this appeal would therefore appear to be whether the trial court, in entering its order and judgment nunc pro tunc, was correcting the record of the court as to the original judgment on the basis that it had not been correctly recorded through inadvertence or mistake, or whether, as claimed by the appellants herein, the court was attempting to correct a judicial error or omission in the entry of its original judgment, and, in so doing, corrected, enlarged, broadened, changed, and modified the judgment originally rendered.

It will be helpful at this point to review some pertinent principles of law relative to the use of nunc pro tunc orders and judgments, as well as the limitations on the use of such orders and judgments. The general Nebraska rules relating thereto are summarized and set out with appropriate citations of authority in 4 Moore, Nebraska Practice § 3178 at 711-12 (1965) as follows: "The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken but its function is to correct the record which has been made so that it will truly express the action taken but which, through inadvertence or mistake, was not truly recorded. It is proper for a court to make an

entry nunc pro tunc in order to correct its records so that they shall speak the truth.

"If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court at any time afterwards, in a proper proceeding and upon a proper showing, is vested with the power to render nunc pro tunc such judgment or make such order. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth.

"A nunc pro tunc order, otherwise proper, may be entered either at the term in which the judgment or order was entered or at a subsequent term.

"The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions." See, *Andrews v. Nebraska State Railway Commission,* 175 Neb. 222, 121 N.W.2d 32 (1963); *Satterfield v. State,* 172 Neb. 275, 109 N.W.2d 415 (1961); *Bower v. Butcher,* 171 Neb. 452, 106 N.W.2d 689 (1960); *Fisher v. Minor,* 159 Neb. 247, 66 N.W.2d 557 (1954); *State v. Kortum,* 176 Neb. 108, 125 N.W.2d 196 (1963); *Watson Bros. Transp. Co. v. Red Ball Transf. Co.,* 159 Neb. 448, 67 N.W.2d 475 (1954).

However, in *Andrews v. Nebraska State Railway Commission,* 178 Neb. 799, 806-07, 135 N.W.2d 712, 717-18 (1965), this court stated: "Appellant seeks to have the 1938 order corrected to delete any reference to any point of origin, or any point of destination, and omit the word 'occasionally,' upon the ground that all of these were a clerical error or mistake. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered; nor to render an order different from the one actually rendered, *even though the order actually rendered was not the*

order the commission intended to render. An order nunc pro tunc 'cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it as it was originally intended or made, nor can it be employed where the fault in the original judgment is that it is wrong as a matter of law or to allow the court to review and reverse its action with respect to what it formerly refused to do or assent to.' 49 C.J.S., Judgments, § 258, p. 475." (Emphasis supplied.) In the foregoing opinion, the court obviously recognized the distinction between clerical errors and judicial errors as being subject to correction by a nunc pro tunc order. The same distinction was recognized by this court in the case of *Gunia v. Morton,* 175 Neb. 53, 120 N.W.2d 371 (1963). In that case this court stated as follows at 56, 120 N.W.2d at 373: "A court of record has inherent authority to amend its records so as to make them conform to the facts. It is proper for a court to make an entry nunc pro tunc so that its records will speak the truth. Fisher v. Minor, 159 Neb. 247, 66 N.W.2d 557. Such an order is proper to correct the record of a judgment, but not to correct the judgment itself. *Clerical errors may be corrected by an order nunc pro tunc but judicial errors may not.*

"The proper function of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded. O'Grady v. Volcheck, 148 Neb. 431, 27 N.W.2d 689. It is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court. Ricketts v. Continental Nat. Bank, 169 Neb. 809, 101 N.W.2d 153." (Emphasis supplied.)

As pointed out in 46 Am. Jur. 2d *Judgments* § 201 at 443-44 (1969), the foregoing rule appears to be the general rule. In the above section, it is stated: "The general rule is that an amendment of the record of a judgment, and a nunc pro tunc entry there-

of, may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission or an affirmative action which should have been, but was not, taken by the court, or to show what the court might or should have decided, *or intended to decide, as distinguished from what it actually did decide.* The power of the court in this regard is to make the journal entry speak the truth by correcting clerical errors and omissions, and it does not extend beyond such function. Although grounds may exist for opening, modifying, or vacating the judgment itself, yet in the absence of such grounds, the court may not, under the guise of an amendment of its records, revise or change the judgment in substance and have such amended judgment entered nunc pro tunc. The nunc pro tunc order must conform to and be no broader in its terms than the judgment originally rendered." (Emphasis supplied.)

We are convinced that that is what happened in the instant case, and that the failure of the original judgment to include any reference to quieting the real estate covered by the garage was not a clerical error in recording the judgment but was, rather, a judicial omission. The nunc pro tunc order and judgment entered by the trial court in this case had the effect of changing and broadening the clear words and effect of the original judgment in this case. There is no written or oral evidence whatsoever in the record that the trial court in entering the original judgment intended to quiet title to the garage property, other than the statement of the court itself made at the hearing on the motion for new trial in connection with the nunc pro tunc judgment, which statement we have set out above in this opinion. It must be remembered that the statement made by the judge was not in any manner evidence or testimony by the judge, but was merely a statement from the bench made at the argument for a

new trial. Even that statement is ambiguous and subject to different interpretations. After stating that he was going to leave the order nunc pro tunc stand, he expressed his reasons therefor as follows: "I think it expresses what we desired, *or at least I desired to express* with regard to the easement rights on the driveway and the permanent right of ownership and possession as to the garage." (Emphasis supplied.) We believe the trial judge was attempting at that time to correct what he believed was a judicial omission and to supply an affirmative action which he believed should have been but was not taken by the court, to show what the court might or should have decided. Under the authorities previously cited, it is clear that this is not a proper function of an order nunc pro tunc.

We therefore conclude that the trial court erred in entering its judgment on May 20, 1980, correcting the original judgment nunc pro tunc, and quieting title to the property upon which the garage was situated. We therefore reverse said nunc pro tunc judgment, and vacate and set aside the court's order entered on May 20, 1980, as well as the court's order of December 21, 1979, which modified the original judgment entry correcting the description of the easement granted by the court in the original judgment (which order of modification was found by the court to be erroneous), and we reinstate the original judgment of the court entered on November 27, 1979, enjoining the defendants from in any way obstructing the south 7.5 feet of the entire Lot 1, Block 5, in such a way as to interfere with the joint use of the said property by the plaintiffs and the defendants. This is the judgment originally entered by the court, and which judgment was not appealed from by either party. This is an equitable action, and our decision will, we believe, do equity to all parties. However, as previously stated, the present appeal is only from the order of the court entered on May 20, 1980, en-

tering its nunc pro tunc judgment. We conclude that that order must be reversed and vacated.

REVERSED AND VACATED.

WHITE, J., participating on briefs.

MERWIN E. JAMESON ET AL., APPELLANTS AND CROSS-APPELLEES, V. GILBERT NELSON ET AL., APPELLEES AND CROSS-APPELLANTS.

318 N.W.2d 259

Filed April 16, 1982. No. 43762.

1. **Equity: Appeal and Error.** Equitable actions are tried de novo in this court.
2. **Waters.** Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation. Neb. Rev. Stat. § 31-201 (Reissue 1978).
3. _____. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence.
4. _____. It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.

Appeal from the District Court for Franklin County: BERNARD SPRAGUE, Judge. Reversed and remanded.

Tye, Worlock, Tye, Taylor & Hopkins, for appellants.

Jacobsen, Orr & Nelson and Jerry N. Stehlik, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and DEBACKER, D.J.

CLINTON, J.

This is an action in equity by the plaintiffs Jameson, who are the owners of the south half of Section 8, Township 4 North, Range 13 West of the 6th P.M., Franklin County, to enjoin the defendants Nelson, who are the owners of the north half of Section 8, Township 4 North, Range 13 West of the 6th P.M., Franklin County, from constructing a ditch or drainway along the south line of the north half of Section 8. The purpose of the ditch is to drain surface waters collected from the northeast quarter of Section 8 onto the southwest quarter of Section 8. The defendants Nelson in their answer alleged that the ditch will empty into a "natural water course or natural depression" on their own land before it drains onto the land of the plaintiffs through a continuation of that natural depression. The trial court, without making any specific findings of fact in the decree, denied injunctive relief, but retained jurisdiction "for a period of time for the purpose of monitoring the construction and performance of defendant's proposed drainage ditch and its effect, if any, on plaintiff's crop land and dams." The trial court did, however, make certain specific findings of fact in a letter to counsel after it took the case under advisement, and while it awaited trial briefs, before making its decision. We will make reference to those specific findings later in the opinion.

The principal issue in this case concerns a factual determination of whether there is a "natural depression or draw . . . wholly on the owner's [Nelson]

land" into which the ditch would empty. "Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation." Neb. Rev. Stat. § 31-201 (Reissue 1978).

Most of the evidence is not in substantial dispute. The defendants Nelson have farmed the north half of Section 8 for more than 40 years. The defendant Gilbert Nelson has owned the northeast quarter of Section 8 since 1965 and the northwest quarter of that section since 1977. The topography of the northeast quarter is essentially flat and surface waters arising from rain and melting snow do not, except that water in an area along the north side of the quarter, naturally flow upon adjacent land. Instead, the surface waters accumulate in a number of low spots on the land and form ponds until the water evaporates or percolates into the soil. The northeast quarter does not contain any natural depression or draw which collects surface waters which then, in the natural course of drainage, flow upon other lands. The evidence indicates crops planted in the pond areas usually drown from the accumulated surface waters, and, thus, the pond areas are unproductive.

The southwest quarter, owned by the plaintiffs Jameson, in its natural state contains a depression or draw beginning near the north line of that property into which surface waters collect and flow to the south. In 1952 the Jamesons and the then owner of the northwest quarter, apparently a Gilbert Nelson ancestor, under the supervision of the Soil Conservation Service, entered into a cooperative project to construct a "ditch" which drained water from two lagoons located on the northwest quarter

into this natural depression or draw located in the Jameson southwest quarter. As part of this cooperative effort, three conservation dams were constructed in the draw upon the Jameson quarter. The evidence indicates that surface waters collect behind these dams until they reach spillway height and overflow into the draw and onto adjacent land to the south. They then flow east to the Little Blue River.

Jameson and the earthmoving contractor, Grabe, who constructed the 1952 project, testified a "cut" was made in 1952 at a point on the boundary line between the northwest quarter and the southwest quarter, permitting the two lagoons to drain into the draw on the Jameson land. This cut required the removal of 1,654 cubic yards of earth. Grabe testified the cut was made through the fence line, and the earth was spread in the lagoon areas and through the pasture. It is at the point of the cut that the proposed ditch would empty.

In February 1980 a contractor hired by Nelson began construction of the drainage project which gave rise to this action. It was partially completed when a temporary injunction suspended construction. The proposed project consisted of the ditch along the south line of the north half of Section 8 beginning at the point where the defendants contend the natural draw or depression begins and extending eastward approximately 3,000 feet. The ditch is approximately 50 feet wide at the top with the sides sloping to a flat bottom approximately 12 feet wide. The ditch is 9 feet deep at its greatest depth. It is to be located wholly upon Nelsons' land. The completed project would also contain two branch drains extending northerly from the ditch into the northeast quarter to drain the pond and lagoon areas.

Various photographs and two surveys, as well as two topographical maps made by the Geological Survey, were introduced in evidence. Two of the photographs are most significant. These photo-

graphs show views from both north and south of the boundary line between the properties at the location where the 1952 changes were made, the same location where the proposed ditch would empty and the head of the draw or depression begins. The Geological Survey topographical maps are of small scale, 1:24,000 and 1:125,000, respectively, and are not particularly helpful in determining where the draw or depression begins. The larger scale map, that is, the 1:24,000, would indicate the depression begins a slight distance north of the boundary. This map, however, was prepared in 1969 after the cut was made at the boundary line and after the 1,654 cubic yards of earth had been moved. One of the surveys made after the project began shows the elevations along and in the ditch. From survey station 6 to survey station 24, a distance of 1,800 feet, the land rises 10 feet from east to west. This, together with the uncontradicted testimony of the witnesses, indicates that no surface waters could in the "general course of natural drainage" flow from the northeast quarter to the northwest quarter nor to the depression or draw located in the southwest quarter.

Since this is an action in equity, we review the matter de novo without reference to the findings of fact made by the trial court but, where the testimony or evidence is in irreconcilable conflict, take into consideration that the trial court observed the witnesses. *Peters v. Langrehr,* 188 Neb. 480, 197 N.W.2d 698 (1972). We also take into consideration the fact that the trial court did view the premises, and we will give appropriate weight thereto. *Delp v. Laier,* 205 Neb. 417, 288 N.W.2d 265 (1980).

The following legal principles, applications of § 31-201, govern the disposition of this case. The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or em-

bankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature. *Nichol v. Yocum,* 173 Neb. 298, 113 N.W.2d 195 (1962). An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence. *Pospisil v. Jessen,* 153 Neb. 346, 44 N.W.2d 600 (1950). While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor. *Nichol v. Yocum, supra.* It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow *in a state of nature. Delp v. Laier, supra.*

Jameson testified that prior to 1952 and the making of the cut, no water from the northwest quarter of Section 8 flowed into the draw on his land. This testimony was corroborated by Grabe who did the earthmoving in connection with the 1952 project. The latter testified that he made the cut through the fence line and removed 2 or 3 feet of earth at that

point. He did not alter the surface on Jamesons' side of the land. Both of these witnesses testified that before the cut was made, no natural depression or drainway existed at that point in the northwest quarter of Section 8. Conversely, Gilbert Nelson testified the natural depression did extend into the northwest quarter and did begin on his land. However, he also testified with reference to the 1952 work: "I don't even recall what was done." The surveyor who prepared the survey after the 1980 project began testified he was not competent to determine whether the depression on the north side of the fence line into which the ditch would empty was natural or man made. The photograph which shows this area indicates that it is a tilled field. This photograph also shows a shallow, irregular wash running through the cultivated field in the area where the 1952 cut was made. The shallow wash runs from the north to the south toward the point where the present ditch ends. It is not possible to determine the depth of this wash from the photograph, but it appears that tilling machinery would obliterate the wash until an adequate accumulation of waterflow causes the wash to reappear.

On trial de novo we can see no reason to disbelieve the positive testimony of Jameson and Grabe that no natural depression existed extending into the northwest quarter at the time the earth was moved in 1952 and that no water from that quarter flowed into the head of the draw on the Jameson land before the cut was made. Gilbert Nelson's testimony, taken in context, is inconclusive. The two photographs to which we have referred reinforce our conclusion.

The findings made by the trial court in the letter to which we have earlier made reference indicate the following:

"2. That the original cut on the Jameson land in 1952 was to provide drainage of lagoons on the Nelson land directly to the north of the cut;

"3. That water did not drain to the south at the place of the cut prior to the cut being made;
"4. That the new ditch will increase drainage flow through the old cut;
"5. That the three dam structures in the draw below the cut do not have sufficient capacity to hold the additional drainage;
"6. That this presents a danger to the crop land of the plaintiff below the dam sites."

Jameson testified the increased flow would wash out the dams in times of heavy rain, while an employee of the Soil Conservation Service testified that insufficient data existed from which it could be concluded the dams would be damaged by the increased flow.

We conclude a natural depression or draw into which surface waters were wont to flow in a state of nature does not exist at the point on the defendants' land where the proposed ditch empties. We hold, therefore, that the defendants are not entitled to drain the ponds and other surface waters from the northeast quarter of Section 8 into the draw on the southwest quarter of Section 8.

Defendants have filed a cross-appeal, asking that they be awarded damages for the cost of defending the injunction action in the court below. The cross-appeal must fail with our reversal of the trial court's judgment on the main issue.

We think it appropriate at this time to specifically point out a possible ground of decision on which we do not rule. Section 31-201 says: "Owners of land may drain the same *in the general course of natural drainage by constructing an open ditch . . . .*" (Emphasis supplied.) As we have pointed out, without the proposed ditch none of the surface waters from the northeast quarter of Section 8 would ever reach the point where the proposed ditch empties even if at that point there were a natural depression. There is language in some of the cases which would indicate

that the use of manmade ditches and drains may not be used to divert water in a different direction so that the flow goes into a natural drainway which it would not otherwise reach. *Flesner v. Steinbruck,* 89 Neb. 129, 130 N.W. 1040 (1911); *Rudolf v. Atkinson,* 156 Neb. 804, 58 N.W.2d 216 (1953); *Ricenbaw v. Kraus,* 157 Neb. 723, 61 N.W.2d 350 (1953); *Schomberg v. Kuther,* 153 Neb. 413, 45 N.W.2d 129 (1950); *Bussell v. McClellan,* 155 Neb. 875, 54 N.W.2d 81 (1952); *Delp v. Laier, supra.* We do not deem the facts of this case appropriate on which to decide the meaning of "in the course of natural drainage," because no substantial amount of the surface waters in this case have any natural direction of flow and because this case involves ponded waters. It is not a case where waters are to be diverted from one natural drainway into which they naturally flow to another natural drainway which they could not reach except for the ditch.

We reverse the decision of the trial court and remand for entry of a decree granting appropriate relief in accordance with this opinion.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

The majority opinion in this case holds in effect that no watercourse, depression, or drain, part of which is man made, can ever become a "natural" watercourse, depression, or draw within the meaning of Neb. Rev. Stat. § 31-201 (Reissue 1978), no matter how long it has been established. Such a watercourse apparently remains an artificial or unnatural watercourse forever.

In view of modern soil and water conservation practices, which constantly affect changes in the course of natural drainage, it seems strange indeed to hold that manmade changes in drainage can never be treated as "natural" for purposes of § 31-201. It seems equally anomalous that granted or prescriptive drainage rights should be confined to

the purposes supposedly intended by the grantor at the time of the initial acquisition of the right.

In this case there is no dispute but that the plaintiffs or their predecessors granted to the defendants the right to construct a portion of the original watercourse involved in 1952. That watercourse was established and used by the defendants for almost 30 years prior to the institution of this lawsuit. Under the majority opinion that watercourse, although established and continued for that period of time under actual or prescriptive right, can never become a natural watercourse within the meaning of § 31-201.

In my view the judgment of the trial court refusing injunctive relief should have been affirmed.

IN RE HILBERS PROPERTY FREEHOLD TRANSFER. DENNIS L. HILBERS ET AL., APPELLANTS AND CROSS-APPELLEES, V. SCHOOL DISTRICT NOS. 26 AND 94, APPELLEES, CONNIE J. MARREEL, INTERVENOR, CROSS-APPELLANT.

318 N.W.2d 265

Filed April 16, 1982. No. 43874.

1. **Parties: Intervention.** An intervenor who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein.
2. **Schools and School Districts: Appeal and Error: Intervention.** In an appeal to the District Court from an action of a freehold board transferring land from one school district to another, where the party appealing the action of the board has no standing to make such an appeal, an intervenor entering the action after the time for appeal has elapsed may not be substituted as an appellant.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN and GEORGE H. STANLEY, Judges. Reversed and remanded with directions to reinstate the order of the freehold board.

James B. Gessford of Perry, Perry, Witthoff,

Guthery, Haase & Gessford, P.C., for appellants Hilbers et al.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellees and intervenor.

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

CLINTON, J.

This is an appeal from an order of the District Court for Dodge County reversing an order of the freehold board provided for by Neb. Rev. Stat. § 79-403 (Reissue 1976), which transferred a 160-acre tract of land from school district Nos. 94 and 26, Dodge County, Nebraska, to school district No. 62, Dodge County. District No. 94 is a Class VI district. District No. 26 is a Class I district. District No. 62 is a Class III district. The Hilbers, petitioners before the board and the appellants in this court, sought the transfer, claiming it to be in the best educative interests of their child.

After the board granted the petition and transfer of the land, district Nos. 94 and 26 appealed to the District Court. In the District Court the Hilbers challenged the standing of the two school districts to appeal from the order of the board. After the time for appeal to the District Court had passed, the appellee Marreel, also a cross-appellant here, filed a petition in intervention asserting her claimed right to appeal the order of the board.

The District Court struck the petition in intervention, overruled the Hilbers' objection to the standing of district Nos. 94 and 26, and, after a hearing on the merits, reversed the action of the board. The Hilbers then appealed to this court, and Marreel filed a cross-appeal.

The assignments of error made by the Hilbers raise the following issues in this court: (1) Whether a school district has standing to appeal an order of

the freehold board made under the provisions of § 79-403, and (2) Whether the trial court's ruling on the merits was erroneous. The cross-appeal argues Marreel has a right to intervene in the District Court and asserts her so doing saves the appeal even though the standing issue is determined adversely to the school districts.

In *Hinze v. School Dist. No. 34,* 179 Neb. 69, 136 N.W.2d 434 (1965), and a number of earlier cases this court held that a school district may not maintain an action involving a change in boundaries of the school district, and has no legal interest in maintaining the boundaries of the district. That case involved a transfer of land pursuant to a freeholder's petition. We affirmed the above-stated principle which had been announced in earlier cases, but held that since an issue of the want of capacity to sue had not been raised in the trial court, the right to challenge on that ground had been waived. We then reversed on other grounds.

The appellee school districts urge that since *Hinze v. School Dist. No. 34, supra,* and its predecessors were decided, statutory changes have been made which allow school district participation in territorial changes in certain cases and that this results in giving standing even in other cases including transfers initiated by freeholders' petitions. Among the statutory changes upon which the school districts rely are Neb. Rev. Stat. §§ 79-403.02 and 79-403.03 (Reissue 1976). Section 79-403.02 provides that, notwithstanding the other provisions of Chapter 79 concerning the transfer of territory, territory may be transferred to a Class I district when "(1) The receiving district contains at least twenty-five hundred acres and located thereon is a nonprofit facility licensed for the care and education of children;

"(2) There are no children of school age in the territory to be transferred to the receiving district and the territory is owned by the owners of the facility

referred to in subdivision (1) of this section; and

"(3) As a part of the proposal for transfer, the board of the receiving district agrees to provide elementary education either in its own facilities or by contracting with another district; *Provided,* that no county shall pay tuition for any nonresident who is a ward of the court or state." Section 79-403.03 provides that a proposal for the transfer of territory under the above statute shall be initiated by the receiving district.

Other statutory changes upon which the appellee school districts rely are contained in Neb. Rev. Stat. §§ 79-402.03, 79-402.04, 79-402.05, and 79-402.06 (Reissue 1976). These statutes provide for changes in the boundaries of school districts and for merger of school districts by methods in addition to that provided for by Neb. Rev. Stat. § 79-402 (Reissue 1976). The latter statute provides for changes upon petition of 65 percent of the legal voters of each district affected.

Section 79-402.03 provides: "In addition to the petitions of legal voters pursuant to section 79-402, changes in boundaries or the creation of a new district from other districts may be initiated and accepted by:

"(1) The board of education of any Class III, IV, V, or VI district; and

"(2) The board of education of any Class I or II district in which is located a city or incorporated village."

Section 79-402.04 provides: "When the legal voters of a Class I or II school district in which no city or village is located petition to merge in whole or in part with a Class I or Class II district, such merger may be accepted by petition of the board of education of the accepting district."

Section 79-402.05 provides: "When the legal voters of a Class I school district petition to merge with a Class I district with a six-member board of

education, such merger may be accepted by petition of the board of education of the accepting district."

And § 79-402.06 provides: "Petitions presented pursuant to sections 79-402.03 to 79-402.05 shall be subject to the same requirements for content, hearings, notice, review, and appeal as petitions submitted pursuant to section 79-402."

The school districts acknowledge that the freeholder statute, § 79-403, does not make any mention of permitting school districts as corporate entities to involve themselves in changes made under the provisions of that statute. However, the districts argue that because the statutes above mentioned grant districts the right to initiate or otherwise participate in certain cases and because § 79-402 (which provides for changes upon petitions signed by 65 percent of the voters of each affected district) gives the right of appeal to any person affected, the right of a school district to appeal from an adverse decision under § 79-403 must be inferred.

We do not accept the districts' arguments for the following reasons. First, it is not at all clear that the above statutory changes give school districts the right to appeal orders transferring property made upon petition of the legal voters pursuant to § 79-402. In any event, that question is not before us, and we cannot decide it in this case. More important, however, is the fact that § 79-403 has not been changed in any way which purports to give the affected school districts the right to appeal in cases of transfers by freeholders' petitions which involve only the property of the petitioners.

The basis for our earlier holdings on the lack of standing of school districts was simply that the statutes made no provision for such authority. From the fact that the Legislature has now given school districts participation in certain cases, one cannot infer an intention to give such capacity in all cases where territorial boundaries of a school district are

affected. Quite the contrary may be inferred by applying certain principles of statutory interpretation.

In circumstances such as this, certain presumptions are used by the courts as an aid in statutory construction. In enacting amendatory legislation, the Legislature is presumed, unless it appears to the contrary, to have known the preexisting state of the law. *State v. Suhr,* 207 Neb. 553, 300 N.W.2d 25 (1980). Also presumed is the Legislature's knowledge of the judicial decisions of the Supreme Court construing and applying that law. *Sidney Education Assn. v. School Dist. of Sidney,* 189 Neb. 540, 203 N.W.2d 762 (1973); *Airport Authority of City of Millard v. City of Omaha,* 185 Neb. 623, 177 N.W.2d 603 (1970). Since the Legislature made no pertinent changes in § 79-403, we assume it did not intend to change the law as it relates to the capacity of a school district to bring suit, except in those cases where they may have done so.

We now address whether the Marreel petition in intervention filed after the time for appeal had expired sustained the appeal in the District Court and hence preserved the court's jurisdiction. It is clear the only purpose of the Marreel petition in intervention was to sustain the appeal in the event the school districts lacked standing in their appeal from the action of the freehold board.

The petition in intervention pled the steps which had been taken by the school districts to appeal. It then alleged the intervenor was a resident and taxpayer residing in school district Nos. 94 and 26 and "[t]he transfer of property ordered by the freehold board as set forth herein was contrary to law." Finally, in its prayer for remedy, it requested the court to set a time and place for hearing the appeal and at said hearing to reverse the freehold board's order.

Accompanying the petition in intervention was an "offer" by the intervenor and the school districts "to

amend the appeal bond filed herein as to form, amount, or parties in such manner as the court may order pursuant to a request of any party herein."

In her cross-appeal in this court the intervenor argues only three points: (1) The notice of appeal by the districts gave notice to the petitioners of the appeal. (2) A bond timely filed may be amended. We note here parenthetically that although not so expressly stated, the proposed amendment is apparently to substitute the intervenor as principal and to either have a new surety or the original surety, a bonding company, accept the intervenor as principal, although there is no showing that the corporate surety would do so. (3) If the school districts lacked standing, that fact did not deprive the District Court of jurisdiction.

The intervenor cites no authority which would allow "amendment" of a bond by a substitution of a new principal and a new surety. The intervenor relies upon *Reiber v. Harris,* 179 Neb. 582, 139 N.W.2d 353 (1966). This court in that case stated, after holding the filing of the bond was jurisdictional, a bond timely filed and approved could be amended if defective. There are numerous cases decided by this court which indicate that the rules permitting amendment of appeal bonds are quite liberal. See, e.g., *The Exchange Bank v. Mid-Nebraska Computer Services, Inc.,* 188 Neb. 673, 199 N.W.2d 5 (1972). *Reiber v. Harris, supra,* does not stand for the principle that an entirely new bond may be substituted, which in effect is what the substitution of a new principal (a tardy appellant) and surety would constitute.

An analysis of the procedural facts in this case indicates that the real issue is not the right to amend a defective bond, but whether an intervenor may, after the time for appeal has expired, become a substitute appellant for an appellant who has no standing. The appellees do not cite any case on point,

and the court's own exhaustive search has disclosed no precedents which are directly on point.

A taxpayer has a right to appeal from a decision of the freehold board granting the transfer. *Reiber v. Harris, supra.* If a taxpayer has taken a timely appeal, we can conceive of no circumstances where there would be any need for any other taxpayer to intervene. This is not to be taken as saying that another taxpayer could not intervene.

The trial court granted the school districts' requested relief which the intervenor now, as an appellee in this court, seeks to preserve. If the school districts had not appealed from the decision of the freehold board, would Marreel have had a right to enter the case after the time for appeal had elapsed? The answer, we believe, is obviously not. The appeal would simply have been untimely. It is clear that Marreel seeks status not as an intervenor in the action, but as an appellant in the District Court.

Somewhat similar to the present case is that of *Parker v. City of Grand Island,* 115 Neb. 892, 215 N.W. 127 (1927). In that case the plaintiffs sought to enjoin the paving of streets in a paving district because of improper notice of the district's creation. R. E. Davis et al. intervened, challenging the plaintiffs' right to maintain the action for injunctive relief. The District Court granted the injunction. Neither the plaintiffs nor the defendant City of Grand Island appealed to the Supreme Court; however, the intervenors did appeal. This court said: "The preliminary question before us is, as between the plaintiffs and the interveners, the right of the latter in the present case to challenge the right of the former to maintain their action." 115 Neb. at 893, 215 N.W. at 127. We held that under the circumstances the intervenors were mere interlopers.

An intervenor who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the is-

sues presented therein. *State ex rel. Nelson v. Butler,* 145 Neb. 638, 17 N.W.2d 683 (1945).

We hold that in an appeal to the District Court from an action of a freehold board transferring land from one school district to another, where the party appealing the action of the board has no standing to make such an appeal, an intervenor entering the action after the time for appeal has elapsed may not be substituted as an appellant.

REVERSED AND REMANDED WITH DIRECTIONS TO REINSTATE THE ORDER OF THE FREEHOLD BOARD.

FRANCIS HENGEN AND LOUISE HENGEN, HUSBAND AND WIFE, APPELLANTS, V. BARBARA H. HENGEN ET AL., APPELLEES.

BARBARA H. HENGEN ET AL., APPELLEES, V. FRANCIS HENGEN AND LOUISE HENGEN, HUSBAND AND WIFE, APPELLANTS.

318 N.W.2d 269

Filed April 16, 1982. Nos. 43891, 43892.

1. **Easements.** The law treats with disfavor a claim of prescriptive right based on adverse user and requires the elements to be clearly, convincingly, and satisfactorily established.
2. _____. An alleged easement that is too indefinite for a determinate description cannot be established and protected by a court of equity.
3. _____. An easement by implication may flow from and be created by the existence of an element of necessity for use and occupancy or by an implied grant from what has been said or done by the parties involved.
4. _____. An easement by implication from former use arises only where the use giving rise to the easement was in existence at the time of the conveyance subdividing the property; the use has been so long continued and so obvious as to show that it was meant to be permanent; and the easement is necessary for the proper and reasonable enjoyment of the dominant tract.
5. _____. 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. Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe.

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

Jess C. Nielsen and Richard A. Birch of Jess C. Nielsen Law Offices, for appellants.

John A. Gale of Girard & Gale, for appellees.

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

MCCOWN, J.

This appeal involves two consolidated cases in each of which one group of landowners seeks injunctive relief to permit the withdrawal of irrigation water from the canal of an irrigation district across land of the other owners. The trial court ruled generally in favor of appellees Barbara Hengen et al. in both cases. Francis and Louise Hengen have appealed.

These two cases involve a section of land located in Lincoln County, Nebraska. At the time of trial in the District Court, Francis and Louise Hengen owned the northeast quarter and the southwest quarter of the section, and Barbara Hengen and her children owned the northwest quarter and the southeast quarter. An irrigation canal of the Birdwood Irrigation District extends across the section from east to west in the southerly part of the north half of the section. In the northwest quarter of the section the canal is located a few hundred feet north of the boundary line between the northwest quarter and the southwest quarter. There are 17 acres of land in the northwest quarter between the canal and the boundary line between the northwest quarter and the southwest quarter.

Until his death in 1946, Frank Hengen owned the

entire section and farmed it with the help of his sons. After Frank died, his sons Francis and Albert and their mother continued to farm the section. After the mother's death in 1960, Francis and Albert became the owners of the section and continued to conduct the farming of the section as a partnership. In October 1963 the two brothers entered into a written partnership agreement and had deeds executed so that Albert became the owner of the southeast quarter and the northwest quarter, and Francis became the owner of the northeast quarter and the southwest quarter. Each of the brothers used his quarter sections in the partnership, and they continued to operate the farm and irrigate the entire section as they had in the past. Albert died in July 1965 and Barbara Hengen and her children inherited the northwest quarter and the southeast quarter. The northwest quarter and the southwest quarter were fenced off from each other and the owners began farming their properties separately.

At the time the properties began to be operated separately there were five turnout boxes on the irrigation district canal in the northwest quarter, and during the partnership years those boxes were used to irrigate the southwest quarter by flooding. The water would flow from the turnout boxes in a southerly direction and flood approximately two-thirds of the southwest quarter and a small portion of the southeast quarter. During the partnership the southeast quarter was irrigated by ditches and by a pump and sprinkler system from a farm pond located near the center of the quarter section. The farm pond was supplied with water from a lateral extending from the Birdwood canal in the northeast quarter. That lateral also supplied water to a lawn and orchard for a house located in the northeast quarter.

One of the consolidated cases involves a dispute between the owners of the northwest quarter and the

owners of the southwest quarter. The other case is between the owners of the southeast quarter and the owners of the northeast quarter. We refer first to the west half of the section.

When the properties were first operated separately there were approximately 45 acres of alfalfa in the northeast portion of the southwest quarter and the remainder of the quarter was meadow. The alfalfa was irrigated with a pipe sprinkler with water from the Birdwood canal, using a centrifugal pump and movable pipe laid across the southern portion of the northwest quarter, and the turnout boxes on the northwest quarter were also used to provide flood irrigation on the rest of the southwest quarter once or twice a year.

Beginning in 1970 disputes arose between the persons farming the land on the northwest quarter and those on the southwest quarter. The pipe used for sprinkling the alfalfa on the southwest quarter would block access to areas of the northwest quarter, and use of the turnout boxes to flood irrigate the southwest quarter would damage crops and stacked hay on the northwest quarter.

In 1974 the Birdwood Irrigation District removed the two easterly turnout boxes on the northwest quarter and constructed a stub lateral from the canal south to the highest point on the north boundary line of the southwest quarter. This work was done with Barbara Hengen's permission at the expense of the irrigation district. The dispute continued and these cases were filed in 1976.

There was no testimony at trial that the stub lateral does not carry sufficient water to irrigate the southwest quarter. The evidence from the witnesses for the owners of the southwest quarter, however, was that only 12 to 15 acres could presently be effectively irrigated from the stub lateral, and that it would be expensive to effectively irrigate the remainder of the quarter from the stub lateral.

We turn now to the east half of the section. After the properties were operated separately the irrigation of the southeast quarter continued as before through the Birdwood lateral across the northeast quarter to the southeast quarter to the farm pond. Sometime in the summer of 1968 Francis Hengen shut down the Birdwood lateral and refused to allow the owners of the southeast quarter to draw water from the lateral to fill the farm pond. The expressed reason for the shutdown was that the owners of the northeast quarter could not water a lawn and orchard while the pond on the southeast quarter was filling.

In July 1976 Francis and Louise Hengen filed the first of these consolidated cases seeking an injunction preventing the owners of the northwest quarter from denying them the use of the five turnout boxes on the northwest quarter to flood irrigate the southwest quarter. In December 1976 Barbara Hengen and the other owners of the southeast quarter filed the second suit against Francis and Louise Hengen seeking an injunction preventing Francis and Louise Hengen from denying their right to irrigate the southeast quarter through the Birdwood lateral.

The cases were consolidated for trial and on September 20, 1980, the District Court found generally for Barbara Hengen et al. in both cases. With respect to the west half of the section, the court found that Francis and Louise did not acquire any easement by adverse possession or by their use of the five turnout boxes for flood irrigation, and that the statutes with respect to subdivided lands applied only to laterals or other facilities in existence at the time of the subdivision, and that Birdwood Irrigation District had no duty to provide any lateral to the southwest quarter, although the existing stub lateral was installed voluntarily. The court also found that the law of implied easements from preexisting uses in the severance of real estate was applicable to the

right to obtain irrigation water and that the location of the stub lateral was appropriate and sufficient to provide adequate irrigation water for the southwest quarter. The court therefore refused to grant Francis and Louise Hengen any rights to flood irrigate or to use the turnout boxes in the northwest quarter, but confirmed their right to use and maintain the stub lateral in its present form and location for the purpose of irrigating the southwest quarter, and enjoined Barbara Hengen et al. from interfering with the use and maintenance of the stub lateral.

As to the east half of the section, the court determined that the lateral from the Birdwood canal to the southeast quarter was an existing facility at the time of subdivision and enjoined Francis and Louise Hengen from prohibiting Barbara Hengen et al. from using the lateral extending from the Birdwood canal in the northeast quarter to the pond located on the southeast quarter, and provided that the irrigation should not conflict with the joint use of the lateral by Francis and Louise Hengen to irrigate the lawn and orchard at their residence on the northeast quarter.

The appellants Francis and Louise Hengen contend that they have the right to irrigate the southwest quarter by flood irrigation from the five turnout boxes on the northwest quarter, and that they should not be restricted to the use of the stub lateral. They also contend that the turnout boxes on the northwest quarter were facilities in existence at the time the property was divided, and that they had acquired a right by adverse possession to flood irrigate from the boxes.

Neb. Rev. Stat. § 46-122 (Reissue 1978) provides in part: "It is hereby expressly provided that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied . . . ."

Neb. Rev. Stat. § 46-1,135 (Reissue 1978) provides:

"Where land within an irrigation district, to which water has been delivered through adequate facilities provided by such irrigation district, is subdivided and transferred in part, the grantee or transferee shall have the right to use laterals and other existing facilities as against his grantor or assignor unless agreed otherwise, which agreement must be expressly stated in the deed of conveyance or transfer."

Neb. Rev. Stat. § 46-1,136 (Reissue 1978) provides: "An irrigation district within which subdivided land is situated, shall not be required to build additional laterals or provide other facilities for the purpose of delivering water to such subdivided land, but shall only be required to deliver water for the irrigation of such subdivided land through the laterals or other facilities in existence before such transfer or subdivision was made."

At the time of subdivision of the section the irrigation water was applied to the southwest quarter by flooding from the canal located in the northwest quarter. There were no laterals in the northwest quarter at that time.

Black's Law Dictionary 531 (5th ed. 1979) defines "facility" as "something that is built or installed to perform some particular function." In the context of §§ 46-1,135 and 46-1,136 the term is limited to something built or constructed for the purpose of delivering irrigation water, and flooding over the land is not a "facility" within the meaning of the statutes. The District Court was correct in ruling that the statutes referred to applied only to laterals or other facilities in existence at the time of the subdivision of the section, and that the irrigation district had no duty to provide any lateral to the southwest quarter, and that the stub lateral was thereafter voluntarily installed by the district.

The finding of the District Court that Francis and Louise Hengen did not acquire an easement by ad-

verse possession was clearly correct since the usage was permissive in its inception and any adverse claim of an easement for flooding had not continued for the necessary prescriptive period. Even if flooding had been adverse and continued for the necessary period, the course of the flooding on the land is too indefinite for any determinate description. In *Wemmer v. Young,* 167 Neb. 495, 93 N.W.2d 837 (1958), this court dealt with a claimed prescriptive easement as a means of ingress and egress to and from the claimant's property. This court said: "A sufficient obstacle to finding that appellant has the right he claims is the absence of clear, convincing, and satisfactory evidence of when the claimed period of adverse user began; from what place the user originated; the course of it on the land of what is claimed to be the servient estate; the identity of that course during the period required to establish an easement; and the quantity of land affected by the user. The law treats with disfavor a claim of prescriptive right based on adverse user and requires the elements to be clearly, convincingly, and satisfactorily established." *Id.* at 518, 93 N.W.2d at 850. The court held in *Wemmer* that an alleged easement that is too indefinite for a determinate description cannot be established and protected by a court of equity. It is clear in the present case that the flooding of the lower portion of the northwest quarter did not proceed in a determinate location or within any precise bounds. Under the *Wemmer* principles no easement for flooding could have been established by adverse possession, and the trial court's finding that it was not an adverse use for any period of 10 years is fully supported by the record.

Finally, the trial court found that Francis and Louise Hengen had an implied easement to obtain irrigation water for the southwest quarter arising from preexisting uses in the severance of the real estate. This is apparently a case of first impression

in this state in dealing directly with an easement implied from preexisting uses in the nature of an element of necessity arising out of the subdivision of property. An easement may be created by implication under Nebraska law. It may flow from and be created by the existence of an element of necessity for use and occupancy or by an implied grant from what has been said or done by the parties involved. *Price Realty Co. v. Airport Authority,* 175 Neb. 791, 124 N.W.2d 207 (1963).

An easement by implication from former use arises only where the use giving rise to the easement was in existence at the time of the conveyance subdividing the property; the use has been so long continued and so obvious as to show that it was meant to be permanent; and the easement is necessary for the proper and reasonable enjoyment of the dominant tract. See 2 Thompson on Real Property § 352 at 305 (1980); *Haynie v. Brenner,* 216 Va. 722, 222 S.E.2d 546 (1976); *Bushart v. West,* 215 Kan. 205, 523 P.2d 391 (1974); *Chournos v. Alkema,* 27 Utah 2d 244, 494 P.2d 950 (1972).

The necessity involved in the present case is to transport the irrigation water from the canal in the northwest quarter to the southwest quarter, and the construction of the stub lateral in 1974, in effect, acknowledged the necessity and located the easement. The trial court found that the location of the stub lateral was appropriate and sufficient to provide adequate irrigation water for the southwest quarter. In *Graves v. Gerber,* 208 Neb. 209, 302 N.W.2d 717 (1981), this court held that 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. *Graves* also held that under certain circumstances a court of equity

may fix the location of a way which the grant does not specifically describe.

In the present case Barbara Hengen et al. and the irrigation district fixed the location of the easement by implication by constructing the stub lateral to deliver irrigation water to the highest point on the north line of the southwest quarter, and the District Court confirmed that location as reasonable. The record fully supports that determination.

With respect to the action concerning the right of Barbara Hengen et al. to irrigate the southeast quarter from the farm pond fed by the lateral extending from the Birdwood canal on the northeast quarter, there is no serious dispute. That lateral was in existence before the property was subdivided. Section 46-1,135 applies and the determination of the District Court was correct.

The judgment of the District Court in each case was correct in all respects and the judgments are affirmed.

AFFIRMED.

ARTHUR H. LINDSAY AND ETHEL D. LINDSAY, HUSBAND AND WIFE, APPELLEES, V. FIRST NATIONAL BANK, BAYARD, NEBRASKA, A CORPORATION, APPELLANT, DELILA ARLENE LEMLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE E. LEMLEY, DECEASED, APPELLEE.

318 N.W.2d 275

Filed April 16, 1982. No. 43961.

1. **Uniform Commercial Code: Security Interests.** Under Neb. U.C.C. § 9-402 (Reissue 1980), there are two formal requisites of a "financing statement," i.e., (1) the signatures and addresses of both parties, and (2) a description of the collateral by type or item. A financing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading.

2. _____: _____. The fundamental purpose of the code is to make the process of perfecting a security interest easy, simple, and certain.
3. **Uniform Commercial Code.** Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions.

James R. Hancock of Hancock Law Offices, for appellant.

Clark G. Nichols of Winner, Nichols, Meister, Douglas & Kelly, for appellee Delila Lemley.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and HAMILTON and CASE, D. JJ.

CASE, D.J.

This is an action for declaratory judgment with the following factual situation: One Richard K. Schultz (not a party to this action) was indebted to the defendant First National Bank of Bayard, Nebraska. He executed a financing statement and security agreement on January 5, 1978, which was filed on January 12, 1978.

In that document the following language appears as a description of a portion of the security: "Lot 5 Lake Minatare and cabin at same location to secure note in amount of $30,000.00." The cabin is on leased land and ownership of the real estate is not an issue.

The parties have stipulated that the plaintiffs are the owners of a cabin and certain other items of personal property located on Lot 5, cabin site area at Lake Minatare Reservoir, situated in the south half of Section 31, Township 23 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska.

Richard K. Schultz filed his petition in the bankruptcy court, declaring himself to be a bankrupt, in

July of 1979. He listed in the schedules for creditors holding security the First National Bank of Bayard, Nebraska; the security being described as financing statement and security agreement dated January 5, 1978, filed with the Scotts Bluff County clerk on January 12, 1978, and recorded at Book 572, Page 93, referring to Lot 5, Lake Minatare, and cabin at same location, to secure note in amount of $30,000 dated January 5, 1978.

Shortly after filing, the bankruptcy court disclaimed the cabin property in that proceeding and Richard K. Schultz proceeded to sell the property to Arthur H. and Ethel D. Lindsay, the plaintiffs herein.

In order to secure a balance due Schultz, the plaintiffs gave a security interest which is evidenced by a financing statement and security agreement which was filed December 6, 1978; the financing statement showing the rights of the secured party (Schultz) assigned to George E. Lemley, who is now deceased and who appears in this action by his personal representative as an additional defendant.

The issues in the trial court were (1) whether the description in the bank security agreement did not reasonably identify what is described, (2) whether the security agreement was signed in blank, and (3) whether the description of the collateral lake cabin was authorized to be inserted by the debtor in the security agreement.

The trial court held adverse to the defendant bank on all issues. As to the first issue, Neb. U.C.C. § 9-110 (Reissue 1980) provides: "For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

Neb. U.C.C. § 9-402(8) (Reissue 1980) provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."

In *Mid-Amer. Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc.*, 191 Neb. 74, 214 N.W.2d 18 (1974), we applied this premise, and are of the opinion that the description of the security herein is sufficient to place others on notice that a reasonably prudent person would be aware that the property was subject to a security agreement.

In *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 55-56, 200 N.W.2d 1, 8 (1972), we set out our belief in the law to be as follows: " 'The fundamental purpose of Art. 9 of the code is to make the process of perfecting a security interest easy, simple, and certain. . . . 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 type or kind. The statement need not necessarily contain detail as to collateral, nor any statement of quantity, size, description or specifications . . . .' "

It is difficult to imagine that any person would be misled by the description used in the financing statement and security agreement. There is only one Lake Minatare in the area of Bayard, and this body of water is of sufficient size to be well known throughout the area.

The evidence here indicates two purchase agreements signed by the plaintiffs, the second being filed with the register of deeds on December 6, 1978; it providing the following description: "Lot 5, in the Cabin Site Area at Minatare Reservior [sic], situated in: The South Half (S½) of Section Thirty-one (31), Township Twenty-Three (23) North, Range Fifty-three (53) West of the 6th P.M., Scotts Bluff County, Nebraska."

One of the plaintiffs, Ethel D. Lindsay, testified that they had never checked the records, and when asked why, she stated they were dealing through a realtor and deemed they were safe in doing so. The

same witness testified that they knew they were not going to get a deed, that the cabin was on leased property, and that when they purchased they knew where the cabin was and that the cabin was personal property.

Mr. James Krantz, president of the defendant bank, testified that, to his knowledge, there are no other leased properties on the lake that have cabins on them.

In *Putnam Ranches, Inc. v. Corkle,* 189 Neb. 533, 535, 203 N.W.2d 502, 503 (1973), we held: "Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies."

As to whether the instrument was signed in blank by the witness Schultz, there is a conflict of testimony. The witness does not deny his signature, stating several times that he suggested that the bank take the cabin as security and that he had no objection to placing the cabin on the security agreement. The bank officer testified that Mr. Schultz gave the information as he filled it out. We believe this to be of little significance.

It nowhere appears in the evidence that the description of the specific items of machinery or the lot itself could have been procured from anyone other than the witness Schultz. It is also significant that the witness Schultz read the petition in bankruptcy and that the information contained in that petition listed the financing statement and security agreement showing the cabin as a part of the security to the defendant bank.

We are of the opinion that if the agreement was not filled in at that meeting of the witnesses Krantz and Schultz, then Schultz, by his testimony herein concerning his actions at that time, authorized, without question, the bank to fill in the form.

We base this premise in part on our interpretations in *Genoa Nat. Bank v. Sorensen,* 208 Neb. 423,

427, 304 N.W.2d 659, 662 (1981), where we held: " 'Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies.' "

Nebraska security agreements are by statute filed in the offices of the county clerk. Section 9-402(7) provides in part: "A filed financing statement remains effective with respect to collateral transferred by the debtor . . . ."

It would appear that the reason the plaintiffs purchased the cabin property with a prior lien thereon is in their own failure to check the records or to have their representative do so, and their reliance upon the seller.

We are of the opinion that the District Court erred in its findings and that a more liberal construction of the Uniform Commercial Code would permit findings that the property was reasonably described for the purposes of the code, and that the debtor agreed with the manner in which the security agreement was completed.

We therefore reverse the judgment and remand the cause with directions to the District Court to enter judgment for the defendant First National Bank of Bayard, finding that they have a valid security agreement with a first priority; the security agreement assigned to the personal representative of the decedent George E. Lemley to have a second priority.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLARD STEFFEN, DOING BUSINESS AS STEFFEN ASPHALT PAVING CO., A SOLE PROPRIETORSHIP, APPELLEE, V. JOHN AINSWORTH ET AL., APPELLANTS.

318 N.W.2d 278

Filed April 16, 1982. No. 43963.

1. **Appeal and Error.** In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
2. **Verdicts: Appeal and Error.** A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.
3. **Appeal and Error.** In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom.
4. **Judges: Appeal and Error.** Alleged improper conduct of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.

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

Howard L. Neuhaus, for appellants.

Steven M. Watson of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellee.

Heard before BOSLAUGH, MCCOWN, WHITE, and CAPORALE, JJ., and FINN, D.J.

FINN, D.J.

This is an action by the plaintiff for money due under a verbal contract for labor and materials provided in installing an asphalt parking lot upon property owned by the defendants. This case was tried before a jury, and the jury verdict was in favor of the plaintiff and against the defendants in the amount of $5,300. Defendants have appealed.

The defendants assign as error that the verdict is contrary to the weight of the evidence, and that there were irregularities in the proceedings at the

trial by opposing counsel and the court which prevented the defendants from having a fair trial.

Plaintiff alleges in his amended petition that he entered into an oral agreement with the defendants on or about October 18, 1979, for the application of an asphalt parking lot on defendants' property; that the agreed price and the reasonable and fair value of the contract amounted to $6,200; and that plaintiff completed the application of the asphalt parking lot and defendants accepted the benefit of the work performed and failed to pay the agreed price therefor. Defendants, in their answer, admitted the contract, but alleged that the plaintiff failed to perform the terms of the contract in a workmanlike and satisfactory manner; that work was required to correct the work improperly performed; and that the cost of such correction would exceed the amount claimed by plaintiff as due and owing. Defendants' cross-petition alleged that the amount agreed upon was $5,536 and not $6,200. Defendants further allege in their cross-petition that plaintiff completed the work, but his performance was in an unworkmanlike and unsatisfactory manner, resulting in the necessity of replacing the asphalt parking lot, and that the cost of removing the existing asphalt parking lot and replacing it would amount to $12,000. Defendants further asserted a claim for damages amounting to the difference between the agreed price and the costs of removal and replacement. Plaintiff answered the cross-petition of defendants by general denial.

The essential facts elicited from the various witnesses at the time of trial were that the plaintiff entered into an oral contract for the application of an asphalt parking lot. The terms of the contract were $4.50 per square yard according to plaintiff's testimony, and $4 per square yard according to the defendant John Ainsworth's testimony.

The plaintiff commenced performance on October

18, 1979, and concluded performance on October 26, 1979. The plaintiff sent the defendants a statement dated November 30, 1979, for $7,600, but subsequently met with defendants and reduced the bill to the original agreement of $4.50 per square yard to a total of $6,228, which was rounded off to $6,200. The defendants alleged that in late spring of 1980 the parking lot was showing signs of failure. Defendants' expert witness testified that the repair of the asphalt lot would cost $12,000. The plaintiff's expert witness testified that the parking lot need not be replaced and that only one small area needed repair. The plaintiff testified that the small area could be replaced for $53.

On this conflicting evidence the jury brought in a verdict for the plaintiff in the sum of $5,300. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. *Trout v. Olson Bros. Mfg. Co.,* 209 Neb. 477, 308 N.W.2d 522 (1981).

In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. *C I T Financial Services of Kansas v. Egging Co.,* 198 Neb. 514, 253 N.W.2d 840 (1977).

The defendants also assign as error that there were irregularities in the proceedings at the trial by opposing counsel and the court which prevented the defendants from having a fair trial. Alleged improper conduct of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection. *Weber v. Southwest*

Nebraska Dairy Suppliers, Inc., 190 Neb. 389, 208 N.W.2d 667 (1973).

The judgment is affirmed.

AFFIRMED.

JANE W. BEEDER, APPELLEE, V. GORDON H. FLEER, APPELLANT.

318 N.W.2d 708

Filed April 16, 1982. No. 43989.

1. **Records: Appeal and Error.** Where the transcript and record filed with the court are sufficient to present all issues before the court and the case is one for determination solely on matters contained within those records and the orders of the District Court, no further bill of exceptions is required for preservation of any error of law on appeal.
2. **Insurance: Deceptive Trade Practices.** It is an unfair or deceptive act or practice for an insurance company to fail to promptly settle claims, when liability has become clear, under one portion of an insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
3. **Insurance: Subrogation.** Under Neb. Rev. Stat. § 25-1222.01 (Reissue 1979), a party is entitled to credit on any judgment rendered against him for any payments or partial payment of damages made on behalf of such party to an injured person or on his behalf to others, including an assignee or subrogee of such injured person.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Reversed and remanded with directions to discharge the judgment.

Schmid, Ford, Mooney & Frederick, for appellant.

Stephen L. Gerdes of Matthews & Cannon, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, and HASTINGS, JJ., and QUIST, D.J., and RONIN, D.J., Retired.

RONIN, D.J., Retired.

Jane W. Beeder (Jane), plaintiff and appellee herein, brought this action in the District Court of

Douglas County, Nebraska, against Gordon H. Fleer (Fleer), the defendant-appellant, to recover for personal injuries and property damage to her automobile received from a motor vehicle collision on September 19, 1979, between automobiles being driven by the said parties. At the time of the accident Jane was insured by the United Services Automobile Association (USAA), which insurance policy also included collision property insurance coverage on Jane's automobile. Fleer's automobile was covered by a liability insurance policy issued by Allstate Insurance Company (Allstate).

On November 9, 1979, Allstate received from USAA a demand for reimbursement in the sum of $1,655.89, representing the amount of its subrogated interest resulting from USAA's payment to Jane for damages to her automobile resulting from the collision with Fleer's automobile. On November 9, 1979, Allstate paid USAA by draft the sum of $1,655.89, the amount of the subrogation claim of USAA. Jane's action was filed thereafter on December 7, 1979. Shortly before jury trial in October 1980 the defendant admitted liability for the accident. There is no evidence in the record that either party's counsel had knowledge prior to trial of the payment by Allstate to USAA of its subrogated interest in Jane's claim for property damage against Fleer to the extent of the amount of the payment that USAA had paid Jane.

The evidence at trial was that the actual property damage to Jane's car was the sum of $1,709.34, which was slightly more than USAA's subrogated claim to Allstate in the sum of $1,655.89. The jury was instructed by the trial court to include in its verdict against Fleer the sum of $1,709.34 for the property damage to Jane's automobile. The jury thereafter returned a verdict for Jane against Fleer in the sum of $3,500 for all of Jane's damages. The trial court having instructed the jury that Jane was en-

titled to recover for damages to her car, the verdict necessarily included a sum for damages to her car.

Following the trial, Allstate paid the sum of $1,947.31 to the clerk of the District Court. This amount is the difference between the actual judgment and costs and the amount that Allstate had previously paid USAA by reason of its subrogated interest in having paid Jane for the property damage to her automobile. The defendant Fleer did not file a motion for a new trial but instead asserted his right to credit for the previous payment to Jane's subrogated insurance carrier, USAA, in his motion to discharge the judgment. The hearing held on the defendant's motion to discharge the judgment for the reason that it was paid in full was not an evidentiary hearing. The trial court, in its order denying the defendant's motion to discharge the judgment, stated its reason for so ruling "on grounds that payment made by defendant's insurance carrier to plaintiff's collision carrier before suit filed (and not disclosed before case submitted to jury to plaintiff, plaintiff's counsel, or defendant's counsel) was not an advance payment written [sic] meaning of Section 25-1222.01. *Plaintiff's counsel acknowledges subrogation right of plaintiff's collision carrier.*" (Emphasis supplied.)

Thereafter the defendant filed a "motion for rehearing and reconsideration." On the rehearing the defendant offered an affidavit of an employee of Allstate which related facts of the provisions of its insurance policy to the defendant and its liability coverage of the accident, and that Allstate received a demand from USAA for reimbursement of its subrogation interest resulting from its having paid Jane's claim for property damage to her automobile. A copy of the Allstate draft payable to USAA in the sum of $1,655.89 in payment of the subrogation claim of USAA was attached as exhibit A to the affidavit. The affiant further stated that upon his in-

formation and belief the USAA "did pay to or on behalf of the plaintiff herein the sum of $1,655.89 in payment of the damages to the plaintiff's automobile sustained as a result of the accident which is the subject matter of this action," that payment by Allstate to USAA was subsequent to the time USAA had paid plaintiff, and that by reason of its subrogation interest Allstate was legally obligated to pay USAA. The trial court, over the objection of the plaintiff, received the affidavit into evidence. No evidence was adduced by the plaintiff. The court, in its order denying the defendant's motion for rehearing and reconsideration, refers to the facts contained in the affidavit admitted in evidence but held again that Allstate's payment to USAA "was not an 'accomodation' [sic] to plaintiff herein, nor a payment on plaintiff's behalf."

The appellee first contends that the decision of the trial court should be affirmed because appellant did not file a bill of exceptions containing the evidence adduced at the hearing on the motion to discharge the judgment. We reject this contention for two reasons. The first is that while no record was made as to any evidence adduced at this hearing, there is a finding of the trial court, in its written order denying the motion, that payment was made by the defendant's insurance carrier to plaintiff's collision carrier before suit was filed. The second reason that this contention of the appellee is not valid is the bill of exceptions that was made by the appellant of the hearing on his motion for rehearing and reconsideration.

We find no real factual dispute between the parties in the record. The trial court's orders overruling the appellant's motions after the verdict were based upon a disputed issue of law and not of fact. Where the transcript and record filed with this court are sufficient to present all issues before the court and the case is one for determination solely on matters

contained therein, no further bill of exceptions is required for preservation of any error of law on appeal. *Progressive Design, Inc. v. Olson Bros. Manuf. Co.,* 190 Neb. 208, 206 N.W.2d 832 (1973).

The sole remaining issue raised in this appeal is whether or not the appellant is entitled to credit for the $1,655.89 payment made prior to trial to the assignee or subrogee insurance company, USAA, by Allstate on the appellee's judgment. The appellant relies, in his claim to this credit, upon the statutory authority provided in Neb. Rev. Stat. § 25-1222.01 (Reissue 1979), which states: "No advance payments or partial payment of damages made by an insurance company or other person, firm, trust, or corporation as an accommodation to an injured person or on his behalf to others or to the heirs at law or dependents of a deceased person made under any liability insurance policy, or other voluntary payments made because of an injury, death claim, property loss, or potential claim against any insured or other person, firm, trust, or corporation thereunder shall be construed as an admission of liability by the insured or other person, firm, trust or corporation, or the payer's recognition of such liability, with respect to such injured or deceased person or with respect to any other claim arising from the same accident or event. Any such payments shall constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such injured or deceased person. In the event of a trial involving such a claim, the fact that such payments have been made shall not be admissible in evidence or brought to the attention of the jury, and the matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties."

The legislative history of this statute discloses that the original statute was amended to add the words "property loss," so that an insurance company

might pay benefits for damages to automobiles as well as for personal injuries and death claims without prejudicing its rights or without an admission of liability, and that it was in the public interest for the injured party to be accommodated in receiving payment for such property loss or medical bills before a complete settlement of the claim for injuries has been determined. The statute expressly provides that any such payment prior to a trial involving such a claim is not admissible during the jury trial. The matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties. This is the procedure that was followed by the appellant herein.

In this case the liability of the appellant was admitted and there was no dispute as to the amount of the property damage to the appellee's automobile. Under these circumstances it was necessary for Allstate as appellant's insurer to promptly settle the property damage portion of the appellee's claim. Neb. Rev. Stat. § 44-1525 (Reissue 1978).

After receiving notice from USAA that the appellee's claim for property damage to her automobile had been assigned or subrogated to it, Allstate was under a legal obligation to make payment to USAA and not to the appellee even though the action was pending in the name of the appellee, for the reason that USAA was then the real owner of the property damage claim for damages to appellee's automobile by reason of its subrogated interest.

The trial court held that Allstate was not entitled to credit for its previous payment to the appellee's subrogated or assigned insurance company, USAA. The reason given for its ruling was that this was not a payment made on appellee's behalf or as an accommodation to appellee under § 25-1222.01.

We find that this statute expressly includes payments "made under any liability insurance policy"

and payments "made by an insurance company." With reference to those persons to whom such payments are made prior to trial, the statute includes not only "an injured person" but also *"on his behalf to others."* (Emphasis supplied.) We hold that the trial court was in error to construe this language to exclude payments made to a subrogee or assignee of the injured person. This construction of the statute would require the appellant's insurance company to make two payments for the property damage in this case, including not only the prior payment that Allstate was legally obligated to make to USAA, but also payment to the appellee on the judgment rendered. We believe that the language and the intent of § 25-1222.01, which provides that an insurance company is entitled to credit on any judgment rendered against an insured for any payments or partial payment of claimed damages made on behalf of such party to an injured person *or on his behalf to others,* includes an assignee or subrogee of such injured person.

REVERSED AND REMANDED WITH DIRECTIONS TO DISCHARGE THE JUDGMENT.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. MAYHEW PRODUCTS CORPORATION, A NEBRASKA CORPORATION, APPELLANT, COUNTY OF YORK ET AL., APPELLEES.

318 N.W.2d 280

Filed April 16, 1982. No. 43993.

1. **Constitutional Law: Statutes.** In construing an act of the Legislature, all reasonable doubt must be resolved in favor of its constitutionality; and the burden of establishing the unconstitutionality of a statute is on the one attacking its validity, because statutes are presumed to be constitutional.
2. _____: _____. The due process clause of the fourteenth amendment of the Constitution of the United States requires that a stat-

ute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined.

3. **Constitutional Law: Statutes: Highways.** The portion of Neb. Rev. Stat. § 39-1320.06 (Reissue 1978) which prohibits the "erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska" is unconstitutionally vague.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and dismissed.

R. Steven Geshell of Robak & Geshell, for appellant.

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

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

CAPORALE, J.

Mayhew Products Corporation, defendant-appellant herein, appeals to this court from a decree entered by the District Court for York County, Nebraska, requiring it to remove an outdoor advertising billboard located along Interstate 80 near mileage marker 349.2 in York County. The court found that the sign as situated violated Neb. Rev. Stat. § 39-1320.06 (Reissue 1978). It provides in pertinent part: "Except as provided in this act, the erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska is hereby prohibited." Appellant contends, among other things, that the quoted portion of the statute is unconstitutionally vague. We are compelled to agree with appellant in that regard, and must therefore find and declare that the

quoted language of § 39-1320.06 is unconstitutional and unenforceable.

This case was tried before the District Court on October 2, 1980, on a stipulation of facts. The billboard advertises a Country Kitchen restaurant and a Red Arrow Campground. It is visible from the Interstate highway. The sign is owned by the appellant and was erected prior to March 27, 1972, on property which was originally part of the right-of-way of the York County road system. The county road was vacated on April 11, 1978, whereupon fee title to the property passed to Norman D. and Edna A. Erb. Mayhew Products Corporation and the Erbs have entered into a lease to maintain the sign at its present location.

The statute was enacted by the Legislature to comply with the federal Highway Beautification Act of 1965, 23 U.S.C. § 131 (1976). The federal act provides financial incentives to states which prohibit advertising structures along Interstate highways in conformance with the act, for the stated purposes of protecting the public investment in such highways, promoting the safety and recreational value of public travel, and preserving natural beauty. See § 131(a). See, also, Annot., Validity and Construction of State or Local Regulation Prohibiting Off-Premises Advertising Structures, 81 A.L.R.3d 486 (1977); Annot., Validity and Construction of State or Local Regulation Prohibiting the Erection or Maintenance of Advertising Structures within a Specified Distance of Street or Highway, 81 A.L.R.3d 564 (1977); Cunningham, *Billboard Control Under the Highway Beautification Act of 1965,* 71 Mich. L. Rev. 1295 (1973). If a state fails to provide for the effective control of advertising structures adjacent to federal-aid highways, the U.S. Department of Transportation is authorized to withhold 10 percent of the state's apportionment of federal-aid highway funds. See § 131(b).

As originally enacted, § 39-1320.06 (Reissue 1974) provided for the control of advertising structures adjacent to the federal highways as follows: "Except as provided in this act, the erection or maintenance of any advertising sign, display, or device within the area adjacent to and within six hundred sixty feet of the right-of-way of the National System of Interstate and Defense Highways, and the system of federal-aid primary roads of the State of Nebraska, and visible from the main-traveled way of such highway or road is hereby prohibited." That statute complied with the provisions of the federal act, and its constitutionality was upheld by this court in *State v. Mayhew Products Corp.,* 204 Neb. 266, 281 N.W.2d 783 (1979), as a reasonable and valid exercise of the State's police power. We found that the State was entitled to a mandatory injunction to require the removal of an advertising sign located within 660 feet of the right-of-way of the Interstate highway system. We also held that the sign owner had the remedy of inverse condemnation against the State upon proof that the sign was lawfully erected or in existence prior to March 27, 1972, the effective date of the statute.

In 1975 the federal Highway Beautification Act was amended to extend the control over all advertising structures to an area "more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way." See § 131(b). In order to comply with the federal act as amended, the Nebraska Legislature amended § 39-1320.06 in 1975 to provide: "Except as provided in this act, the erection or maintenance of any advertising sign, display or device *which is visible* from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of

the State of Nebraska is hereby prohibited." (Emphasis supplied.)

It is well established in this jurisdiction that in construing an act of the Legislature, all reasonable doubt must be resolved in favor of its constitutionality; and the burden of establishing the unconstitutionality of a statute is on the one attacking its validity, because statutes are presumed to be constitutional. *Evans v. Metropolitan Utilities Dist.,* 187 Neb. 261, 188 N.W.2d 851 (1971). See, also, *Aschenbrenner v. Nebraska P. P. Dist.,* 206 Neb. 157, 291 N.W.2d 720 (1980).

However, this court has also stated that the due process clause of the fourteenth amendment of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined. *Linn v. Linn,* 205 Neb. 218, 286 N.W.2d 765 (1980); *Heywood v. Brainard,* 181 Neb. 294, 147 N.W.2d 772 (1967).

We must determine that the 1975 amendment to the statute extending the area regulated from signs located within 660 feet of the Interstate right-of-way to signs visible from the right-of-way is impermissibly vague.

The act fails to define with certainty the extent to which billboards are "visible" under the statute. The "visible" criterion is not vague merely in the sense that it is an imprecise term; rather, the statute fails to specify any standard by which visibility might be measured. The term "visible" as defined in Webster's Third New International Dictionary, Unabridged (1968), contains the following definitions, among others: "capable of being seen," "tangibly present," "easily seen," "conspicuous," "in full

view," and "can readily be seen." Applying these terms to the statute, it is uncertain if visibility is meant to be the legibility of the writing on the billboard from the Interstate right-of-way or the possibility of observing a billboard in the far distance regardless of its legibility from the highway.

In *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), the U.S. Supreme Court stated: "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide *explicit standards* for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Emphasis supplied.) See, also, *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972); *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939); *Connally v. General Const. Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960).

We therefore hold that the portion of § 39-1320.06 which prohibits the "erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska" is unconstitutionally vague. The statute pro-

vides no standards by which to calculate with precision the meaning of the term "visible." It creates the risk of ensnaring innocent landowners or lessees and condemns the application of the statutory provisions to arbitrary guesswork by the Department of Roads. This indefiniteness runs afoul of the due process requirements that persons be given fair notice of the conduct to be avoided.

In view of the foregoing analysis and disposition of the case, it is unnecessary to address appellant's other assignments of error.

The decree of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

RHEN MARSHALL, INC., A CORPORATION, APPELLANT, V. PUROLATOR FILTER DIVISION, PUROLATOR, INC., A CORPORATION, APPELLEE.

318 N.W.2d 284

Filed April 16, 1982. No. 44079.

Offers to Buy or Sell. Advertising circulars soliciting orders for merchandise are not ordinarily intended or understood as offers to sell. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain, rather than an offer.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Gary G. Thompson, for appellant.

Ronald G. Sutter of Everson, Noble, Wullschleger, Sutter, Sharp & Korslund, for appellee.

Heard before MCCOWN, HASTINGS, and CAPORALE, JJ., and STUART and HIPPE, D. JJ.

STUART, D.J.

The appellant (Rhen Marshall) brought an action based on contract against the appellee (Purolator).

After trial the District Court found generally for Purolator and dismissed Rhen Marshall's petition. We affirm.

In the fall of 1977 Rhen Marshall received in the mail an advertising circular from Purolator entitled "Christmas Comes Early at Purolator," and setting forth premiums which could be selected along with an order for Purolator brand merchandise. The premiums varied according to the size of the order, and "Deal 5A" stated that, with an order for 100,000 pounds of Purolator brand products, Purolator would send its customer a premium of a new 1978 Buick Electra automobile and 100 EK-6 Kodak Instant cameras, and stating "you will be billed $500.00 for the package which has a manufacturer's suggested retail value of $17,450.00." Rhen Marshall placed an order for over 100,000 pounds of Purolator oil filters and also ordered "Deal 5A as outlined in your brochure." The advertising circular did not contain provisions for billing or for discounts. Rhen Marshall's order requested a 5 percent truckload discount and a "30-60-90 day billing." (In previous dealings between these parties, a "30-60-90 day billing" meant a discount of 2 percent if paid within 30 days, a discount of 1 percent if paid within 60 days, or payment in full at the end of 90 days.) Upon receipt of this order, Purolator telephoned Rhen Marshall and stated that its order was not accepted. No oil filters or premiums were delivered and no payment was made. Rhen Marshall's suit was brought on the theory that the circular received by it was an offer and the order placed by it was an acceptance of that offer and that damages resulted from the nonfulfillment of such contract.

This general subject has been covered in text form by Professor Williston as follows:

"Frequently negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms and

yet the natural construction of the words and conduct of the parties is rather that they are inviting offers, or suggesting the terms of a possible future bargain, than making positive offers. Especially is this likely to be true where the words in question are in the form of an advertisement. Thus, if goods are advertised for sale at a certain price, it is not an offer, and no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at that price. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer. [Citing *Poposia Coal Co. v. Nye-Schneider-Fowler Co.*, 106 Neb. 4, 182 N.W. 586 (1921).] So a published price list is not an offer to sell the goods listed at the published prices. Even where the parties are dealing exclusively with one another by private letters or telegrams, or by oral conversation, the same question may arise; and language that at first sight may seem an offer may be found merely preliminary in its character." 1 Williston on Contracts § 27 at 61-62 (3d ed. 1957).

In *Nebraska Seed Co. v. Harsh,* 98 Neb. 89, 152 N.W. 310 (1915), the defendant sent a letter to plaintiff in which he stated he had about 1,800 bushels of millet seed, of which he was mailing them a sample. He further stated: "I want $2.25 per cwt. for this seed f.o.b. Lowell." Upon receipt of the letter the plaintiff replied in part: "Sample and letter received. Accept your offer." *Id.* at 89-90, 152 N.W. at 310. The defendant refused to deliver and the plaintiff brought suit for such nondelivery. We ruled therein that the letter was not an offer but was an invitation for offers, quoting in part: " 'If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the

public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases.' " *Id.* at 91, 152 N.W. at 311.

Here it should be noted that Rhen Marshall set forth conditions in its order that were not previously discussed by the parties. The sales promotion circular by Purolator did not contain terms with regard to discounts or billing. Rhen Marshall's order requested a 5 percent truckload discount and a 30-60-90-day billing. Rhen Marshall had attached conditions in its order which were usual in its previous dealings with Purolator, but the discounts offered by the promotion were substantial and it could not be assumed by Rhen Marshall that Purolator would also give other, additional discounts.

We hold that the brochure was not an offer by Purolator, but that Rhen Marshall's order was itself an offer which Purolator did not accept. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. LEROY B. FORTNER, APPELLANT, V. WARD URBOM AND DAVID URBOM, SPECIAL PROSECUTORS FOR THE COUNTY OF RED WILLOW, APPELLEES.

318 N.W.2d 286

Filed April 16, 1982. No. 44481.

1. **Mandamus.** Mandamus is an extraordinary remedy which is not awarded as a matter of right.
2. _____. A writ of mandamus should not issue where there is another plain and adequate remedy available.
3. **Mandamus: Plea Bargains.** Mandamus is not available to enforce a plea agreement or similar agreement in a criminal pro-

ceeding, because another plain and adequate remedy is available.

4. **Plea Bargains.** The State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by the defendant constituting detrimental reliance upon the agreement.

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

John J. Battershell of Cunningham Law Offices, P.C., for appellant.

Ward C. Urbom and David W. Urbom of Urbom Law Offices, P.C., for appellees.

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

HASTINGS, J.

The relator, LeRoy B. Fortner, filed a motion in the District Court seeking an alternative writ of mandamus against the respondents, Ward Urbom and David Urbom, to compel respondents to carry out an agreement not to prosecute relator. From a judgment overruling the motion and denying the writ, the relator has appealed.

Certain criminal charges were pending in the county court of Red Willow County against Fortner involving a relationship with McCook Equity Exchange. The State of Nebraska, through a Red Willow County deputy county attorney and a special prosecuting attorney, entered into a stipulation with Fortner in the criminal case pending in county court. The agreement provided generally that an offer had been made (presumably by Fortner) to McCook Equity to settle all civil cases pending for the approximate amount of $653,000. The agreement further provided that whether the offer was accepted by McCook Equity Exchange or not, all pending charges against Fortner arising out of his employment by McCook Equity as general manager

would be reduced to one misdemeanor. In addition, the prosecuting attorneys agreed to recommend that a fine plus costs be the only penalty assessed against Fortner.

The settlement was never completed. Because of certain developments, the deputy county attorney and the special prosecuting attorney either withdrew or were removed from the case, and the respondents were appointed as special prosecutors to replace them. The State of Nebraska, through its representatives, has refused to abide by or carry out the agreement set forth in the stipulation. As a matter of fact, both parties concede in their briefs that all charges or complaints pending in county court were dismissed by the respondents, who then filed a new complaint in the District Court charging five separate felony counts.

Fortner's only assignment of error is that the District Court erred in refusing to issue a writ of mandamus. In order to resolve that issue, we must address two preliminary questions. First, is mandamus a proper remedy for use in a criminal case to attempt to enforce the terms of an agreement not to prosecute, and, secondly, was the State entitled to unilaterally withdraw or revoke the agreement under the circumstances of this case?

"The writ of mandamus may be issued to any . . . person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. . . ." Neb. Rev. Stat. § 25-2156 (Reissue 1979). "Mandamus is an extraordinary remedy which is not awarded as a matter of right. . . . The writ should not issue where there is another plain and adequate remedy available." *State ex rel. Newbold v. County of Buffalo,* 202 Neb. 813, 814, 277 N.W.2d 246, 248 (1979).

Fortner had another plain and adequate remedy by way of a motion requesting the District Court to enforce the agreement or dismiss the felony pro-

ceedings. See *State v. Thompson,* 48 Md. App. 219, 426 A.2d 14 (1981). Therefore, in our opinion, mandamus was not a proper remedy in this instance.

However, there is an additional reason why the writ should not be issued in this case. In support of his contention that he was entitled to enforce what he calls the "plea agreement," Fortner relies upon the rule laid down in *Santobello v. New York,* 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). In that case, the Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. However, in that case, the defendant had pleaded guilty, had changed positions to his detriment, and was then denied the "benefit of his bargain."

All of the other cases cited by Fortner involved a detrimental reliance by the defendant, such as, a plea of guilty, furnishing of evidence of criminal activity, self-incrimination, undercover work, or the like.

Shields v. State, 374 A.2d 816 (Del. 1977), is more nearly in point with the case at hand. Shields had been indicted for first degree murder and rape. A plea bargain was made whereby he would enter pleas to second degree murder and rape. Later, *and* for reasons never given, the deputy attorney general announced that the State was unilaterally withdrawing from the plea bargain agreement. In denying Shield's motion for specific performance of the agreement, the Delaware court stated: "We hold that the State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement." *Id.* at 820. To the same effect, see *State v. Wheeler,* 95 Wash. 2d 799, 631 P.2d 376 (1981).

No plea had ever been entered by Fortner. By agreeing to submit a settlement proposal of his civil liability to McCook Equity, he had in no way been subjected to any detrimental reliance. The evidence is conclusive that he furnished no additional information as to the criminal action. The respondents were well within their rights in refusing to carry out the agreement.

The judgment of the District Court dismissing the relator's motion for a writ of mandamus was correct and is affirmed.

AFFIRMED.

IN RE INTEREST OF SHEARETTAA IONE SHEPHERD, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
JACQUALYN SHEPHERD, APPELLANT.
318 N.W.2d 288

Filed April 16, 1982. No. 81-607.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights requires a de novo review.
2. **Parental Rights.** The right of a parent to maintain custody of his or her child is a natural but not an inalienable right; the public has a paramount interest in the protection of the rights of a child.
3. _____. Courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
4. _____. An order of the juvenile court terminating parental rights must be based on clear and convincing evidence.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Steven D. Wolf of Westergren, Hauptman & O'Brien, P.C., for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly, for appellee.

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

CAPORALE, J.

Jacqualyn Shepherd appeals to this court from an order entered by the separate juvenile court of Douglas County, Nebraska, dated June 9, 1981, terminating her parental rights to Shearettaa Ione Shepherd, a minor, born September 5, 1973. That order also terminated the parental rights of Alvin Kearney, the natural father, but that portion of the order has not been appealed.

The two issues presented are (1) whether the order of the juvenile court terminating the parental rights of the appellant is supported by the evidence, and (2) whether the court erred by failing to specify the specific grounds upon which the termination was based. We find the assignments to be without merit and affirm.

We review the record in light of the rule that an appeal from an order terminating parental rights requires a de novo review. *In re Interest of Spradlin,* 210 Neb. 734, 317 N.W.2d 59 (1982); *In re Interest of Farmer,* 210 Neb. 500, 315 N.W.2d 454 (1982); *In re Interest of Stoppkotte,* 210 Neb. 1, 312 N.W.2d 454 (1981).

A petition was filed by the county attorney in the interest of Shearettaa Ione Shepherd on February 6, 1980, alleging the child as being homeless or destitute, or without proper parental support, under the terms of Neb. Rev. Stat. § 43-202(1) (Reissue 1978), and for being a child lacking proper parental care by reason of the fault or habits of her natural mother within the meaning of Neb. Rev. Stat. §§ 43-202(2)(b) and 43-209(2) (Reissue 1978). A detention hearing was held on February 12, 1980. The appellant did not appear at that hearing and the child was placed in the temporary custody of Douglas County Social Services for placement in a foster home.

The cause then proceeded to an adjudication hearing on October 8, 1980, which the natural mother failed to attend. The testimony of several witnesses appearing at the hearing established that the appellant abandoned custody of Shearettaa upon her birth to the child's maternal grandmother, provided little support for the child, and, on occasion, physically abused her daughter.

A Child Protective Services worker, Colleen Kibbi-Vest, testified that Shearettaa has lived with her mother for only 5 months of her life, from late August 1979 to January of 1980. Shortly after her birth on September 5, 1973, Shearettaa was relinquished by her mother to the care and custody of her maternal grandmother. It appears the maternal grandmother provided care until her death in November of 1977, whereupon the child was passed around amongst various family members before being returned to her natural mother in August of 1979. This witness was told by Jacqualyn Shepherd that she had disciplined the child by using her hands or a belt and that on at least one occasion she had used an extension cord upon the child. The natural mother also admitted to the Child Protective Services worker that she used marijuana and alcohol in the home while the child was present, and that she had on numerous occasions left the child alone without proper supervision. The testimony also reveals that Shearettaa was excessively absent from school because the natural mother left it to this 7-year-old child to wake and prepare herself for school.

Sandra Cotton, director of family services for the Salvation Army at Booth Memorial Hospital, testified that she had provided emergency housing for Jacqualyn Shepherd and her daughter at the facility on December 11, 1979. The Shepherds' stay at that facility was terminated after 1 day because appellant engaged in fights with other residents and failed to follow the rules of the facility. She was observed

slapping the child about the head.

Anthony Hadley, a member of the Omaha Police Department, testified that he observed bruises on Shearettaa on January 23, 1980, which the child said she suffered upon being whipped by her mother. Officer Hadley proceeded to issue a citation for child abuse to Jacqualyn Shepherd, and, upon questioning, the natural mother admitted to slapping the child with two belts.

On December 3, 1980, the court found Shearettaa to be a neglected and abused child within the meaning of § 43-202(2) and § 43-209(2). A review hearing was held on February 4, 1981, which the appellant attended. At this proceeding, various exhibits were admitted which indicate that during the year Shearettaa was in foster care the appellant had visited her only three times. The record of that proceeding also indicates that Jacqualyn Shepherd expressed little concern about the possibility of having her parental rights terminated. The court, however, kept parental rights under advisement and ordered the appellant to comply with the plan of rehabilitation under the supervision of the juvenile court and Douglas County Social Services upon the assurances by appellant's counsel that she was willing to participate in such a program.

Another hearing was held on June 8, 1981, which proceeding the mother failed to attend. It was established that the appellant was not cooperating with Douglas County Social Services; was not participating in the court-ordered rehabilitation program; had failed to undergo certain psychological, psychiatric, and medical evaluations; and had failed to maintain regular visitations with her child. Upon the recommendation of both the child's guardian ad litem and the juvenile court service officer, the parental rights of Jacqualyn Shepherd were terminated.

As we have held in the past, the right of a parent

to maintain custody of his or her child is a natural but not an inalienable right; the public has a paramount interest in the protection of the rights of a child. *In re Interest of J.L.L.,* 209 Neb. 76, 306 N.W.2d 175 (1981).

Section 43-209 sets out six independent conditions, any one of which existing alone will justify termination of parental rights. The applicable portion of the statute in this case states: "The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: . . . (2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection."

However, courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *In re Interest of D.,* 209 Neb. 529, 308 N.W.2d 729 (1981). Furthermore, an order of the juvenile court terminating parental rights must be based on clear and convincing evidence. *In re Interest of Farmer,* 210 Neb. 500, 315 N.W.2d 454 (1982); *In re Interest of Hiatt,* 209 Neb. 195, 307 N.W.2d 108 (1981); *Santosky v. Kramer,* 50 U.S.L.W. 4333, decided March 24, 1982.

The record in this case clearly and convincingly establishes a sad history on the part of the appellant in the continual neglect, and ofttimes abuse, of her minor daughter. The record supports the finding that the appellant has been unable, or unwilling, to discharge her proper parental responsibilities and there are no reasonable grounds upon which to believe that she has or will make attempts to rehabilitate herself. The appellant has expressed much

anger, brutality, and inhumane ambivalence toward the care and custody of her child. On her birth, Shearettaa's custody was relinquished by her mother to other relatives, and except for a 5-month period in her life there has been very little interaction between the girl and her natural mother. The uncontroverted evidence clearly shows that after Shearettaa was returned to her mother's care, she was abused by serious beatings and not provided supervision or financial or emotional support.

At the adjudication hearing held on December 3, 1980, the court specifically found Shearettaa to be a minor within the meaning of § 43-202(2) and § 43-209(2). This was a clear and specific finding by the court of the statutory grounds upon which it was proceeding against the appellant. We cannot agree with appellant's contention that the order of termination of June 8, 1981, does not intimate the grounds which were used by the court in terminating her parental rights. The court was clearly proceeding under § 43-209(2). Despite attempts by the juvenile court to provide methods of rehabilitation, the mother was unwilling to provide proper parental care and support. The trial court made a specific finding under that statutory section reflective of the substantial and continuous neglect of Shearettaa by her natural mother.

It is clear that the court acted properly and in the best interests of the child under the facts of the case as set out and discussed above. The order of the court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MICHELLE A. HIROSS, APPELLANT.
318 N.W.2d 291

Filed April 16, 1982. No. 81-656.

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.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

E. Dean Hascall of Hascall, Jungers & Garvey, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Michelle A. Hiross, appeals from a conviction and sentence imposed upon her for the crime of contributing to the delinquency of a minor in violation of Neb. Rev. Stat. § 28-709(1) (Reissue 1979). We affirm.

Hiross was originally charged in the county court of Sarpy County, Nebraska. Through her privately retained counsel, she entered a plea of not guilty and trial was thereafter held to the court on April 7, 1981. The trial court found Hiross guilty of the charge, a Class I misdemeanor, and sentenced her to serve 30 days in jail and to pay the costs incurred in the prosecution of the case.

Hiross then filed a timely appeal to the District Court for Sarpy County, Nebraska, whereupon trial was had to the District Court. The District Court affirmed the decision of the county court, including the sentence previously imposed.

Hiross now appeals to this court, raising three assignments of error. First, she maintains that the

trial court erred in failing to order a presentence investigation prior to imposing sentence.

Hiross' second assignment of error is that the trial court erred in failing to grant her a trial to a jury in view of the fact that the possible sentence for a violation of a Class I misdemeanor is up to 1 year's imprisonment.

The third and final assignment raised by Hiross is that § 28-709 is unconstitutional in that it is void for vagueness.

We may quickly dispose of each of these matters in the order in which they are presented to us.

Following the trial to the county court, the court inquired of counsel whether a presentence investigation was desired. Although this was a misdemeanor and therefore not required, the court nevertheless indicated to Hiross that the court was willing to obtain a presentence investigation prior to imposing sentence. See, Neb. Rev. Stat. § 29-2261 (Reissue 1979); *State v. Cardin,* 194 Neb. 231, 231 N.W.2d 328 (1975); *State v. Jablonski,* 199 Neb. 341, 258 N.W.2d 918 (1977). In response to the inquiry, counsel for Hiross advised the court that she did not desire a presentence investigation, desired to waive the court's offer to obtain one, and desired to be sentenced immediately. Having waived the court's offer to provide the appellant with a presentence investigation, she is not now in a position to claim error.

With regard to the second issue, that she was entitled to trial by jury, we are likewise confronted with the same situation as with the first assignment of error. Hiross made no demand for a jury trial, entered a plea of not guilty, and voluntarily submitted her case to a trial by the court. In *State v. Mangelsen,* 207 Neb. 213, 215, 297 N.W.2d 765, 767 (1980), we said: "Nebraska provides a statutory right to jury trial in a criminal case in county or municipal court, with certain exceptions not appli-

cable here, but the statute requires a demand to invoke the right. See Neb. Rev. Stat. § 24-536 (Reissue 1979)." Hiross did not make such request. Nor did she at any time prior to her appearance in this court raise any issue as to the constitutionality of Neb. Rev. Stat. § 24-536 (Reissue 1979) insofar as it requires the defendant to request a jury trial. This is not a case where, in return for waiving her rights, the defendant pled guilty as was the case in *State v. Tweedy,* 209 Neb. 649, 309 N.W.2d 94 (1981). Here Hiross pled not guilty and voluntarily went to trial by the court even though the statute gave her a right to a jury trial. We believe that she has waived any objection she might otherwise have had. The issue as raised by Hiross is simply not before us at this time and the assignment must likewise be overruled.

Turning to her last and final assignment, that the act itself, § 28-709(1), is unconstitutional, we again note that the issue of the constitutionality of the statute was raised for the first time in the District Court on appeal. We have many times noted that in order for the constitutionality of a statute to be considered by this court, the issue must have been properly raised in the trial court. In *State v. Irwin,* 208 Neb. 123, 127, 302 N.W.2d 386, 389 (1981), we said: " '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. McConnell,* 201 Neb. 84, 266 N.W.2d 219 (1978). Having failed to properly raise the issue in a timely fashion in the county court, the issue is deemed waived. The third assignment must likewise be overruled.

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

AFFIRMED.

VIRGINIA T. HANZLIK, APPELLANT, V.
FREDERICK F. PAUSTIAN, APPELLEE.

318 N.W.2d 712

Filed April 23, 1982. No. 43877.

1. **Summary Judgment.** On a motion for summary judgment, the question which must be decided is whether or not there is a genuine issue as to any material fact, and not how that issue is to be decided.
2. _____. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of cases in which there is no genuine claim or defense.
3. _____. In considering a motion for summary judgment the trial court must take the view of the evidence most favorable to the party against whom the motion is directed.
4. _____. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.
5. **Medical Malpractice: Expert Witnesses.** Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony.
6. **Summary Judgment.** Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact.
7. _____. On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law.
8. _____. The movant on a motion for summary judgment may discharge his burden of proof by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position.
9. _____. A prima facie showing by the movant for summary judgment, i.e., the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial, shifts the burden of producing evidence to the party opposing the motion.
10. _____. A prima facie showing for summary judgment having been made, it should be granted to the movant unless the opposing party offers competent evidence that there is a genuine issue as to a material fact.
11. _____. In the absence of a prima facie showing by the movant that he is entitled to summary judgment, the opposing party is not required to reveal the evidence which he expects to produce at trial to prove the allegations of the petition.

Appeal from the District Court for Douglas County:

JAMES F. BUCKLEY, Judge. Reversed and remanded.

Jon B. Abbott, for appellant.

Sodoro, Daly & Sodoro, for appellee.

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

HASTINGS, J.

This is a medical malpractice case brought by Virginia T. Hanzlik against Frederick F. Paustian, a physician. Both parties filed motions for summary judgment. A hearing was had and evidence was adduced, consisting of answers to interrogatories, two depositions of the plaintiff, and one of the defendant. The District Court overruled the motion of Mrs. Hanzlik, but sustained that of Dr. Paustian, and ordered the petition dismissed. The court by its judgment found that in order to establish the acts of negligence as alleged in the petition, it would require proof by expert medical testimony. The court determined that the plaintiff had failed to submit such evidence, and concluded that there was no genuine issue of fact. It is such findings which the plaintiff assigns as error.

In her petition, the plaintiff alleged that upon the recommendation of the defendant, she submitted to a dilation of her esophagus which caused a perforation resulting in secondary pneumonia, and necessitated open chest surgery. The negligent acts of which she alleged the defendant was guilty were specified to be: (1) The failure to terminate dilation when he knew or in the exercise of reasonable medical care he should have known that to proceed would result in a complete perforation; (2) The failure to terminate dilation when, in the exercise of reasonable care that an ordinary (nonmedical) person would employ, he should have known that to proceed would result in a complete perforation; and (3) A failure to inform the plaintiff fully and ade-

quately of the serious complications which had developed in the dilation procedure when the defendant in the exercise of ordinary care would know that plaintiff would not consent to further dilation.

For a factual background we will first examine the deposition of Dr. Paustian. He testified that upon examination of Mrs. Hanzlik in Bishop Clarkson Memorial Hospital in August of 1974, he found that she was suffering from a distal esophageal stricture caused by the ingestion of lye some 40 years earlier. Following X-ray studies and an upper gastrointestinal endoscopy, he advised Mrs. Hanzlik that several alternatives for management of her problem were available. The first was to leave the condition as it was; the second, to proceed with upper dilation of the esophagus through utilization of instruments of progressively expanded caliber; and the third, surgical resection of the esophagus. Dr. Paustian recommended dilation because the first alternative was unsatisfactory under the circumstances, and the alternative involving surgery carried a greater mortality risk. According to the defendant's deposition, he explained in detail to the plaintiff the dilation procedure as well as pointing out to her the risk of disrupting the mucosa and resulting bleeding, along with the more dangerous risk of perforating the esophagus. Following this, the procedure of dilation was commenced.

The defendant's deposition further reveals that dilation was done on a daily basis from August 16th through the 19th. Following the August 19th dilation, the plaintiff had modest postdilation pain and some blood appeared on the dilator. An X-ray was taken to determine if there had been any disruption of the integrity of the esophageal wall. A report of the X-ray study stated: "The mucosa is minimally irregular, suggesting that there may be a superficial tear now present." No dilation was done on the 20th because of the postdilation pain, but by the 21st the

pain had subsided, and further dilation was done with the resultant presence of chest pain, a temperature of 101, and a notation of suspected perforation. There was no dilation on the 22nd, but the procedure was done on the 23rd. As of the 23rd, the plaintiff still had mild pain, but, according to the defendant, the "patient [was] very anxious to continue with dilations," and following that dilation a good deal of blood was noted on the sputum, raising a question of confined perforation. An esophagram was done without perforation, and a second dilation with a larger caliber instrument was done on the 23rd, with relative ease. There was a dilation procedure on the 24th. Mrs. Hanzlik's treatment terminated in a ruptured esophagus following the dilation on the 24th, which required that plaintiff undergo major surgery for the drainage of the chest area and examination of the esophagus.

According to the defendant's testimony, he suspected a recurrent confined perforation on August 21st, but he stated that mucosal tears frequently occur, and such condition is not a "contraindication to proceeding with continued dilation." Other than the various hospital records to which Dr. Paustian referred during his testimony, there was no further medical testimony or evidence offered by either party.

Mrs. Hanzlik's answers to interrogatories established that before beginning treatment, the defendant had described to her the procedure involving an "esophagus scope," and warned her that dilation could result in a perforation of the esophagus which would require immediate surgery. She also agreed that she understood his explanation. She admitted that as of the date of answering the interrogatories, she had not employed any experts to consult with her about her lawsuit.

In her deposition, Mrs. Hanzlik also agreed that Dr. Paustian had explained to her the procedure for

dilating or "stretching" her esophagus. She again conceded that he told her about the risk of perforation: "It was a risk. . . . [I]f it did get perforated . . . he would have to take me to surgery right away." It was the plaintiff's belief that the perforation occurred during the last dilation. At one point in her deposition she stated that she did not remember whether the defendant had talked to her about continuing treatments, and in a later portion of the same deposition she admitted that she was asked at each step whether they should proceed with the next treatment or not.

Mrs. Hanzlik said that she was not complaining in her lawsuit about any treatment by Dr. Paustian until the last time, and then she thought he surely must have known that he did something and still she was not taken to surgery until she was "half dead." As a matter of fact, she stated that it was not Dr. Paustian who ever advised her of the perforation, but rather the physician who performed the surgery. She acknowledged, of course, that she would not have expected Dr. Paustian to advise her of the perforation until it had actually happened. However, she went on to say that the doctor had "said there was risks, but the thing I'm getting at, he surely must have known he done that. Why did he . . . wait so many days and let me lay there before he did something about it?"

The question which must be decided on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue is to be decided. *Scheideler v. Elias,* 209 Neb. 601, 309 N.W.2d 67 (1981). The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of cases in which there is no genuine claim or defense. *Brown v. Nebraska P. P. Dist.,* 209 Neb. 61, 306 N.W.2d 167 (1981). The trial court, in considering such a motion, must take the view of the evidence most favor-

able to the party against whom the motion is directed. *Scheideler, supra.* "Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt." *Id.* at 605, 309 N.W.2d at 70.

There appears to be no dispute as to the primary facts. The parties are in agreement that the defendant explained to Mrs. Hanzlik the medical procedures to be employed and the risks which were involved, and that she understood the explanation and warning. Also, it is apparent that the result which Dr. Paustian recognized as a possibility became a reality. However, contrary to the plaintiff's contention, we do not believe, under the evidence and the circumstances in this case, that "the recognition of the alleged negligence may be presumed to be within the comprehension of laymen." *Halligan v. Cotton,* 193 Neb. 331, 336, 227 N.W.2d 10, 13 (1975). To the contrary, the applicable rule is as expressed in *Halligan, supra,* that "whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony." *Id.* at 335, 227 N.W.2d at 12-13.

However, we also cannot agree with the defendant's claim that Mrs. Hanzlik was obligated to come forward at this stage of the proceedings with expert witnesses to prove the existence of negligence on the part of Dr. Paustian. Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact. *Metro. Tech. Community College v. South Omaha Industrial Park,* 207 Neb. 472, 299 N.W.2d 535 (1980). Dr. Paustian's deposition explained the surgical procedures followed by him, and detailed the possible consequences which might be expected therefrom, but nowhere do we find any evidence that such procedures met the accepted standards of reasonable medical care.

On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law. The movant may discharge this burden of proof by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position. "A prima facie showing by the movant for summary judgment—*i.e.,* the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial—shifts the burden of producing evidence to the party opposing the motion. Summary judgment should be granted to the movant unless the opposing party offers competent evidence . . . that there is a genuine issue as to a material fact." *Nader v. de Toledano,* 408 A.2d 31, 48 (D.C. 1979).

The defendant failed to make a prima facie showing of the absence of negligence on his part, and therefore no burden of producing evidence shifted to the plaintiff. Without that prima facie showing, a plaintiff faced with a motion for summary judgment is not required to reveal the evidence he expects to produce to prove the allegations of the petition. *Bishop Cafeteria Co. v. Ford,* 177 Neb. 600, 129 N.W.2d 581 (1964).

The defendant was not entitled to a summary judgment, and the judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

CAPORALE, J., disqualified.

WILLIAM G. MEYERS, APPELLANT, V.
FROHM HOLDINGS, INC., A CORPORATION, APPELLEE.
318 N.W.2d 716

Filed April 23, 1982. No. 43935.

1. **Contracts: Parol Evidence: Accord and Satisfaction.** Parol evidence is not admissible to vary the terms of a written agreement constituting an accord and satisfaction, unless said agreement is ambiguous.
2. **Contracts.** When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.
3. _____. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.
4. _____. A contract is not ambiguous within that sense merely because it may be difficult to construe. The construction of a contract, if needed, being a question of law for the court as well as a duty that rests upon the court, there can be no ambiguity within the rule to which we have referred unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Martin A. Cannon of Matthews & Cannon, P.C., for appellant.

Lyle E. Strom and David S. Houghton of Fitzgerald, Brown, Leahy, Strom, Schorr & Bartmettler, for appellee.

Heard before KRIVOSHA, C.J., BRODKEY, WHITE, and HASTINGS, JJ., and WINDRUM, D.J.

WINDRUM, D.J.

Plaintiff was employed by Union Packing Company, a Nebraska corporation, for many years. Frohm Holdings, Inc., is a successor company. The company was solely owned, or nearly so, by one Carl Frohm, its founder. Plaintiff performed many duties for the company, as directed by Carl Frohm. At

his behest, a separate corporation, named Diamond Investment Company, was created, with Carl Frohm and plaintiff as the incorporators. All its capital was loaned to it by Union Packing Company. Plaintiff, in his petition, alleges all the stock of Diamond was owned by Carl Frohm. Initially, the purpose of the corporation was to purchase and relocate houses and thereafter to rent and to sell same, and to feed cattle. Plaintiff claims he spent many hours in connection with the Diamond Investment Company but never received any income.

At the time of Carl Frohm's death, Diamond still had three houses left requiring the services of plaintiff. There were no negotiations for the sale of the plant of Union Packing Company. After Carl Frohm's death, plaintiff claimed that Carl Frohm, on behalf of Union Packing Company, had promised to someday pay him for the services he performed for Diamond, and further promised that plaintiff would receive $100,000 from Union when its plant was sold, if he was still an employee, to reimburse him for the delay in payment.

Prior to September 16, 1977, plaintiff, who was then president of Union, reported that there were very few assets in Diamond, and the liabilities of Diamond to Union were extensive. He suggested Diamond be liquidated, and he volunteered to assign all of the stock of Diamond issued in his name, which was 50 percent of the total, to Union, without consideration, for the purpose of liquidating Diamond. No action was taken.

On September 16, 1977, the board of Union accepted an offer to sell out. At that time, plaintiff informed the board of Union of his claim for $100,000 from the proceeds of the sale. The board not only denied the existence of such an agreement but, and the only issue presented here, alleged that the matter of all special deferred compensation had been fully settled and compromised by a certain written

agreement between the parties dated December 28, 1976.

Plaintiff further claims he was promised that when all the assets of Diamond were disposed of he would be then paid for the services he performed for Diamond. At the time he made the claim for $100,000 there were still three houses to be sold. Prior to suit they were sold. Plaintiff claims he is now entitled to be paid for such services and the $100,000. Union claims the matter of payment for services was likewise settled by the agreement of December 28, 1976, which said agreement constituted an accord and satisfaction.

Paragraph 9 of the agreement dated December 28, 1976, contained, among other things, the following sentence: "Meyers agrees, however, that his claim to any special deferred compensation is entirely resolved and satisfied by this agreement." In sustaining the motion for summary judgment of defendant, the trial court noted that there was no ambiguity, stating that the "dictionary definition of 'deferred' is 'put off; withheld for or until a stated time.' "

A recitation of a portion of the evidence adduced by way of a deposition and an affidavit of plaintiff and an affidavit of the attorney of Union concerning the agreement dated December 28, 1976, is appropriate.

While Carl Frohm was ill, and shortly before his death, plaintiff and Union executed a written document providing for disability benefits, death benefits, and retirement benefits to plaintiff. This was dated back to October 8, 1973. The agreement was executed on behalf of Union by Carl Frohm's brother, but was never submitted to the board of directors of Union for approval. Carl Frohm died July 18, 1976. At the directors' meeting of August 23, 1976, plaintiff presented his claim to the deferred compensation arrangement. The written agreement, so backdated, did not mention any claim for services ren-

dered through Diamond, nor did it refer to $100,000 to be paid when the plant was sold. On December 28, 1976, and later approved by the board of directors of Union, plaintiff and Union entered into the "Deferred Compensation Agreement." The preambling clauses stated, among other things:

"WHEREAS, Meyers claims that he was promised special deferred compensation benefits, but Union disputes and denies Meyers' entitlement thereto; and

"WHEREAS, Meyers is indebted to Union in the sum of $175,000 . . .; and

"WHEREAS, the parties have agreed to compromise the aforementioned disputes as more particularly provided hereinafter."

Paragraph 9 of the agreement provides as follows: "The benefits provided for Meyers and/or his spouse and estate under this agreement are in addition to any other regular pension, retirement, disability or fringe benefits which Union provides for some or all of its eligible employees, and Meyers shall be entitled to all such other benefits for which he is eligible by reason of his employment by Union in addition to the benefits provided under this agreement. Meyers agrees, however, that his claim to any special deferred compensation is entirely resolved and satisfied by this agreement."

In *High-Plains Cooperative Assn. v. Stevens,* 204 Neb. 664, 284 N.W.2d 846 (1979), we stated that the essential elements in accord and satisfaction are: (1) A bona fide dispute between the parties; (2) Substitute performance tendered in full satisfaction of the claim; and (3) Acceptance of the tendered performance. Existence of these elements in this case is evident.

Surely no one would suggest that, if the parties so intend, an accord and satisfaction may not preclude recovery for any and all existing claims between the parties, whether in dispute or not. The key element

of accord and satisfaction is the intention of the parties, which, although as a general rule presents a question of fact, becomes a question of law when the evidence creates no conflict as to intention. *Black v. Denver United States National Bank,* 362 F.2d 38 (8th Cir. 1966), *cert. denied* 385 U.S. 990, 87 S. Ct. 596, 17 L. Ed. 2d 451.

The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents. Generally, oral testimony is not admissible to vary the terms of a written instrument of accord and satisfaction. 1 Am. Jur. 2d *Accord and Satisfaction* § 56 (1962).

"When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Neb. Rev. Stat. § 25-1217 (Reissue 1979).

A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used. *Bishop Cafeteria Co. v. Ford,* 177 Neb. 600, 129 N.W.2d 581 (1964).

A contract is not ambiguous within that sense merely because it may be difficult to construe. The construction of a contract, if needed, being a question of law for the court as well as a duty that rests upon the court, there can be no ambiguity within the rule to which we have referred unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties. *Bishop Cafeteria Co. v. Ford, supra.*

Draftsmen, in preparing an agreement of accord and satisfaction, would surely attempt to draft the same so that all contingencies would be covered, and that belated claims or new demands, such as has actually happened in this case, would be excluded from future consideration.

In reading paragraph 9 of the deferred compensation agreement in its entirety, it is hard to imagine how a scrivener could draft a more unambiguous paragraph. The words "special deferred compensation" should be clear enough. However, "special deferred compensation" is further defined in that the benefits provided in said agreement, which was labeled as "Deferred Compensation Agreement," were in addition to other benefits, which benefits were defined as "regular pension, retirement, disability or fringe benefits which Union provides for some or all of its eligible employees." By failing to provide for further exceptions, it may be reasonably inferred that the parties intended there be none. If it was the intention of the parties that the agreement constituting the accord applied only to the dispute concerning the agreement of 1976, dated back to October 8, 1973, then there would have been no necessity to make an exception to other "regular" benefits due Meyers.

Lastly, Meyers waived not only the claim then in dispute but his claim to "any" special deferred compensation.

The claims now proffered by plaintiff do not fall within the exceptions, and no matter how one looks at them, they are claims for deferred payment, special in nature, especially as to defendant. Plaintiff alleged in his petition that the services were rendered for Diamond, which was owned by Carl Frohm, and yet, allegedly, Carl Frohm promised plaintiff all the payment would be by Union. If such would not constitute a claim for special deferred compensation, what would?

In determining that the deferred compensation agreement contained no ambiguities, and that Meyers is barred from collecting upon his claims by reason of the agreement of accord and satisfaction, there is no necessity to determine or to consider plaintiff's argument that the only dispute contem-

plated by any of the parties when the accord and satisfaction agreement was executed was the agreement of 1976, dated back to October 8, 1973. What was disputed is of no importance; what was the intent of the parties, as determined by the unambiguous agreement, is.

The decision of the district judge granting the defendant's motion for summary judgment is in all respects affirmed.

AFFIRMED.

IN RE ESTATE OF FLORENCE MILLER CORBETT, DECEASED.
WILLIAM DEVRIES ET AL., APPELLANTS, V.
MARIA HAMMANG ET AL., APPELLEES.
318 N.W.2d 720

Filed April 23, 1982. No. 43986.

1. **Jury Instructions.** If it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and give any additional instructions in writing in the presence of the parties or their counsel.
2. **Jury Instructions: Appeal and Error.** After a jury has retired to deliberate, it is error to give a further instruction out of the presence of the parties and their counsel. But if it clearly appears that prejudice did not and could not flow therefrom, it is error without prejudice and not ground for reversal.

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

Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellants.

Ray C. Simmons of Ray C. Simmons, P.C., for appellees Hammang and Canino.

Brian Schmid of Schmid, Ford, Mooney & Frederick, for appellee Rix.

Heard before BOSLAUGH, MCCOWN, and HASTINGS,

JJ., and QUIST, D.J., and RONIN, D.J., Retired.

BOSLAUGH, J.

Florence Miller Corbett died testate on July 21, 1977. Her will dated March 31, 1975, was admitted to probate in the county court of Dodge County, Nebraska, on August 22, 1977. On September 20, 1977, a motion to vacate the order admitting the will to probate was filed by William DeVries, a nephew of the deceased. Later, a codicil dated December 22, 1976, was admitted to probate. In *DeVries v. Rix,* 203 Neb. 392, 279 N.W.2d 89 (1979), we held that the contestant was entitled to be heard upon the motion and remanded the cause to the District Court for a new trial.

A petition for formal probate of the will and codicil was filed in the District Court on April 29, 1980, by Elmer Rix, Maria Hammang, and Rita Bolanos Canino, devisees and legatees under the will and codicil. The contestant and intervenors filed an answer alleging that the deceased lacked testamentary capacity and was under undue influence at the time the will and codicil were executed. The jury found that the deceased had testamentary capacity at the time the will and codicil were executed and that the will and codicil were not the product of undue influence. The contestant and intervenors have appealed. The assignments of error relate to the sufficiency of the evidence to sustain the judgment and the instructions to the jury.

The record shows that the deceased was survived by two sisters, Eva Grimes and Alice DeVries, five nephews, and one grandnephew. A prior will dated October 17, 1969, and codicils dated April 19, 1971, and May 1, 1974, divided the property between the two sisters, with the nephews and grandnephew as residuary legatees.

The will in question left the bulk of the estate to Elmer Rix, a tenant on the farm of the deceased,

and to Maria Hammang and Rita Bolanos Canino, two housekeeper-companions who had cared for the deceased since 1971. The will devised approximately one-half of the real estate to Rix and the rest to Maria. Rita received all of the testatrix' stocks and bonds. The will also made bequests to the two sisters and Donald DeVries, a nephew and intervenor; forgave a $20,000 debt owed to the deceased by the contestant William DeVries; and made a small bequest to Father Muller, the minister of the church of the deceased. The other nephews and the grandnephew received nothing under the will. The codicil gave one-half the contents of the house to Rita.

It is undisputed that the deceased had a slight stroke in 1966 and a more severe stroke in 1970. In 1972 she had a heart attack, after which she was confined to a wheelchair until she died on July 21, 1977. Maria and Rita began providing nursing assistance to the testatrix in 1971, and continued to work for her in that capacity until she died in 1977. Elmer Rix had farmed the testatrix' land since 1939, when the land had belonged to her mother. After the testatrix inherited the land, he continued to farm for her until her death.

Maria Hammang's husband, Warren, helped the testatrix manage her farm in 1974 and 1975. He testified that in March of 1975, at the request of the testatrix, he helped her make a list of her property with notations as to who would receive the property. He testified "she told me what she wanted done." He then typed the list and returned it to her. The testatrix then called her attorney, A. C. Sidner, to her home and asked him to draft a new will according to the list. The attorney dictated a memorandum for the file, which was received in evidence, which stated that he had discussed the provisions of the new will with the testatrix and reminded her that she was "disposing of most of her property outside of the family and it was probable that some of the

family would resent what she was doing. She stated she was aware of all of this, but each of her sisters had as much as she did and were well able to give to their own families. That Maria and her sister had been so kind to her and would stay with her and take care of her. . . . She again stated that the girls [Maria and Rita] had been so kind to her and she had a great aversion to ever going to a rest home and that this way she was assuring herself of care for the remainder of her life." The 1975 will was witnessed by Sidner and Dr. Merrick, the physician who had cared for the deceased. The codicil was drafted by Neil W. Schilke, a partner of her original attorney who was then deceased. It was witnessed by Schilke and G. Michael Wiseman, another partner in the firm.

Dr. Merrick testified at the trial that he was of the opinion that the deceased had testamentary capacity at the time of the execution of the will. Schilke and Wiseman testified that they believed the testatrix had testamentary capacity at the time the codicil was executed. The memorandum prepared by Sidner stated that the testatrix was "in good spirits and very alert" at the time the will was executed. It further stated that he had "asked [testatrix] if anyone was 'twisting her arm' and she laughed and said no, this was her idea."

The contestant nephews, most of whom lived quite far away from the testatrix and none of whom had spent much time with her around the time of the execution of the will and codicil, testified that they thought the testatrix did not have testamentary capacity at the time in question, based mainly on the opinion that the testatrix had begun to "slip" mentally as early as 1973. Mrs. DeVries and two of her acquaintances from Lincoln testified to the same effect. However, a number of witnesses from Fremont and the surrounding area, both friends and business acquaintances of the testatrix, testified to

numerous contacts with her around the time of the execution of the will and codicil. Practically without exception, they testified that, although her speech was slightly slurred from the 1970 stroke and she was somewhat hard of hearing, they were of the opinion that the testatrix understood them when they talked to her, that they could understand her, and that she had testamentary capacity at the proper times.

All of the witnesses who had knowledge testified that Maria and Rita were very good to the testatrix and took excellent care of her. A number of witnesses also testified that it was obvious the testatrix was extremely fond of both Maria and Rita, and also that she got along well with Elmer Rix and respected his farming ability. Only the testatrix' sister, Mrs. DeVries, ventured an opinion that Maria and Rita were exercising influence on the testatrix, basing her opinion largely upon observations that Maria and Rita would occasionally hug the testatrix, pat her hand, or kiss her cheek.

The evidence, although in conflict, clearly was sufficient to sustain the finding by the jury that the deceased had testamentary capacity at the time she executed the will and codicil, and that the will and codicil were not the result of undue influence.

Much of the appellants' argument is devoted to a theory that the will was executed under a mistake of fact because the testatrix believed she would avoid going to a nursing home by leaving the bulk of her property to Maria and Rita. This theory finds little or no support in the evidence.

There is evidence that the deceased did not want to go to a nursing home and wished to be cared for in her own home. There is no evidence of an agreement between the deceased and Maria and Rita by which the latter agreed to care for the deceased, or that the deceased believed such an agreement existed. The evidence does show that the deceased

wanted Maria and Rita to continue to care for her and hoped she would be able to stay in her own home during the balance of her life. Instruction Nos. 5 and 6 requested by the contestants related to the theory of mistake as to an agreement and were properly refused. The substance of requested instruction No. 4 was included in instruction No. 17 given by the trial court. There was no error in refusing to give requested instruction Nos. 4, 5, and 6.

After the jury had commenced deliberations, a written message was sent to the trial court requesting an "[e]xplanation of 'that there was a disposition to exercise undue influence,' " a phrase used in instruction No. 18, which enumerated the elements of undue influence.

Without notifying counsel, the trial court sent a written reply to the jury, stating: " 'Disposition' as used in this context, means an attitude; a mental inclination; or a willingness." The contestants contend this amounted to an instruction given outside the presence of counsel in violation of Neb. Rev. Stat. § 25-1116 (Reissue 1979). The statute requires further instructions to be given in open court "in the presence of or after notice to the parties or their counsel."

Taulborg v. Andresen, 119 Neb. 273, 279, 228 N.W. 528, 531 (1930), states: "If it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel." In *Barry v. Moore,* 172 Neb. 57, 108 N.W.2d 401 (1961), we said: "It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal." (Syllabus of the court.) See, also, *Breiner v. Olson,* 195 Neb. 120, 237 N.W.2d 118 (1975).

The appellants argue they were prejudiced because the failure to notify counsel deprived them of the opportunity to argue for a preferred "explanation" of the term the jury questioned, and an opportunity to resubmit requested instruction Nos. 4, 5, and 6 to the court. Appellants fail to show what other definition they would have submitted instead of that given by the trial court.

The jury asked for an "[e]xplanation of 'that there was a disposition to exercise undue influence.' " Appellants argue the jury could have been asking for an explanation of the entire phrase, including the term "undue influence." Since "undue influence" was defined in instruction No. 17, it would appear the jury was asking for a definition of the term "disposition" as used in the context of the phrase "disposition to exercise undue influence." The trial court's written reply gave a definition of "disposition" very similar to that appearing in Black's Law Dictionary 558 (4th ed. 1968), which defines disposition as "an attitude; a willingness." Further, in *Holman v. Morrison,* 186 Neb. 159, 181 N.W.2d 441 (1970), the acts of the proponent which the court found demonstrated a "disposition" to exercise undue influence showed a willingness and an attitude on the proponent's part to influence the testatrix. Indeed, the very case which appellants cite in their brief states that "disposition . . . implies a willingness to do something wrong or unfair." *Estate of Phillips,* 15 Wis. 2d 226, 232, 112 N.W.2d 591, 595 (1961). Thus, it appears that the answer given by the trial court to the jury was correct.

Appellants argue they would have resubmitted requested instruction Nos. 4, 5, and 6, all of which purport to define and elaborate upon the term "undue influence" but contain no definition of "disposition." The trial court's instructions had already defined "undue influence" adequately, and the requested instructions would not have provided a different or

better answer to the jury's request. Although the failure to notify counsel and instruct the jury in open court was error, appellants have failed to show they were prejudiced. It furnishes no basis for reversing the judgment in this case.

There being no prejudicial error, the judgment is affirmed.

AFFIRMED.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A FOREIGN CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ANTHONY R. GRECO, APPELLANT AND CROSS-APPELLEE.

318 N.W.2d 724

Filed April 23, 1982. No. 44074.

1. **Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, the reviewing court must consider the evidence most favorably to the successful party and every controverted fact must be resolved in his favor and he must have the benefit of every inference as reasonably deducible therefrom.
2. **Evidence.** Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence, such issues must be submitted to the jury.
3. **Interest.** While the rule is generally to the effect that unliquidated demands do not bear interest until the amounts have been liquidated, the rule is otherwise where the parties have contracted to do otherwise.
4. _____. Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed as modified.

John J. Hanley and Peter L. Harlan, for appellant.

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

KRIVOSHA, C.J.

The appellant, Anthony R. Greco (Greco), appeals from a verdict returned by a Douglas County District Court jury finding Greco liable to the appellee, The Prudential Insurance Company of America (Prudential), by reason of a certain lease agreement entered into by and between Greco and Prudential. We affirm.

The evidence in the case is virtually without dispute. On April 11, 1967, Greco entered into a commercial leasehold agreement with Westroads, Inc., a Nebraska corporation. Subsequently the lease was assigned by Westroads, Inc., to Prudential. Upon the expiration of the lease, Greco was required to vacate the premises. Thereafter, Prudential commenced this action against Greco for certain amounts allegedly due to it under the terms of the lease.

At the conclusion of the plaintiff's case, Greco moved the court to direct a verdict against Prudential with respect to the amount claimed by Prudential under section 29 of the lease agreement. The trial court took the motion under advisement. Thereupon, Greco confessed judgment to the plaintiff under sections 4, 8, and 19 of the lease agreement in the principal sum of $4,211.22. Subsequently Greco rested without introducing any evidence of his own and renewed his motion for a directed verdict against Prudential with respect to the amount claimed by Prudential under section 29 of the lease agreement. Again, the trial court took the motion under advisement and submitted the matter to the jury, instructing it to return a verdict for Prudential in an amount not less than $4,211.22, plus such additional amount, if any, they should find due to Prudential from Greco under section 29 of the lease.

The jury returned a verdict for Prudential for the full amount of its claim against defendant, including the amount claimed under section 29 of the lease agreement. The total verdict was in the amount of $8,495.42. The trial court then overruled Greco's motions, which had previously been taken under advisement, and judgment was rendered upon the jury verdict in that amount.

Greco has brought this appeal on a single assignment of error. He maintains that the trial court should have sustained his motion for directed verdict with respect to the amount claimed under section 29 of the lease. The basis of his argument is that Prudential failed to produce sufficient evidence to sustain its burden of proof. In further support of his argument, Greco maintains that the only person competent to determine the amount due under section 29 of the lease was the county assessor of Douglas County, Nebraska. We believe that the claim is totally without merit.

Section 29 of the lease simply and clearly provides in part as follows: "Tenant shall be liable for and shall pay to either the Owner or the taxing authority before delinquent all taxes levied or assessed against or for leasehold improvements; store fixtures; lighting fixtures; merchandise; equipment; interior partitions; that heating, cooling, and ventilating equipment located within the demised premises; or any other interior improvements of whatever kind and to whomever belonging situated or installed in or upon the demised premises whether or not affixed to the realty. In the event that the taxing authorities shall at any time during the term of this lease assess any of the above-described property against the real estate, the taxes thus assessed shall be repaid by the Tenant to the Owner not later than three (3) days prior to the delinquent date thereof."

The president of Management, Inc., a corporation

employed by Prudential to manage the shopping center and to carry out the terms of the lease, testified both on direct examination and in part in response to questions put by Greco's counsel, allegedly on the grounds that the questions were foundational, how the amount determined to be due and owing from Greco to Prudential was computed. The president testified that Prudential paid the full amount due on the taxes, including the amounts due on Greco's improvements for which it sought reimbursement. He further testified the company works with the county assessor in developing a breakdown of all the improvements in the shopping center. Specifically, he testified: "Well, the owner of the shopping center is assessed for the total and the Assessor's Office then assists with the breakdown by tenants to arrive at the value of these individuals, but our bill is a single assessment, a single bill which we then bill back out." He further testified, when asked what factors go into Management, Inc.'s, considerations of the individual allotment: "Square footage and the value, the degree and quality of improvements within a particular space, the amount of frontage." He again testified that the county assessor meets with Management, Inc., in assisting it in the breakdown to the individual tenants. The testimony of Management, Inc.'s, president, if believed, sufficiently made out a prima facie case under the provisions of section 29 of the lease. The elements necessary to establish a right of recovery were that Prudential paid taxes levied to the taxing authority; that included in the amount paid as taxes was a sum based upon tenant's improvements; and that Greco owes Prudential a sum certain for the payment of the taxes. This Prudential did.

We have frequently held that in determining the sufficiency of the evidence to sustain a verdict, the reviewing court must consider the evidence most

favorably to the successful party and every controverted fact must be resolved in his favor and he must have the benefit of every inference as reasonably deducible therefrom. See, *Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc.*, 206 Neb. 651, 294 N.W.2d 369 (1980); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Lockhart v. Continental Cheese, Inc.*, 203 Neb. 331, 278 N.W.2d 604 (1979).

Under the state of the record, the trial court had no alternative except to submit the case to the jury for its decision. The best that can be said regarding the evidence from Greco's standpoint is that a dispute existed as to how much was owed and whether Prudential's method of computing the amount owed was correct. Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence, such issues must be submitted to the jury. See *Hansen v. Hasenkamp*, 192 Neb. 530, 223 N.W.2d 44 (1974). If Greco believed that the method used by Prudential in computing the amounts claimed to be due was improper, Greco should have sought to introduce such evidence. Having failed to do so, the trial court was left with no other alternative but to submit the issue to the jury for its consideration. There was no error in doing so. Prudential was under no obligation to provide such witnesses, as Greco preferred.

Prudential has filed a cross-appeal in this case alleging that the trial court erred in the amount allowed Prudential as prejudgment interest. On January 23, 1981, following hearing on the application, the trial court entered an order awarding Prudential prejudgment interest in the amount of $233.90.

However, section 34 of the lease provides in part as follows: "If any rent or other sums due and payable under this lease are not paid by the Tenant within fifteen (15) days after same are due and payable, it is agreed that the rent or other sums payable

. . . shall bear interest at the rate of nine percent (9%) per annum from fifteen (15) days after same are due and payable until paid." Such a contractual provision is valid and binding if agreed to by the parties. Neb. Rev. Stat. § 45-104 (Cum. Supp. 1980) provides: "*Unless otherwise agreed,* interest shall be allowed at the rate of twelve per cent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. *Unless otherwise agreed* or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing." (Emphasis supplied.)

Having "otherwise agreed," the provisions of § 45-104 were superseded by section 34 of the lease. The only question then is the date from which prejudgment interest should be computed. The trial court apparently used the date of judgment rather than the time provided for in the lease. We believe this was error. While the rule is generally to the effect that unliquidated demands do not bear interest until the amounts have been liquidated, the rule is otherwise where the parties have contracted to do otherwise. See, *Mid States Engineering v. Rohde,* 182 Neb. 590, 156 N.W.2d 149 (1968); *Frank McGill, Inc. v. Nucor Corp.,* 195 Neb. 448, 238 N.W.2d 894 (1976). Specifically, in 47 C.J.S. *Interest & Usury* § 40 a. at 99-100 (1982), the author notes: "Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable. Thus, if the contract provides for a certain rate of interest

until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity; in other words, the contract governs until the payment of the principal or until the contract is merged in a judgment."

On that basis, we believe that the trial court should have awarded prejudgment interest in favor of Prudential and against Greco at the rate of 9 percent per annum on the principal amount of $8,495.42 for the period beginning May 5, 1979, and ending January 7, 1981, the date of the judgment. This amounts to $1,281.92. The judgment of the trial court is in all respects affirmed, except that it is modified with regard to prejudgment interest to provide that prejudgment interest in favor of Prudential and against Greco should be awarded in the amount of $1,281.92.

AFFIRMED AS MODIFIED.

WHITE, J., concurs in the result.

Z & S CONSTRUCTION CO., INC., APPELLEE, V.
L. ALICE COLLISTER, APPELLANT,
ASHLAND OIL COMPANY, A CORPORATION, APPELLEE.
318 N.W.2d 728

Filed April 23, 1982. No. 44112.

1. **Appeal and Error: Final Orders.** There can be no appeal to this court until there has been a final order in the court below.
2. _____: _____. The jurisdiction of this court is based upon a final judgment or order in the court below.
3. _____: _____. An order overruling a special appearance is not a final order from which an appeal can be taken.
4. _____: _____. When substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Appeal dismissed.

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

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee Z & S.

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

BOSLAUGH, J.

This action was commenced to foreclose a lien for the expense of equipping and operating an oil and gas well. Service upon the defendant Collister, who is a resident of Colorado, was obtained by publication.

A second amended petition, filed July 2, 1979, added a cause of action in quantum meruit for the reasonable value of the goods and services provided by the plaintiff. To this petition the defendant Collister filed a general demurrer and an answer.

On November 19, 1979, trial was had to the court upon all issues except the claim in quantum meruit. That issue was reserved for trial at a later date to a jury, if necessary. On October 29, 1980, the court found generally for the defendant upon the issues tried to the court, and ordered the claim in quantum meruit to be tried at the earliest possible date. The defendant Collister then filed a motion for new trial objecting to that part of the order relating to the trial of the quantum meruit claim and alleging that the court had no jurisdiction over the person of the defendant. The motion for new trial was overruled on January 19, 1981. From that order the defendant Collister has appealed to this court.

We do not reach any of the issues raised by the appellant because it is apparent from the record there has been no final order in the District Court. It is elementary that there can be no appeal to this court until there has been a final order in the court below. *Fritch v. Fritch,* 191 Neb. 29, 213 N.W.2d 445 (1973);

Dale Electronics, Inc. v. Federal Ins. Co., 203 Neb. 133, 277 N.W.2d 572 (1979). The jurisdiction of this court is based upon a final order from which an appeal can be taken. *Root v. School Dist. No. 25,* 183 Neb. 22, 157 N.W.2d 877 (1968).

When, as in this case, substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final. *Versch v. Tichota,* 192 Neb. 251, 220 N.W.2d 8 (1974); *Krepcik v. Interstate Transit Lines,* 153 Neb. 98, 43 N.W.2d 609 (1950).

There being no final order in the District Court, the appeal is dismissed.

APPEAL DISMISSED.

BANKERS UNION LIFE INSURANCE COMPANY, A CORPORATION, ET AL., APPELLANTS, V. THE NEBRASKA CORPORATION, A CORPORATION, ET AL., APPELLEES.

318 N.W.2d 730

Filed April 23, 1982. No. 44143.

Equity: Interest. A court of equity has reasonable discretion to allow or withhold interest as is reasonably just, except in cases where interest is recoverable as a matter of right.

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

John M. Guthery of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellants.

Charles W. Hastings of Fitzgerald, Brown & Dunmire, for appellees.

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

CAPORALE, J.

This appeal arises from a determination by the

District Court of Nebraska for Clay County that interest on certain sales of land at auction, pursuant to the terms of a stipulation among the parties, ceased upon the entry of its order of confirmation.

The plaintiffs-appellants, Bankers Union Life Insurance Company (Bankers) and Thomas Jefferson Life Insurance Company (Jefferson), assert the trial court erred in fact and law by failing to award appellants interest on their judgment to the day it was actually paid in full. We find the trial court was correct, and we affirm.

This matter arises out of a mortgage foreclosure action filed by appellants, as mortgagees, against The Nebraska Corporation, as mortgagor, and others, including appellees Hastings Production Credit Association and Mega Corporation, each of which was a junior mortgagee.

On March 31, 1980, a decree was entered by the District Court. That decree, as modified by an order nunc pro tunc, found certain amounts due to the appellants and Hastings Production Credit Association and Mega Corporation. It gave to The Nebraska Corporation a certain time period within which to remedy its default, otherwise a decree of foreclosure would be entered. The Nebraska Corporation failed to remedy its default within the allotted time and, on August 25, 1980, a decree of foreclosure was entered.

The Nebraska Corporation took an appeal to this court from the decree of March 31, 1980. Through our settlement procedures a stipulation for judgment was entered into by the parties. On November 6, 1980, we entered an order incorporating that stipulation.

The stipulation provided in pertinent part as follows:

"4. Nebraska Corporation and Jerry Wallingford are indebted to Bankers Union in the sum of $1,512,-291.58, as of August 11, 1980, with interest accruing

at the rate of $504.09 per day from and after August 12, 1980, and that said amount is a first lien on an undivided 88% interest of the real estate described in Exhibit 'A', a first lien on the personal property described in Exhibit 'C', and a second lien on the personal propperty [sic] described in Exhibit 'B', all of which are attached hereto and made a part hereof by this reference. The Nebraska Supreme Court should enter judgment in this amount in favor of Bankers Union against Nebraska Corporation and Jerry Wallingford.

"5. Nebraska Corporation is indebted to Mega in the sum of $32,529.13 as of August 11, 1980, with interest accruing at the rate of $10.84 per day from and after August 12, 1980 and that said sum is a second lien on an undivided 88% interest on the real estate described in Exhibit 'A', and the Nebraska Supreme Court should enter a judgment in this amount in favor of Mega and against Nebraska Corporation.

"6. Nebraska Corporation is indebted to Hastings Production Credit Association in the sum of $435,-614.87 as of August 11, 1980, with interest accruing at the rate of $145.20 per day from and after August 12, 1980 and said sum is a third lien on the real estate described in Exhibit 'A' and a first lien on personal property described in Exhibit 'B', attached hereto and made a part hereof, and the Nebraska Supreme Court should enter a judgment in this amount in favor of HPC and against Nebraska Corporation.

. . . .

"10. Lightner Auction & Realty Company shall be retained as auctioneer to conduct the public sale, with the sale to take place on the premises, at a site agreed to by the parties, on or before November 17, 1980. The fee to be paid said auctioneer shall be 1% of the gross sales price of the real property and personal property, under the terms and conditions of the listing contract marked as Exhibit 'D', attached hereto and made a part hereof by this reference.

That the 1% fee paid to the auctioneer shall cover all expenses incurred by the auctioneer in the preparation and conducting of said sale, provided, however, that the auctioneer shall not be responsible for advertising. The sale to be conducted by the auctioneer shall cover both the real and personal property described in this agreement.

"11. The advertising expenses incurred in preparation for this sale shall be paid by Nebraska Corporation and Wallingford at their own expenses, and said expenses shall not be reimbursed out of the proceeds of this sale. All advertising shall be commenced at least thirty (30) days prior to the date of sale.

"12. Title Insurance shall be obtained and given to the purchaser or purchasers of the real property described in this agreement, and the expense of such title insurance shall be taken out of the gross sale price of the sale as a sale expense.

"13. Terms of the sale shall require the purchaser to pay 15% down, by certified or cashiers check or personal check with bank letter of credit, and the balance upon closing, which shall not be more than thirty (30) days after the day of the auction. The closing shall take place at Bankers Union's attorney's office, 1806 First National Bank Building, Lincoln, Nebraska. Provided, however, that in the event Banker's Union is the purchaser, it shall not be required to make any down payment or to make any payment at closing to the extent that the total bid of Banker's Union is equal to or less than the amount due to it under this agreement except an amount necessary to pay the real property sale expenses as hereinafter described. To the extent that the amount bid by Bankers Union would be in excess of the amount due to it under this agreement after the payment of the real property sale expenses, it shall pay the difference at the time of closing. Payments shall be made to Dan Baird, as

trustee, who shall then make disbursements in accordance with this agreement."

In conformance with the stipulation and court order, a sale of the subject real estate was conducted by public auction on November 17, 1980.

On December 2, 1980, a motion was filed in the District Court by the appellants to confirm the sale which had taken place on November 17, 1980.

An order confirming the sale was filed December 10, 1980, directing that deeds be delivered to the purchasers by the trustee upon final payment.

Closing on one parcel of land auctioned November 17, 1980, apparently through no fault of appellants or appellees, did not take place until January 30, 1981, because of a variety of problems.

On February 3, 1981, Hastings Production Credit Association filed a motion in the District Court asking it to determine that interest on appellants' judgment ceased upon entry of the order of confirmation.

The District Court determined that the interest on appellant's judgment terminated on December 10, 1980. The court allocated $504.09 of the disputed interest to appellants, $10.84 to Mega Corporation, and the balance of $12,041.85 to Hastings Production Credit Association. Appellants contend they are entitled to interest to January 30, 1981, the date their judgment was paid in full, claiming the proper amount to be $11,993.10.

It is true, as appellants argue, that Neb. Rev. Stat. § 45-103 (Reissue 1978) provides that interest on all decrees and judgments for the payment of money shall be from the date of rendition until the same shall be paid. It is likewise true that in *Trompen v. Hammond,* 61 Neb. 446, 85 N.W. 436 (1901), wherein the mortgaged property was offered for sale in the usual way, we held that the lienholder was entitled to interest during the 18 days which intervened between the sale and confirmation. Moreover, it is

true that in *Stenger v. Carrig,* 61 Neb. 753, 86 N.W. 475 (1901), wherein a decree was entered on April 25, 1896, an order of sale issued and the premises sold on May 17, 1897, the sale confirmed on June 5, 1897, an appeal to this court dismissed at the January 1899 term, and a mandate issued to the trial court on April 3, 1899, we held that interest accrued from the date of the decree until paid. From the foregoing statute and cases, appellants distill the rule that interest in mortgage foreclosure cases accrues until both payment and confirmation have taken place.

However, there is a distinction between the above-cited cases and the one sub judice, in that in the former the sales were conducted pursuant to the statutory procedures relating to foreclosure sales and in the latter the sales were conducted pursuant to terms stipulated to by the parties. In the usual foreclosure proceedings, the bidder ordinarily pays cash at the time of the sale and, upon confirmation, takes whatever interest would have vested in the mortgage. *DeMoulin Loan & Investment Co. v. McLain,* 107 Neb. 858, 187 N.W. 123 (1922); *Gosmunt v. Gloe,* 55 Neb. 709, 76 N.W. 424 (1898); *Mauzy v. Elliott,* 146 Neb. 865, 22 N.W.2d 142 (1946). In the instant case, the bidders were allowed to make partial payment at the time of sale and were entitled to title insurance. These were procedures negotiated by the parties hereto and agreed upon among themselves in an effort to realize more money for all than might be the case under the statutory foreclosure procedures. Under such circumstances, it cannot be said the provisions of § 45-103 as applied in *Trompen* and *Stenger* control. It cannot be said appellants were entitled to interest as a matter of right after confirmation and prior to payment.

A court of equity has reasonable discretion to allow or withhold interest as is reasonably just, except in cases where interest is recoverable as a matter of right. *Cumming v. Cumming,* 193 Neb. 601, 228

N.W.2d 296 (1975); *Patterson v. Spelts Lumber Co.*, 166 Neb. 692, 90 N.W.2d 283 (1958).

Under the circumstances of this case, it cannot be said the trial court abused its discretion in allocating the interest as it did.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CRISTOBAL M. LONGA, APPELLANT.

318 N.W.2d 733

Filed April 23, 1982. No. 44343.

1. **Constitutional Law: Arrests.** A person has been "seized" within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.
2. **Constitutional Law: Search and Seizure.** In appropriate circumstances the fourth amendment allows a properly limited search or seizure on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime.
3. **Investigative Stops.** An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity.
4. **Arrests.** The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.
5. **Arrests: Evidence.** The mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible per se.
6. **Evidence: Search and Seizure.** The "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source.
7. **Search Warrants: Probable Cause.** In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.
8. _____: _____. Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit for a search warrant, and is not limited to the firsthand knowledge of the officer who executed the affidavit.

9. **Search Warrants: Affidavits.** An affidavit is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded.
10. **Convictions: Appeal and Error.** This court will not reverse a criminal conviction in the absence of prejudice to the defendant.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

I. Mark Bledstein and Leslie Ellen Shear of Bledstein & Lauber, for appellant.

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

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

HASTINGS, J.

The defendant, Cristobal M. Longa, was charged by information with knowingly or intentionally possessing cocaine with the intent to distribute, deliver, or dispense said controlled substance. Defendant's motions to suppress certain evidence seized following his arrest were overruled after a hearing on the motions. According to a jury verdict filed on April 17, 1981, the defendant was found guilty by the District Court for Douglas County and was sentenced to a term of not less than 3 nor more than 5 years in the Nebraska Penal and Correctional Complex. He has appealed from that conviction and sentence, contending specifically that certain evidence seized was inadmissible as the fruits of an arrest made without probable cause; that the warrants for the seizure of evidence were not based on probable cause; and that the trial court erred in limiting testimony at the suppression hearing to evidence appearing on the face of the warrants. We affirm.

At some time prior to September 3, 1980, members of the Omaha Police Department received information from a confidential source concerning certain drug-related activities in the city of Omaha. This

informant told police that he had seen cocaine packaged for street sale in a residence house located at 422 North 34th Street in Omaha. Furthermore, he stated that he also had been inside the residence of one Ned Reynolds at 4057 Frederick Street and had observed cocaine packaged for street sale there as well. Finally, the informant told police that Ned Reynolds was involved in the sale of narcotics, and that on the evening of September 3 or 4, 1980, Mr. Reynolds would leave his residence at 4057 Frederick Street to make a purchase of cocaine. Another source informed the police at a later point that while someone would be leaving the Frederick Street residence to purchase cocaine, that person would not be Mr. Reynolds.

On the basis of this information, the police obtained search warrants for both residences during the afternoon of September 3, 1980. Surveillance was also established at the Frederick Street residence in the late afternoon of September 3, 1980, by members of the vice and narcotics unit.

At approximately 6:30 p.m., on September 3, 1980, officers observed a person, who was later identified as James Sorensen, leave the Frederick Street residence and drive away in a yellow Mustang. This car was followed to a duplex on Jackson Street where Sorensen was observed entering the residence at 3524 Jackson Street. Approximately 25 minutes later Sorensen was seen leaving the Jackson Street residence carrying a black soft object or objects, described by one officer as "packets of some sort." From here Sorensen was followed to the 422 North 34th Street address and eventually returned to the Frederick Street residence.

Prior to Sorensen's arrival at the Jackson Street address the police were completely unaware of any suspicious activity at this residence. Upon Sorensen's arrival at that address, one officer noted the presence of a 1977 Cadillac parked in the vicinity of

the duplex. While Sorensen was inside the Jackson Street duplex, a second car approached the residence and an occupant thereof went inside the residence for a short time. This vehicle was followed as it left the residence and was eventually stopped. Its occupants, however, were not held for any reason connected with the present case.

Following Sorensen's departure from Jackson Street, Officer McKillip was left at the address to continue with the surveillance. At approximately 7:30 p.m., 10 to 15 minutes after Sorensen had left, this officer noticed four people emerge from the residence, stand on the lawn and talk for a few minutes, and then walk off in separate directions. Two of these individuals, one of whom was identified as the appellant herein, walked toward the aforementioned Cadillac. The officer observed appellant remove what appeared to be a pillowcase from the passenger side of the Cadillac and dump its contents into the trunk of the car. Appellant's companion, Oswald Gonzalez, was observed crossing the street carrying an object under his shirt. Upon reaching the car, Gonzalez entered the driver's side and was seen removing what appeared to be a black shaving case from under his shirt and placing it on the front seat. The officer termed the companion's activities "strange" and stated that it made her pay "particular attention to what they [Longa and his companion] were doing." Appellant then got into the passenger seat of the Cadillac and Gonzalez got behind the wheel and drove away.

At this point the officer conducting the surveillance was picked up by a second officer, Sergeant O'Donnell, in order to follow the Cadillac. Officer McKillip advised Sergeant O'Donnell that the occupants of the Cadillac had acted "strange" and that she felt the car should be stopped for further investigation. The Cadillac was followed until it stopped at a convenience store at the intersection of 33rd and

Cass Streets. At this point the officers pulled up behind the Cadillac, approached the car, and identified themselves as police officers. While there is some dispute over whether appellant was in the car or standing outside of it at this point, such a conflict does not appear material or relevant to this case. Upon identifying himself as an officer, Sergeant O'Donnell asked the occupants of the Cadillac whether they possessed any drugs or money, to which appellant's companion responded that they did not have any drugs but did have over $1,000 in cash with them. At or near this time, third and fourth officers arrived. Longa and his companion, Gonzalez, were handcuffed and placed in a squad car, and the Cadillac was impounded.

Shortly after Longa's arrest the police served the search warrants at 422 North 34th Street and 4057 Frederick Street. These searches resulted in the seizure of substances, suspected to be cocaine, from each address and the detention of six or seven persons at the Frederick Street residence. Based upon these seizures and arrests, plus activities of those persons under surveillance, warrants were issued for the search of the 1977 Cadillac as well as the residence at 3524 Jackson Street. The search of the Jackson Street residence took place at about 10:30 p.m. on September 3, 1980, and resulted in the seizure of substances suspected to be cocaine, a large amount of money, and the arrest of one Scott Rosenkrantz. The Cadillac, which was registered in Gonzalez' name, was searched at about 10:45 p.m. that same evening, and resulted in the seizure of a black bank bag containing over $8,000 and numerous items of identification of one Oswald Gonzalez. A search of the car's trunk revealed numerous items of clothing scattered about the trunk on hangers. No controlled substances were found in the Cadillac.

The absence of any controlled substances in the Cadillac, as well as the absence of any "toilet arti-

cles," aroused the interest of the police in discovering where Longa was staying while in Omaha. By questioning Mr. Rosenkrantz it was discovered that Longa may have been staying at the New Tower Motel, and preparation for a warrant application for that location was commenced. An attempt to locate appellant's room at the New Tower proved unsuccessful, and gave rise to an investigation of local motels in an attempt to find the one at which Longa was staying. This investigation resulted in the discovery that appellant was staying at the Thrifty Scot Motel, and consequently the affidavit for the warrant was altered, at the direction of one of the investigating officers, by the insertion of "Thrifty Scot" wherever "New Tower" appeared. It should be noted that affidavits setting forth all the facts concerning the activities of September 3, 1980, as set out above, were also attached to the request for the warrant to search the motel room.

On the strength of these affidavits, a warrant was issued to search room 407 at the Thrifty Scot Motel. The search resulted in the seizure of certain notebooks and papers; $3,800 in cash; a suitcase containing a suspected controlled substance, a scale, and other assorted items; and certain other amounts of a suspected controlled substance from various other areas of the room. The substances seized from the motel room were later analyzed by a chemist who confirmed that the substances were cocaine of varying quality. These findings resulted in the filing of the aforementioned information against appellant and his subsequent conviction.

Longa's first assignment of error concerns the admissibility of the items seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room. He contends that the officers did not have probable cause to stop the Cadillac at 33rd and Cass Streets, and that, therefore, all evidence seized thereafter is inadmissible as the fruits of an illegal arrest.

The resolution of this issue requires that we first address the question as to when the arrest actually occurred. As recently noted by the U.S. Supreme Court: "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. . . . We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *United States v. Mendenhall,* 446 U.S. 544, 553-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

On at least one occasion in the past we have determined that one who is stopped by an officer during a rainstorm and asked to come down to the sheriff's office to talk was not under arrest until he reached the sheriff's office and was observed trying to conceal a knife as he got out of the car. This was in spite of the fact that another officer accompanied the person as a passenger in the car as the person drove his automobile to the sheriff's office. *State v. Irwin,* 191 Neb. 169, 214 N.W.2d 595 (1974).

In light of *Irwin* and the standards for arrest articulated by the U.S. Supreme Court, we cannot conclude that appellant was arrested at any point prior to the time he was handcuffed and placed in the police squad car. The actions of Officers McKillip and O'Donnell in stopping their car behind the Cadil-

lac, approaching appellant and his companion with guns holstered and identifying themselves as officers, and then inquiring whether appellant or his companion possessed either a controlled substance or a large amount of cash were not tantamount to an arrest and therefore did not mandate that the officers possess "probable cause" at this time.

Neb. Rev. Stat. § 29-829 (Reissue 1979) permits officers to make stops short of an arrest in order to determine the name and address of the person stopped, and receive an explanation of that person's actions. While such "investigative stops" are governed by the fourth amendment as well, it is clear that "in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

The rationale behind requiring something less than probable cause for such stops is readily applicable to the present case. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* [*Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams,* 407 U.S. 143, 145-46, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). See, *State v. Jefferson,* 196 Neb. 340, 242 N.W.2d 881 (1976); *State v. Micek,* 193 Neb. 379, 227 N.W.2d 409 (1975).

This lesser standard for investigative stops was recently articulated by this court in *State v. Ebberson,* 209 Neb. 41, 305 N.W.2d 904 (1981), and reiterated in *State v. Nowicki,* 209 Neb. 640, 309 N.W.2d 89 (1981). Therein, relying on *United States v. Cortez,* 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), we determined that " 'an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

" 'Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.* See, *Brown v. Texas,* 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse,* 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).' " (Emphasis in original.) 209 Neb. at 645, 309 N.W.2d at 92-93.

It must be noted that this lesser standard is applicable only to "reasonable" seizures that fall short of an arrest. "The reasonableness of seizures that are less intrusive than a traditional arrest [citations omitted] depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " *Brown v. Texas,* 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

It is readily apparent when one applies the facts of the present case to these standards that the officers in question took reasonable action on the basis of particularized and objective facts. A view of the to-

tality of the circumstances reveals that Longa was present at a house prior to and during a visit to said house by one James Sorensen. The police had observed Sorensen previously leaving a house from which they suspected someone was to leave to make a drug purchase on September 3, 1980. Police also observed this same James Sorensen leave the house where appellant was located, carrying two soft packets of something. Furthermore, appellant and a companion were seen leaving this house 10 to 15 minutes after Sorensen, and the companion was carrying an object under his shirt in a "strange" manner. This activity caused one officer to conclude that appellant and his companion should be investigated further. Finally, the police had been made aware of the fact that the drug supplied for the suspected sale was from out of state and possibly was connected to Las Vegas, Nevada. This knowledge served to increase suspicion when appellant and his companion entered a car bearing California license plates.

On the basis of these facts we conclude that the activities of the officers prior to the actual arrest of appellant were based upon a suspicion of criminal activity falling within the fourth amendment guidelines set forth above. Therefore, such action was permissible under § 29-829.

We move next to Longa's contention that the arrests of himself and Gonzalez were illegal and all evidence seized was the "fruit of the poisonous tree." Although we believe that the arrests in this instance may very well have been justified under the ruling in *United States v. Vasquez,* 638 F.2d 507 (2nd Cir. 1980), it is not necessary for us to make that determination. The only evidence which the record discloses that the officers obtained from Longa or Gonzalez was the fact that they possessed no drugs, but did have over $1,000 in cash. This information was furnished by Gonzalez *prior* to the ar-

rest as a result of a legitimate investigatory stop.

As we recently noted in *State v. Smith,* 207 Neb. 263, 268-69, 298 N.W.2d 162, 166 (1980): "In *Brown v. Illinois,* 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), the U.S. Supreme Court made it clear that the mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible 'per se.' Further, in the case of *Costello v. United States,* 365 U.S. 265, 280, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961), the U.S. Supreme Court made it clear that, '[T]he "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an "independent source." ' " Was the evidence being challenged by appellant, to wit, the evidence seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room, "fruit of the poisonous tree," or was it obtained from an untainted "independent source"? The test to be applied is whether " 'the evidence to which instant objection is made has been come at by exploitation of that illegality [the illegal arrest] or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun v. United States,* 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Upon applying this test to the facts of the present case, it is our conclusion that the evidence seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room was not discovered as a result of an "exploitation" of the arrest claimed to have been illegal, but resulted instead from independent sources. Appellant's first assignment of error is without merit.

Turning to appellant's second assignment of error challenging the existence of probable cause for the issuance of the search warrants for the Cadillac, the Jackson Street duplex, and the Thrifty Scot Motel

room, we have serious doubts as to his standing to challenge the search of either the Cadillac or the Jackson Street duplex. However, because the three searches were so intertwined from a factual standpoint, we will ignore the standing issue for the purposes of this opinion.

We note that "[t]he rule is well established that, in evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *Spinelli v. United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *State v. Bazis,* 190 Neb. 586, 210 N.W.2d 919 (1973). It is also well established that affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion; and that where the circumstances are detailed, where reasons for crediting the source of information is given, and when the magistrate has found probable cause to exist, the court should not invalidate the warrant by interpreting the affidavit in a hyper-technical manner. *State v. Payne,* 201 Neb. 665, 271 N.W.2d 350 (1978)." *State v. Stickelman,* 207 Neb. 429, 433, 299 N.W.2d 520, 523 (1980). Furthermore, we have held that "probable cause is to be evaluated by the collective information of the police as reflected in the affidavit, and is not limited to the firsthand knowledge of the officer who executes the affidavit." *Id.* at 433, 299 N.W.2d at 524.

The affidavits for the warrants to search the Cadillac and the Jackson Street residence were also attached to the application for the warrant for the Thrifty Scot Motel room. Therefore, the information provided to the magistrate in support of the issuance of warrants for each location included the fact that an informant had provided information regarding a drug purchase that was to originate at 4057 Frederick Street on September 3 or 4, 1980; that officers had observed James Sorensen drive from

the Frederick Street address to a duplex at 3524 Jackson Street and leave that address carrying a packet containing a soft substance; that appellant and a companion were observed leaving the Jackson Street address shortly after Sorensen had left, and the companion was carrying an object under his shirt; that appellant and his companion had admitted prior to their arrest that they were carrying over $1,000 in cash; and that a search of the Frederick Street residence following Sorensen's return to that address resulted in the seizure of multiple ounces of a suspected controlled substance. An additional affidavit attached to this application contained information regarding the basis of the informant's information and his credibility. On the basis of this information, we conclude that probable cause did indeed exist for the issuance of the warrants for the Jackson Street duplex and for the Cadillac.

The existence of probable cause for the issuance of the warrant to search the room at the Thrifty Scot Motel additionally relates to the so-called "defective" affidavit. Although somewhat redundant, we believe that it is necessary to discuss this affidavit in more detail. The affidavit was signed by Officer Jack Caniglia. As originally drawn, it states: "When Scott ROSENKRANTZ was questioned by Sgt. O'DONNELL concerning the two Cubans GONZALEZ and LONGA, Scott ROSENKRANTZ stated that while these two persons were in town they were staying at the NEW TOWER MOTEL, 7101 Grover St . . . ." However, Lieutenant Olson, who was supervising the preparation of the affidavit, testified that he sent Sergeant O'Donnell and Officers Wills and Gorgen out to check things out with the desk clerk. Sometime thereafter, Sergeant O'Donnell reported back the fact that the two suspects had checked out of the New Tower Motel that morning. Lieutenant Olson then ordered his officers to check other motels in

the area to see if they could be located. Sometime around midnight, Lieutenant Olson received a call from Officer Gorgen that he had "located them at The Thrifty Scott." Olson then instructed the typist to go through the affidavit and wherever the affidavit said "New Tower" to insert "Thrifty Scot." Also, he dictated an additional paragraph which read "Officer GROGEN [sic] checked the motel and found that a LONGA & GONZALEZ are registered there and there is a note in their box, Room 407."

We have noted in the past that "an affidavit is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded." *State v. Green,* 201 Neb. 828, 832, 272 N.W.2d 764, 767 (1978). When this is done to the present affidavit, although all reference to the location of Longa and Gonzalez being at the Thrifty Scot Motel as related by Rosenkrantz would be deleted, the affidavit still contains the statement that "Officer GROGEN [sic] checked the motel [Thrifty Scot] and found that a LONGA & GONZALEZ are registered there . . . ." Considering that all the facts set forth above in relation to the Jackson Street and Cadillac warrants were also contained in affidavits attached to the application for the Thrifty Scot warrant, in spite of the misstatement of fact contained in the one affidavit, we conclude that the warrant was properly issued for a search of the Thrifty Scot Motel room. Appellant's second assignment of error is without merit.

This brings us to appellant's third and final assignment of error. That assignment is as follows: "The trial court erred in limiting testimony to information appearing on the face of the warrants, since all information known to the police was relevant to the constitutionality of Appellant's arrest." His proposition of law in support of this assignment reads: "The requirement that probable cause be challenged only from the face of the search warrant affidavit

does not apply where the defendant seeks to suppress evidence as the fruit of an arrest made without probable cause." That Longa is truly concerned only with the warrantless arrest and not the search warrants is evident by reference to counsels' comments to the trial court at the suppression hearing. Gonzalez' attorney stated: "I believe that it is very relevant to this arrest, not to the affidavits, but to this arrest, whether the information received by the officer came from a reliable informant. We are ruling here on the warrant. The ruling has to be upon whether this Court feels that the officers acted within the law by relying upon the information given to them by this informant." Immediately thereafter, Longa's attorney said: "There is no affidavit or warrant for the arrest of these guys, Judge. . . . I agree that what Jack O'Donnell [the arresting officer] knew is certainly important. . . . [B]ut I think it was quite clear . . . that here is the man, Lieutenant Olson, that is feeding him a lot of the information, not personally gathering information, but he is kind of the axle in the thing giving out the information." Additionally, in the argument portion of his brief, Longa states: "But there was also an issue as to the validity of the warrantless arrests of Longa and Gonzales [sic]. With respect to that issue, the defense was entitled to inquire fully into the state of mind of the officers."

Even assuming that the trial court was in error in limiting appellant's examination as to the reliability of the informant, Longa's attack in this regard goes only to the question of whether there was sufficient probable cause to arrest appellant and, consequently, whether evidence seized subsequent to the arrest was inadmissible as fruit of an illegal arrest. In light of our determination that the evidence seized was not connected with appellant's arrest, a challenge of probable cause for the arrest is immaterial

and any error by the trial court in that area would be harmless error.

"It is a longstanding rule of this court that it will not reverse a criminal conviction in the absence of prejudice to the defendant." *State v. Brehmer, ante* p. 29, 38, 317 N.W.2d 885, 891 (1982). Therefore, we may disregard the third assignment of error.

There is no prejudicial error in this record, and the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

JOHN G. SACCO, APPELLEE, V.
CYNTHIA A. SACCO, APPELLANT.
318 N.W.2d 712

Filed April 23, 1982. No. 81-701.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Thomas R. Wolff, for appellant.

Jerry L. Pettit, for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

JOSEPH KOHLBECK, APPELLANT, V.
CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

318 N.W.2d 742

Filed April 23, 1982. No. 81-703.

1. **Estoppel.** The essential elements of equitable estoppel are (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
2. **Fraud.** A misrepresentation as to the law will not give rise to an action for fraud and deceit.

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

Thomas F. Dowd of Dowd & Fahey Law Offices, for appellant.

Herbert M. Fitle, City Attorney, and George S. Selders, Jr., for appellee.

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

KRIVOSHA, C.J.

This appeal presents to the court the question whether the enactment by a municipal corporation of an ordinance, later declared invalid by the Supreme Court, is a fraudulent act which denies to the municipal corporation the right to raise the defense of statute of limitations when sued by an employee not a party to the action in which the ordinance was declared void. We believe it is not, and affirm the

action of the three-judge Workmen's Compensation Court which dismissed appellant's petition seeking workmen's compensation benefits on the basis that the statute of limitations had run against the claim.

On February 11, 1980, the appellant, Joseph Kohlbeck, filed a petition in the Nebraska Workmen's Compensation Court alleging that on September 26, 1972, while employed by the appellee, City of Omaha, as a semiskilled laborer, he twisted and injured his back. He further alleged that by reason of the direct and proximate result of the injury "occurring out of and in the course of [his] employment," he became totally disabled. Kohlbeck further alleged that he was a member of the City of Omaha Employees Retirement System at the time of his injury and was granted a disability retirement pension from the City. He prayed that a hearing be held before the Nebraska Workmen's Compensation Court and that the rights and liabilities of the parties be determined.

The City of Omaha filed its answer in which it admitted that Kohlbeck was employed by the City and was injured on September 26th, but generally denied the other allegations of the petition. The City further alleged that the last bills paid under workmen's compensation on behalf of Kohlbeck were paid in 1973 and that any further claim for payments "is barred by the Statute of Limitation."

Kohlbeck filed a reply in which he alleged that the City of Omaha "is estopped from raising the affirmative defense of Statute of Limitations for the reason that Defendant enacted and adopted an Ordinance, specifically Section 7.24.127 of the Omaha Municipal Code, which Ordinance provided in part disability payments under the Pension System were in lieu of Workmen's Compensation obligations, which provisions were contrary to State statute; that by virtue of said Ordinance, the Defendant misled Plaintiff into believing he was not entitled to Work-

men's Compensation benefits to the disadvantage of the Plaintiff and, by virtue thereof, the Defendant is estopped from raising the affirmative defense of the Statute of Limitations."

In lieu of offering evidence, the parties entered into a stipulation for judgment which in essence held that if the court found that the City of Omaha was estopped from raising the defense of statute of limitations, Kohlbeck should receive his benefits. On the other hand, if the compensation court found that the statute of limitations was applicable, then the petition should be dismissed.

The parties further stipulated, in effect, that if Kohlbeck were called to testify, he would testify that he did not pursue his claim under workmen's compensation because of the Omaha city ordinance "and advice in connection therewith from representatives of the Defendant, City of Omaha, that he was not entitled to receive Workmen's Compensation benefits if his disability benefits equaled or exceeded the amount he was entitled to under Workmen's Compensation," which they did.

The hearing before the one-judge court resulted in a finding that the City of Omaha was estopped from raising the defense of statute of limitations, and judgment was entered for Kohlbeck. On rehearing before a three-judge court, the action of the one-judge court was reversed. The three-judge court held that the City of Omaha was not estopped from raising the defense of the statute of limitations, and Kohlbeck's petition was dismissed.

Kohlbeck has now appealed to this court and assigns as error that the three-judge Nebraska Workmen's Compensation Court erred in concluding that the City of Omaha made no representations of fact, false or otherwise, so as to be estopped from raising the defense of statute of limitations. As we have already indicated, we believe that the assignment of error must be overruled.

The specific stipulation relied upon by Kohlbeck is of little aid to us in determining what, if any, fraudulent misstatements of fact were allegedly made. The stipulation simply provides that Kohlbeck "did not pursue his rights and remedies under the provisions of the Nebraska Workmen's Compensation Act subsequent to May 16, 1973 because of his reliance on Section 7.24.127 of the Omaha Municipal Code and *advice in connection therewith from representatives of* the Defendant, City of Omaha, that he was not entitled to receive Workmen's Compensation benefits if his disability benefits equaled or exceeded the amount he was entitled to under Workmen's Compensation . . . ." (Emphasis supplied.) The stipulation does not tell us, either, when the representations were made, or by whom they were made. We simply must conclude that the record in this case falls short of establishing any basis for imposing the doctrine of equitable estoppel against the City of Omaha.

We have frequently said that the essential elements of equitable estoppel are " '(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.' " *Chappelear v. Grange & Farmers Ins. Co.,* 190 Neb. 589, 592, 210

N.W.2d 921, 924 (1973). See, also, *Pester v. American Family Mut. Ins. Co.,* 186 Neb. 793, 186 N.W.2d 711 (1971); *Hilt Truck Lines, Inc. v. House of Wines, Inc.,* 207 Neb. 568, 299 N.W.2d 767 (1980); *Williams v. Williams,* 206 Neb. 630, 294 N.W.2d 357 (1980). We are unable to find anything in this record which even remotely approaches evidence sufficient to establish either the first or the third element necessary to create equitable estoppel.

The City of Omaha did in fact have an ordinance which did provide that disability pension benefits which equal or exceed workmen's compensation benefits would be in lieu of workmen's compensation benefits. The specific ordinance was adopted on June 20, 1972, and was in effect within the City of Omaha until December 19, 1980, when this court decided the case of *Novotny v. City of Omaha,* 207 Neb. 535, 299 N.W.2d 757 (1980), in which we held the ordinance unenforceable. The evidence presented to the compensation court on rehearing, and to this court, does not establish that the City of Omaha falsely informed Kohlbeck as to the ordinance then in existence. To the contrary, the City of Omaha told him the truth as it then existed. It has frequently been held that a misrepresentation as to the law will not give rise to an action for fraud and deceit (see, *Loringer v. Kaplan,* 179 Neb. 215, 137 N.W.2d 716 (1965); *Abbott v. Abbott,* 188 Neb. 61, 195 N.W.2d 204 (1972)), and, therefore, cannot be said to constitute conduct which amounts to a false representation or concealment of material facts or at least which is calculated to convey the impression that those facts are otherwise than and inconsistent with those which the party subsequently attempts to assert. Absent that fact, the first element of equitable estoppel is totally lacking.

Kohlbeck argues that the City's adoption of the ordinance in question was itself a fraudulent act because of our earlier decisions in *Shandy v. City of*

Omaha, 127 Neb. 406, 255 N.W. 477 (1934), and *City of Lincoln v. Steffensmeyer,* 134 Neb. 613, 279 N.W. 272 (1938). We believe that a reading of both those cases and our later decision in *Novotny, supra,* does not support that claim. In *Shandy* the City claimed that by accepting a pension in excess of death benefits allowable under the Nebraska Workmen's Compensation Act, the beneficiaries were barred from making claim under the Workmen's Compensation Act. There was no ordinance in effect at the time. We simply held in *Shandy, supra* at 413, 255 N.W. at 480, "that the payment of pensions to firemen or their dependents under the laws relating to metropolitan cities in no way affects the claims of such persons under the workmen's compensation act or their right to recover under the provisions thereof." As we note, however, there was no city ordinance in existence at the time which provided that both recoveries could not be sought.

And in *Steffensmeyer, supra,* we simply held that by seeking the benefits of the Workmen's Compensation Act, a city employee did not "surrender" his right to a disability pension. Again, there was no similar city ordinance as exists in the instant case. And, finally, in *Novotny, supra,* we acknowledged that there was a bona fide dispute. At 540, 299 N.W.2d at 760, we said: "In the present case, the employer had never denied liability under the workmen's compensation act and had continuously maintained payments due under that act until the date the employer commenced paying disability benefits to the plaintiff under the pension plan involved here. Those payments were approximately twice the amount of workmen's compensation benefits and the disability pension plan provided that such benefits were in lieu of workmen's compensation benefits. Under such circumstances the Workmen's Compensation Court determined that a reasonable controversy existed, and the evidence supports that deter-

mination." We have difficulty seeing how it can be said, on the one hand, that a reasonable controversy existed as to the validity of the city ordinance, and, at the same time, maintain that telling someone about the existence of the ordinance constitutes a fraudulent misrepresentation sufficient to bar the City from raising the defense of the statute of limitations. We think that such simply is not supported by the evidence or the law. Unlike the facts in *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959), where an employee was told by government employees that he had 7 years in which to sue, when, in fact, the code provided that suit must be brought in 3 years, all that Kohlbeck was ever told was the truth as it then existed. If Kohlbeck chose to disagree with the validity of the ordinance, he was required to take action similar to that taken by Novotny and bring suit to challenge the validity of the ordinance. Having failed to do so, he is not now in a position to claim that he was fraudulently misled and therefore entitled to file his claim out of time. The judgment of the Workmen's Compensation Court on rehearing dismissing Kohlbeck's petition because of the statute of limitations was, in all respects, correct and is affirmed.

AFFIRMED.

FRED C. BLACK, APPELLANT, V. W. H. SCHMITZ, M.D., AND IMMANUEL MEDICAL CENTER, A CORPORATION, APPELLEES.

318 N.W.2d 746

Filed April 23, 1982. No. 81-776.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded.

Walter J. Matejka, for appellant.

Joe P. Cashen and Daniel P. Chesire of Kennedy, Holland, DeLacy & Svoboda, for appellee Schmitz.

Thomas J. Walsh and Sally Millett Rau of Walsh, Walentine, Miles & O'Toole, for appellee Immanuel.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is a medical malpractice action. The District Court entered summary judgment in favor of defendants and plaintiff has appealed.

The plaintiff filed this action in 1975 alleging medical malpractice in connection with a surgical resection of the prostate performed by the defendant physician in the defendant hospital in 1973. The petition was dismissed for lack of prosecution in 1978, but reinstated over objections. On January 27, 1981, the case was again placed on the dismissal docket, and on February 12, 1981, the District Court again removed the case from the dismissal docket on condition that the matter be certified for trial within 30 days.

The defendants thereafter moved for summary judgment. At the hearing on the motions the court file and the deposition of the only medical witness listed by the plaintiff were introduced into evidence. The deposition established that the medical witness was a psychiatrist, was not familiar with surgical procedures, and would not appear at the trial to testify. Plaintiff's counsel conceded that plaintiff had no other medical expert witness who could testify.

The petition alleged negligence by the defendant physician in four specific particulars. The defendant physician's answer admitted that he performed an operation on plaintiff but denied each allegation of specific negligence. For further answer, the defendant physician alleged "that at all times through-

out the course of his care and treatment of plaintiff he acted in accordance with good medical and surgical practice as followed by other physicians in Omaha, Douglas County, Nebraska; that throughout the course of treatment he possessed and exercised that degree of skill and learning ordinarily possessed and exercised by members of his profession in good standing practicing in the area of Omaha, Nebraska, and at all times he used reasonable care and diligence in the exercise of his skill and in the application of his learning and at [sic] all according to his best medical judgment." That answer was filed September 22, 1975, and no reply was ever filed.

In the absence of any affidavit or deposition of a medical expert witness for the defendants establishing the facts alleged in the answer, there was no evidence upon which the trial court could enter a summary judgment. It is obvious, however, that the plaintiff was still not ready for trial and was still unable to remedy a long-continued lack of prosecution.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLANT, V.
RENNE EDMUNDS, APPELLEE.
318 N.W.2d 859

Filed April 30, 1982. No. 43910.

1. **Constitutional Law.** The Legislature shall not pass local or special laws in any of the following cases, that is to say: Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. Neb. Const. art. III, § 18.
2. **Supreme Court: Constitutional Law: Statutes.** It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negate any constitutional infirmity. State laws are accorded a presumption of constitutionality.

3. **Legislature.** The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification.
4. **Statutes.** A statute must be general and uniform throughout the state, and must operate alike on all persons of a class with reference to relations and circumstances provided for.

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

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, and Kermit A. Brashear II, Special Assistant Attorney General, for appellant.

Larry W. Myers, for appellee.

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

WHITE, J.

The issue before the District Court and before us is the constitutionality of Neb. Rev. Stat. § 60-1701 (Cum. Supp. 1980), the motor vehicle inspection statute.

The appellee, Renne Edmunds, was arrested on May 2, 1980, and charged with a violation of § 60-1701, failure to have a valid inspection certificate on a motor vehicle. The appellee filed a demurrer to the complaint, contending that § 60-1701 was unconstitutional and void because it violated article I, § 16, and article III, § 18, of the Constitution of the State of Nebraska and the fourteenth amendment of the U.S. Constitution. A hearing was held, arraignment was waived, and the appellee pled not guilty on May 29, 1980. On June 30, 1980, appellee's demurrer was overruled and trial was set for July 21, 1980. At trial, after the State presented its case, the appellee made a motion to dismiss on the same grounds set forth in his demurrer. The court overruled the appellee's motion to dismiss, found the appellee guilty, sentenced him to pay a fine of $10, and ordered him to pay the cost of prosecution. Edmunds

appealed the conviction to the District Court of Douglas County, Nebraska. The appeal was heard on September 22, 1980. The transcript of proceedings and testimony heard in the municipal court were received into evidence and the court took judicial notice of paragraph 1.18 of the rules and regulations issued by the Department of Motor Vehicles without objection by either the State or the appellee. On September 22, 1980, the District Court reversed the conviction and dismissed the action.

In its order dated September 22, 1980, the District Court held: "[T]he Court finds that Sec. 60-1701 R.R.S., Neb., 1943, as amended by the 1980 legislature is unconstitutional and void in that it contains classifications and exceptions which are unreasonable, arbitrary and unrelated to the public interest. Sec. 60-1701 R.R.S. Neb., 1943, as amended is therefore found to be in violation of Article III, Section 18 of the Constitution of the State of Nebraska."

The State was granted leave to docket error proceedings pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1979) on October 8, 1980. The State assigns as error the District Court's determination that, under the pleadings and the evidence, § 60-1701 was in violation of article III, § 18, of the Constitution of the State of Nebraska. The State also assigns as error the District Court's reversal of the appellee's conviction. The State contends that the exceptions and classifications contained in § 60-1701 are rationally based on actual differences in circumstances and, thus, are constitutionally permissible.

The original safety inspection statute was enacted in 1967 and provided in part: "Every motor vehicle and semitrailer as defined in section 60-301, except school buses subject to the provisions of section 79-488, shall be inspected once each year beginning in 1969 at official inspection stations at times established by the Department of Motor Vehicles and an official certificate of inspection and approval shall

be obtained for each such vehicle. . . . No person shall operate any motor vehicle or semitrailer without the required certificate of inspection and approval. No motor vehicle dealer licensed under the provisions of Chapter 60, article 14, shall sell at retail any motor vehicle or semitrailer until such motor vehicle or semitrailer has been inspected and an official certificate of inspection and approval attached." § 60-1701 (Reissue 1968).

The exceptions to the inspection statute were school buses, already subject to inspection on a more frequent than yearly basis, and those vehicles excluded from the definition of motor vehicle under Neb. Rev. Stat. § 60-301 (Reissue 1968).

Section 60-1701 was amended in 1969 Neb. Laws, ch. 520, § 1, p. 2132; 1969 Neb. Laws, ch. 521, § 1, p. 2133; 1973 Neb. Laws, L.B. 522, § 1; 1977 Neb. Laws, L.B. 472, § 1; 1980 Neb. Laws, L.B. 743, § 1; and 1980 Neb. Laws, L.B. 820, § 4. The latest amendments were effective April 24, 1980, and, thus, it is that act with which we are concerned in this case.

Section 60-1701 (Cum. Supp. 1980) provides in part: "Every motor vehicle, semitrailer weighing over five thousand pounds, trailer weighing over five thousand pounds, as defined in section 60-301, and school bus subject to the provisions of section 79-488, except motor vehicles and trailers registered pursuant to section 60-305.09, shall be inspected once each year beginning in 1969 at official inspection stations at times established by the Department of Motor Vehicles and an official certificate of inspection and approval shall be obtained for each such vehicle. . . . No person shall operate any motor vehicle, semitrailer, or school bus subject to the provisions of section 79-488, except implements of husbandry subject to section 60-333 and motor vehicles and trailers registered pursuant to section 60-305.09, without the required certificate of inspection and approval.

"The required certificate of inspection and ap-

proval for vehicles subject to the provisions of section 60-320, and owned by motor vehicle dealers subject to sections 60-1401 to 60-1435, shall consist of a certificate of inspection that shall be carried in the vehicle at all times as proof of such approval. Such certificate of inspection shall be valid for the same period as that provided in section 60-1703.

"No motor vehicle dealer licensed under the provisions of Chapter 60, article 14, shall sell at retail any motor vehicle, semitrailer weighing over five thousand pounds, or trailer weighing over five thousand pounds until such motor vehicle, semitrailer, or trailer has been inspected and an official certificate of inspection and approval attached; *Provided,* that if approval is denied and the purchaser agrees to make the necessary repairs and adjustments to meet the standards prescribed by the department, then the motor vehicle dealer shall issue to such purchaser a permit setting forth the time of purchase and delivery to the purchaser, the needed repairs and adjustments, and the signature of the purchaser agreeing to make such repairs and adjustments. The permit shall be in a form prepared by the department and attached to a conspicuous place on the motor vehicle or semitrailer. The motor vehicle dealer shall retain in his or her files a copy of such permit for a period of one year from the date of sale and the permit shall not be removed from such motor vehicle or semitrailer until it has been reinspected and meets the requirements prescribed by the department. Such motor vehicle or semitrailer shall not be operated on any public street or highway except to the place of repair or to the place of an official inspection station."

The definitions for motor vehicle, semitrailer, and trailer which were in effect at the time of arrest are found in § 60-301 (Supp. 1979). Noting, however, that this court does not decide moot cases, we will concern ourselves only with those sections of the stat-

utes which remain in the law as of the time of the writing of this opinion.

Section 60-301(1) (Supp. 1981) provides: "Motor vehicles shall include all vehicles propelled by any power other than muscular power, except mopeds, farm tractors, self-propelled equipment designed and used exclusively to carry and apply fertilizer, chemicals, or related products to agricultural soil and crops, and other implements of husbandry designed for and used primarily for tilling the soil and harvesting crops, vehicles which run only on rails or tracks, off-road designed vehicles, including but not limited to golf carts, go-carts, riding lawnmowers, garden tractors, all terrain vehicles, snowmobiles, and minibikes, and road and general purpose construction and maintenance machinery not designed or used primarily for the transportation of persons or property, including, but not limited to, ditch-digging apparatus, well-boring apparatus, asphalt spreaders, bucket loaders, leveling graders, earth-moving carryalls, power shovels, earthmoving equipment, crawler tractors, and self-propelled invalid chairs."

Paragraph 1.18 of the rules and regulations issued by the Department of Motor Vehicles provides in part: "Approval stickers are to be placed on the lower left hand corner of windshield. Approval stickers for dealer plated vehicles may be carried in the vehicle at all times, as proof of such approval, instead of attaching to vehicle."

The District Court found that § 60-1701 (Cum. Supp. 1980) violates article III, § 18, of the Constitution of the State of Nebraska, which provides in part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say:

. . . .

"Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . ."

It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negate any constitutional infirmity. State laws are accorded a presumption of constitutionality. *Parker v. Roth,* 202 Neb. 850, 278 N.W.2d 106 (1979).

The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. *State ex rel. Halloran v. Hawes,* 203 Neb. 405, 279 N.W.2d 96 (1979).

A statute must be general and uniform throughout the state, and must operate alike on all persons of a class with reference to relations and circumstances provided for. *Cleland v. Anderson,* 66 Neb. 252, 92 N.W. 306 (1902); *State Securities Co. v. Ley,* 177 Neb. 251, 128 N.W.2d 766 (1964).

The question then for this court to decide is whether there is some rational basis for the exceptions contained in § 60-1701 and whether these exceptions are in the public interest.

Section 60-301(1) defines motor vehicles. The statutory definition contains mainly exceptions. These exceptions do not appear to be based on the safety or inherent danger of the particular object. Rather, the exceptions contained in § 60-301(1) appear to have their basis on considerations not readily discernible, except for possibly the special interest of the owners of these vehicle classifications.

Mopeds are exempted from the definition of motor vehicles possibly since they are related more to a bicycle than a motorcycle. A moped weighs between 50 and 75 pounds more than a bicycle, can be operated at sustained distances at a speed of 30 miles per hour, has a motor, and the pedals, which are mechanically linked to the motor operation, can only be operated for short distances without exhausting

the operator. See Hearing, Committee on Public Works, L.B. 23 (January 17, 1979). The elimination of this class of vehicles from the safety inspection requirement is not justified by any significant reduction in danger to the operator or others by reason of faulty equipment as compared with other two-wheeled vehicles not exempted.

The farming industry receives special treatment in § 60-301(1). Tractors, self-propelled fertilizer and chemical carriers, and other implements of husbandry are all exempted from inspection under this statute. Obviously, self-propelled fertilizer carriers are not exempted because of their safe nature or difference of circumstance. It is true that they are not used for transportation of persons and are used primarily for the application of fertilizers and pesticides to fields, but the fact remains that they still use the roadways to get to the farm fields. The danger that one of these trucks imposes is significant. A truck that is not mechanically sound poses a greater danger than an automobile. A bad wheel on a truck carrying anhydrous ammonia would not only pose a serious threat to the driver but also to the occupants of any automobile that may collide with it and the general area in which a collision could possibly occur.

Section 60-1701 exempts semitrailers and trailers that weigh less than 5,000 pounds. The purpose of this exemption was to allow farm trailers carrying anhydrous ammonia and other equipment to be free from inspection. See Hearing, Committee on Public Works, L.B. 976 (April 30, 1969). Again, there is no rational basis for different treatment. These trailers have no significant quality about them which makes them inherently safer than a trailer over 5,000 pounds. The fact that they are used to apply chemicals to the soil is not enough. They are still required to be hauled on state roadways to get to the farm fields. We cannot discern a rational basis for

exempting these trailers other than to provide special economic advantage to fertilizer suppliers.

In reviewing § 60-1701 we can only find one exemption or exception to the statute which is rationally based on a substantial change in circumstance. Motor vehicles and trailers registered pursuant to Neb. Rev. Stat. § 60-305.09 (Cum. Supp. 1980) are exempted from inspection. The purpose of this exemption lies in the fact that these vehicles are required to meet stricter regulations on safety and maintenance under the Department of Transportation regulations. Unlike the previous exceptions discussed, these vehicles are required to meet other safety requirements which accomplish or exceed the same purposes and goals of § 60-1701.

Section 60-1701, as presently drafted, is so riddled with exceptions for special purposes and special interest groups that its effectiveness and goals are unobtainable. It is so permeated with exceptions that severance of the offensive portions of the statute would render it incomprehensible. The District Court's decision was correct. Section 60-1701 (Cum. Supp. 1980) contains classifications and exceptions which are unreasonable, arbitrary, and unrelated to the public interest. We therefore hold that § 60-1701 is unconstitutional and void in that it violates article III, § 18, of the Constitution of the State of Nebraska. The District Court's decision is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

CHUCK MEYER, APPELLEE, V. SANDHILLS BEEF, INC., A NEBRASKA CORPORATION, APPELLANT.

318 N.W.2d 863

Filed April 30, 1982. No. 43942.

1. **Uniform Commercial Code: Contracts.** A contract to purchase a matured corn crop of stated acreage, to be harvested and delivered by the

seller, together with the right to pasture the stalks and certain additional grassland, all for a stated gross consideration is not an output contract within the meaning of Neb. U.C.C. § 2-306(1) (Reissue 1980).

2. **Pleadings.** Under Neb. Rev. Stat. § 25-852 (Reissue 1979), a pleading may be amended in the furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense.

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

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Raymond, Olsen, Coll & Ediger, P.C., for appellee.

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

CLINTON, J.

This is an action by the plaintiff Meyer against the defendant, Sandhills Beef, Inc., to recover a balance alleged to be owed on the following described written contract: "This agreement dated November 13, 1979 states that Chuck Meyers will harvest and deliver all corn off the Francis DeVear Farm, located 35 miles Northeast of Scottsbluff on hiway 71, to Sand Hills Beef of Mitchell, Nebraska. The DeVear Farm has 1260 acres of corn under Pivot Sprinklers.
"All corn will be delivered by 12-1-79. Sand Hills Beef will pasture the corn stalks and approximately 600 acres of grass. Meyers will put down 2 submersible pumps in the present irrigation wells and provide electricity. Sand Hills Beef will provide the stock tanks and fencing.
"For all corn and pasture Sand Hills Beef will pay Meyers $185,000.00 total. $100,000.00 on 11-13-79 and the balance when all corn is delivered to Sand Hills Beef.
"Meyers guarantees all crops are lien free.

"Sand Hills Beef */s/ by Darwin Heggem*
/s/ Chuck Meyer "

The plaintiff's petition alleged the making of the

contract and plaintiff's substantial performance of the contract's conditions. It further alleged that the acres of corn planted on the DeVries (erroneously referred to as DeVear in the contract) farm numbered 1,132 acres, not the 1,260 acres stated in the contract, and that, accordingly, the defendant was entitled to a credit of $18,794.24; that all of the corn from the DeVries farm had been delivered; that 20 acres of corn could not be combined because of snow in the field; that Sandhills refused to pasture the corn stubble and the grassland; and that the plaintiff mitigated his damages by selling a portion of the corn stubble for the sum of $5,000. He then prayed for judgment in the amount of $61,205.76.

Sandhills in its answer admitted execution of the contract; the corn acreage of 1,132 acres rather than the 1,260; payment of the $100,000 downpayment; and Meyer's delivery to Sandhills of 1,145.085 tons of corn which had a market value of only $93,896.97. Sandhills further alleged that Meyer breached the contract in several respects, only four of which are necessary to notice on this appeal: "a) By tendering an amount of corn unreasonably disproportionate to the stated estimate of 66 bushels per acre;

"b) By failing to deliver a quantity of corn reasonably within the expectations of the parties;

. . . .

"g) Failure to deliver the corn free of liens; and

. . . .

"Plaintiff failed to conduct his business in good faith and according to commercial standards of fair dealing in the trade and his output failed to approximate a reasonably foreseeable figure." Included in Sandhills' answer was a counterclaim which alleged that Sandhills paid the $100,000 "under the supposition the fields would yield an amount of corn reasonably proportionate to the stated figure of 66 bushels per acre for 1,260 acres." It asked for judgment on the counterclaim in the amount of $6,103.03 and pre-

judgment interest in the amount of $17,240.

The case was tried before the district judge without a jury, and on September 3, 1980, both parties rested. The court then directed the parties to file briefs on September 15 and set oral argument for September 17. On September 10, 1980, Sandhills filed a motion asking that it be allowed to amend its answer to the petition to allege the following defenses, to conform the pleading to the proof, viz, fraud, breach of express warranty, and mutual mistake. All of these defenses were founded upon the claim that before the contract was made, the plaintiff had represented that some of the corn already harvested had averaged 66 bushels per acre and that the harvested corn was the poorest in the field.

The trial judge, on September 17, overruled the motion to amend. The court then at a later date made findings of fact and conclusions of law and rendered judgment against the defendant in the sum of $64,057.20 plus costs, with credit to be given for satisfying a judgment for a thresher's lien.

Among its factual findings the court found that during the negotiations leading up to the contract and determination of the contract price, "Defendant asked to buy the corn per hundred weight—plaintiff refused. Plaintiff insisted on a sale in gross for *all* corn. They negoiated [sic] price and ultimately Heggem [defendant's agent] prepared," and the parties executed, the contract which we have previously set forth. The court also found: "During discussions leading to the sale, plaintiff estimated a yield of 66 bushel per acre but expressly refused to guarantee any bushel-yield, either per acre or in total."

The court found that the contract was not an "output" contract as contended by Sandhills and gave the reasons for that conclusion, stating: "The 'all' is definite because it is in existence, identifiable, inspected, seen and measureable.

"The problem lies in the fact that the measuring is not done by output or production. The measuring was done by estimating and weighing." The court further found that plaintiff was not a producer.

The court rendered the following conclusions of law: "1. Quantity is not measured by either the output or production of the seller.

"2. Exhibit #1 is a full, final and complete expression of the agreement of the parties.

"3. Plaintiff has substantially performed its obligations under the contract except as to a portion regarding mistaken total acreage and 20 acres unharvested because of weather.

"4. Defendant has breached the contract by a refusal to pay the balance due less mitigation and credits. The amount due is $64,057.20. Upon satisfaction of a judgment in Hohnstein [sic] v. Sandhills Beef, Case #27895, defendants should receive additional credit of $17,240.00 and may receive credit on this judgment by demonstrating a payment thereof." (The judgment in #27895 relates to a thresher's lien in a case which was pending on appeal at the time of trial of this action.)

Sandhills appeals to this court. The assignments of error made by Sandhills raise the following issues: (1) Whether the contract was an "output" contract within the meaning of Neb. U.C.C. § 2-306(1) (Reissue 1980), and if it was, whether there was a breach of "good faith" in its performance and whether the quantity tendered was unreasonably disproportionate to a stated estimate; and (2) Whether the court erred in refusing to permit Sandhills to amend the pleadings to conform to the proof. We find the two assignments are without merit and affirm the trial court's judgment.

Section 2-306(1) provides: "A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except

that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded." An output contract is not further defined by the Uniform Commercial Code, nor does the case law define the term other than as may be inferred from the facts in the decided cases. However, both the decided cases and the commentary on § 2-306(1) are helpful in arriving at a definition of the term which confirms that which the language of the statute conveys.

The commentary accompanying § 2-306(1) includes the following: "1. Subsection (1) of this section, in regard to output and requirements, applies to this specific problem the general approach of this act which requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement. It applies to such contracts of nonproducing establishments such as dealers or distributors as well as to manufacturing concerns.

"2. Under this article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shut down by a requirements buyer for lack of orders might be permissible when a shut down merely to curtail losses

would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section."

It is clear from the language of § 2-306(1) and the commentary that an output contract is one in which the actual quantity of goods subject to the sale or purchase is indefinite. The quantity is determined either by the output of the seller or the requirements of the buyer. Section 2-306(1) is referred to by the text writers as a gap filler. White & Summers, Uniform Commercial Code § 3-8 (2d ed. 1980). This code section gives validity to the contract despite the uncertainty as to quantity, while at the same time making certain equitable exceptions. The nature of an output contract and of the exceptions is determined by examining the language of the statute. Output means "such actual output . . . as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded." § 2-306(1).

It is the good faith and stated estimate requirements upon which Sandhills relies for its defense in this case. The term "may occur in good faith" clearly pertains to performance of the contract and to production which is at least to some extent within the seller-producer's control. Sandhills also relies upon Neb. U.C.C. § 1-203 (Reissue 1980), which provides: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."

A common characteristic of output and requirements contracts is that they refer to future output and future requirements. *R. L. Kimsey Cotton Co.*

v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975); *Tennell v. Esteve Cotton Co.,* 546 S.W.2d 346 (Tex. Civ. App. 1976); *Harris v. Hine,* 232 Ga. 183, 205 S.E.2d 847 (1974); *Columbia Gas Transmission v. Larry H. Wright, Inc.,* 443 F. Supp. 14 (S.D. Ohio 1977). Because quantity is uncertain, such contracts fix a price based upon units rather than a total price for the entire purchase.

In this case the evidence shows the crop here purchased was a matured crop of a stated number of acres and the price to be paid for that crop as well as the pasturage was a fixed price for the whole quantity to be harvested and delivered by the seller. That price was $185,000 and was arrived at by negotiations between the parties after the seller initially asked for $230,000 and the buyer offered $130,000. The evidence showed that an agent of the buyer inspected the corn in the field, took a number of ears as samples, tested them for weight and moisture content, and found the moisture was high and the weight was substantially lighter than normal. Another agent of Sandhills, Heggem, who signed the contract, made his own estimate of total production and the value of the cornstalks and other pasturage. The court properly found that the contract was not an output contract.

Reliance by Sandhills upon § 1-203 is also misplaced. That section refers to performance of the contract in good faith. There is no evidence that would support a finding that the plaintiff did not perform in good faith. It is plain Sandhills' present complaints relate not to lack of good faith in performance, but to matters which preceded the making of the contract.

We now consider whether the court erred in not permitting amendment of Sandhills' answer to allege the affirmative defenses we earlier mentioned. Neb. Rev. Stat. § 25-852 (Reissue 1979) provides that the court may, either before or after judgment, per-

mit certain amendments, and then goes on to read, "or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Under § 25-852, a pleading may be amended in the furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. *Stungis v. Union Packing Co. of Omaha, Inc.*, 196 Neb. 126, 241 N.W.2d 660 (1976); *Johnson v. American Smelting & Refining Co.*, 80 Neb. 250, 114 N.W. 144 (1907); *Scott v. Spencer*, 44 Neb. 93, 62 N.W. 312 (1895).

It is clear from the portion of Sandhills' answer that we have earlier quoted and from the specific findings of the trial court, the latter all being clearly supported by the evidence, that Sandhills was relying upon §§ 2-306(1) and 1-203 as the basis for its defense and that the proposed amendments would substantially change the defense. It is evident that if plaintiff had known at trial that the defense of warranty, fraud, and mistake was at issue, an entirely different approach would need to have been taken in objection to evidence and interrogation of witnesses, both on direct and cross-examination. The trial court did not err in denying Sandhills' motion to amend because the requested amendments would have substantially changed the defense.

AFFIRMED.

IN RE GUARDIANSHIP OF JAMES MICHAEL JONAS, AN INCAPACITATED PERSON. RICHARD DOUGLAS MCCLAIN, APPELLANT, V. PAUL L. DOUGLAS, ATTORNEY GENERAL, EX REL. STATE OF NEBRASKA, DEPARTMENT OF PUBLIC INSTITUTIONS, APPELLEE.

318 N.W.2d 867

Filed April 30, 1982. No. 43945.

1. **Guardians Ad Litem.** The provisions of Neb. Rev. Stat. § 30-2222 (Reissue 1979), authorizing a court to appoint a guardian ad litem to represent the interests of an incapacitated person, are limited to proceedings pending in that court.
2. _____. Every court has inherent power to appoint a guardian ad litem to represent an incapacitated person in proceedings before that court; that power does not extend to the appointment of such guardian for the purpose of managing litigation in another court or tribunal, except for necessary appeals.
3. **Guardians Ad Litem: Attorney Fees: Costs.** The fees of a guardian ad litem are chargeable as costs in cases which involve incompetents in litigation, and should be taxed in the court or courts in which the services were rendered.
4. _____: _____: _____. The fact that the estate of a disabled person possessed no property out of which the fees of a guardian ad litem can be paid in noncriminal cases does not furnish any reason for imposing liability on the state to pay the same, other than as may be taxed as costs of the proceeding.

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

Richard Douglas McClain, pro se.

Paul L. Douglas, Attorney General, and John Boehm, for appellee.

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

HASTINGS, J.

This appeal involves the appointment of Richard Douglas McClain as guardian ad litem for James Michael Jonas, a mentally incapacitated person, and an order fixing fees for the services rendered by McClain in that capacity. The county court fixed

and approved fees for McClain, and McClain in turn appealed that order to the District Court. The District Court reversed and vacated the order and dismissed the appeal, and McClain appeals that action to this court.

James Michael Jonas had been a resident-patient of the Beatrice State Home since sometime prior to May 20, 1954. On that date, Gerald Jonas, the father, was appointed by the county court of Dakota County as the guardian for James. On April 27, 1978, the guardian, through McClain, his attorney, filed an application in the county court, alleging that a proceeding was pending before the Department of Public Institutions of the State of Nebraska to administratively remove James from the Beatrice State Developmental Center for placement in a community-based program outside the control of the Department of Public Institutions. The application went on to request that McClain be appointed as "attorney for said James Jonas in said proceedings and also as guardian ad litem, if necessary, all at government expense." Following a hearing, the county court entered an order (on the 9th day of June 1978) appointing Richard D. McClain "at government expense" as attorney and guardian ad litem for James Jonas. Although the record does not disclose that the director of the Department of Public Institutions was either served with notice of that hearing or appeared at the same, nevertheless, on June 20, 1978, the director filed a motion to amend or vacate the order of appointment. This motion was overruled by the county court on July 12, 1978, and the guardian ad litem was directed to file objections to the "transfer of said ward from the Beatrice Home." No appeal was taken from that order.

The source of the present litigation may be found in the case of *Horacek v. Exon,* the preliminary proceedings of which are reported at 357 F. Supp. 71 (D. Neb. 1973). That case was an action brought under

the Civil Rights Act against state officials by certain parents of and on behalf of children at the Beatrice State Home. It was alleged that conditions of confinement were violative of the eighth amendment's ban on cruel and unusual punishment. Eventually, a settlement was entered into by the various parties and approved by the court. That agreement provided, among other things, for periodic evaluations to determine the most appropriate manner to transfer residents of the Beatrice State Home to community mental health facilities. Additionally, it provided that in the event that either the parent or legal guardian of any resident of the home objected to the transfer, a due process hearing should be had, which was to include appointment of competent counsel to represent the mentally retarded person.

Following the completion of the "due process" hearings, which were apparently held before a hearing examiner of the Department of Public Institutions, but are not contained in this record, McClain filed an application in the county court of Dakota County seeking fees for himself for services rendered in those proceedings. A hearing was had on that application on December 11, 1979, and on May 7, 1980, the county court entered an order which "fixed and approved" fees for McClain in the amount of $3,100 but directed that the fees were "not the obligation of Dakota County, Nebraska, but are the expense of some other governmental body." McClain appealed that order to the District Court, which reversed the order of the county court.

The effect of the order of reversal entered by the District Court was that the county court lacked subject matter jurisdiction to appoint McClain as guardian ad litem.

It is McClain's position that the action of the county court was justified by Neb. Rev. Stat. §§ 30-2628, 30-2222, 25-310, and 25-307 (Reissue 1979), and §§ 83-383 and 83-387 (Reissue 1976). The sections

found in Chapter 83 relate to the situation where the Department of Public Institutions initiates guardianship proceedings to facilitate the admission of a disabled person to a residential mental health facility. Those sections provide that if the disabled person is without the means to pay the costs, including attorney fees, the Department of Public Institutions shall pay the same upon presentation of a proper claim by the judge of the county court in which the proceedings were commenced. As an aside, we note that Neb. Rev. Stat. §§ 83-1049, 83-1050, and 83-1051 (Reissue 1976 and Cum. Supp. 1980) do provide for the appointment of counsel for an indigent subject of a petition for commitment upon certification by the mental health board of the subject's indigency to the clerk of the District Court or county court. Counsel is then appointed by the judge of that court and fees are allowed by that same court upon the filing of a proper application. We must conclude that none of the sections found in Chapter 83 are applicable to the present situation.

The provisions of §§ 25-307 and 25-310, urged by McClain, relate solely to a minor ward, not a mentally incapacitated person. Not cited by McClain is Neb. Rev. Stat. § 25-309 (Reissue 1979), which provides, in part, that except as provided by the Nebraska Probate Code, the defense of an *infant* must be by a guardian for the suit, "who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge." However, that provision also is limited only to situations involving a minor and has no application to the present action.

Section 30-2222(4) provides in part: "At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of . . . an incapacitated . . . person . . . if the court determines that representation of the interest otherwise would be inadequate. . . . The court shall set out its reasons for

appointing a guardian ad litem *as a part of the record of the proceeding.*" (Emphasis supplied.) It would seem apparent from the clear language of the statute that this section relates to the appointment of a guardian ad litem in a proceeding before that particular court, not one pending before another body.

We have been unable to find any statutory authority to justify the action taken by the county judge in this case. While it is true that every court has inherent power to appoint a guardian ad litem to represent an incapacitated person in proceedings before that court, that power does not extend to the appointment of such guardian for the purpose of managing litigation in another court or tribunal, except for necessary appeals. *King v. Emmons,* 283 Mich. 116, 277 N.W. 851 (1938).

This court has addressed the subject of fees for the services of a guardian ad litem on several occasions. "The fees of a guardian ad litem are chargeable as costs in cases which involve minors or incompetents in litigation. It would seem, therefore, that the fees of a guardian ad litem should be taxed as costs in the court or courts in which his services were rendered." *White v. Ogier,* 175 Neb. 883, 898, 125 N.W.2d 68, 77 (1963). "For performing the duties of a guardian *ad litem* an attorney must look, and look only, for the amount of his compensation to the court, and the compensation allowed the guardian should be taxed as costs in the proceedings and as such collected." *Englebert v. Troxell,* 40 Neb. 195, 210, 58 N.W. 852, 856 (1894). "We can find no authority, and none has been cited, which authorizes the legal fees to be taxed against the State except as a part of the costs. The fact that Gloria [ward] appears to have no property out of which the fees of the de facto guardian ad litem can be paid in a noncriminal proceeding does not furnish any reason for imposing the liability on the State." *State v. Cavitt,* 182 Neb. 712, 722, 157 N.W.2d 171, 178 (1968).

Based on the reasons set forth above, we conclude that the county court was without authority under the facts of this case to appoint a guardian ad litem, or to fix fees in the manner which it did, in light of the circumstances then existing. The judgment of the District Court was correct, and is affirmed.

AFFIRMED.

MARLIN V. WICHMAN, APPELLANT, V. HARRY "PETE" PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

318 N.W.2d 747

Filed April 30, 1982. No. 43984.

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

William W. Griffin, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellee.

Heard before KRIVOSHA, C.J., and HASTINGS, J., and COADY and FAHRNBRUCH, D. JJ., and RONIN, D.J., Retired.

PER CURIAM.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

MARY A. JENSEN, APPELLANT, V.
FLOAIR, INC., APPELLEE.
318 N.W.2d 870

Filed April 30, 1982. No. 44078.

1. **Workmen's Compensation: Jurisdiction.** The Nebraska Workmen's Compensation Act is not applicable to a nonresident employer and resident employee where the contract of employment was made in this state for services to be performed in another state and the employer was not, at the time of the contract, engaged in any trade, business, profession, or vocation in this state.
2. _____: _____. The Nebraska Workmen's Compensation Act is not applicable where a resident employee's employment by a nonresident employer for services to be performed outside the State of Nebraska was neither in nor incidental to any trade, business, profession, or vocation carried on by the employer in this state.

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

John B. Ashford of Bradford, Coenen & Ashford, for appellant.

Douglas L. Kluender of the Healey Law Office, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case in which the Nebraska Workmen's Compensation Court dismissed plaintiff's petition against the defendant, Floair, Inc. Plaintiff has appealed.

In 1970, following his retirement from the Navy, Clifford Jensen sought a job as an aircraft pilot. In 1971 Jensen applied in person to Floair, Inc., at its offices in Wichita, Kansas, and made test flights. On December 26, 1971, Floair telephoned Jensen at his home in Bellevue, Nebraska, and offered him a position as a pilot for the defendant. Jensen accepted the offer by telephone, and the next day went to Wichita, Kansas, and began work for the defendant. Thereafter, Jensen continued to work for Floair

as a ferry pilot, primarily in connection with international deliveries.

On October 31, 1977, Jensen was assigned to deliver an airplane to Sydney, Australia. Upon his return from Australia, Jensen was a passenger on a commercial flight which was routed through Denver, Colorado. While Jensen was at Denver's Stapleton Airport on November 10, 1977, Jensen suffered a fatal heart attack.

Jensen's widow, the plaintiff, filed this action under the Nebraska workmen's compensation laws on November 9, 1979, alleging that the decedent's heart attack arose out of and in the course of his employment with Floair. In particular, the plaintiff contends that the decedent's heart attack was due to work-related strain while piloting the plane to Australia and on the return trip from that destination.

The defendant's answer alleged that the Nebraska Workmen's Compensation Court did not have jurisdiction to determine the dispute, and that the death of Clifford Jensen did not arise out of and in the course of his employment with defendant, and requested dismissal of the petition.

The evidence established that Floair, Inc., is a Kansas corporation which maintains its business offices in Wichita, Kansas, and operates two major divisions, one of ferrying aircraft to various international and domestic destinations and the other of maintaining fixed-base operation activities. It has no business offices, hangars, or other facilities in any state other than Kansas. At the time of Jensen's death, Floair did no business in Nebraska, maintained no agents or agencies in Nebraska, and did not deliver any planes to Nebraska. The president of Floair testified that, in his memory, none of its pilots had ever delivered a plane to Nebraska. Most pilots employed by Floair lived in the area of Wichita, Kansas, but a few lived in other areas. All

flight assignments are made in Wichita. Jensen was employed in the international division of the ferrying operation. Ordinarily, a Floair ferry pilot would pick up an airplane at either a factory or some other location and ferry it to Wichita where test flights were conducted. A pilot would then ferry the plane to its destination overseas and return to Wichita on a commercial air flight after completing the delivery.

At the initial hearing in the Nebraska Workmen's Compensation Court, the court determined that it had jurisdiction of the case under Neb. Rev. Stat. § 48-115(2)(c) (Reissue 1978) because the initial contract of employment was accepted by telephone in Nebraska in 1971, but the court determined that the plaintiff had failed to sustain her burden of proving that the decedent's death arose out of and in the course of his employment by Floair, and dismissed plaintiff's petition.

Upon rehearing before a three-judge panel of the court, the panel found that a 1973 amendment to § 48-115(2), purportedly extending jurisdiction to any case in which the original contract of hire was made in Nebraska, had no retroactive effect. The court then determined that it was without jurisdiction to hear the case, and that it was unnecessary to decide whether Jensen's death arose out of his employment. The court again dismissed plaintiff's petition, and this appeal followed.

The plaintiff contends that because Jensen's original contract of hire in 1971 was concluded by his telephone acceptance in Nebraska, the Nebraska Workmen's Compensation Court has jurisdiction under § 48-115(2).

In workmen's compensation cases in the area of conflict of laws, the principal problem is what range of application to persons and things outside the state will be given by a state to its own workmen's com-

pensation statute. Restatement (Second) of Conflict of Laws § 181 (1971) states the permissible range of territorial application of workmen's compensation law: "A State of the United States may consistently with the requirements of due process award relief to a person under its workmen's compensation statute, if

"(a) the person is injured in the State, or

"(b) the employment is principally located in the State, or

"(c) the employer supervised the employee's activities from a place of business in the State, or

"(d) the State is that of most significant relationship to the contract of employment with respect to the issue of workmen's compensation under the rules of §§ 187-188 and 196, or

"(e) the parties have agreed in the contract of employment or otherwise that their rights should be determined under the workmen's compensation act of the State, or

"(f) the State has some other reasonable relationship to the occurrence, the parties and the employment." Sections 187 and 188 are not materially relevant here.

Section 196 provides: "The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the [sic] event the local law of the other state will be applied." Section 6 sets out general choice of law principles and is not directly material here.

Under the evidence in the case at bar, a major portion of Jensen's services were to be performed in

Kansas, and virtually all other significant relationships of the employer and the employment were in Kansas. The only relationship which Nebraska had to the contract of employment was the fact that Jensen accepted the initial contract of employment by telephone in 1971 in Nebraska.

This court has consistently held that the Workmen's Compensation Act of Nebraska is not applicable to a nonresident employer and resident employee where the contract of employment was made in this state for services to be performed in another state and the employer was not, at the time of the contract, engaged in any trade, business, profession, or vocation in this state. *Watts v. Long,* 116 Neb. 656, 218 N.W. 410 (1928). See, also, *Freeman v. Higgins,* 123 Neb. 73, 242 N.W. 271 (1932); *Rigg v. Atlantic, Pacific & Gulf Oil Co.,* 129 Neb. 412, 261 N.W. 900 (1935).

The Workmen's Compensation Court proceeded on the premise that the basic jurisdictional issue was to be determined by whether the contract of hire provision of § 48-115(2) was applicable to this case. Neither party has, therefore, briefed or argued conflict of laws jurisdictional issues. We note that § 48-115(2) applies only to "an employee subject to this act," and refers to "Every person in the service of an employer . . . as described in section 48-106 . . . ." Neb. Rev. Stat. § 48-106 (Reissue 1978) provides in part that the provisions of the Workmen's Compensation Act shall apply "to every employer in this state, including nonresident employers *performing work in the State of Nebraska.*" (Emphasis supplied.) That language has remained unchanged since 1957. The evidence in the present case is clear that the employer defendant was not engaged in business or performing work in Nebraska at any time.

We have held that the Nebraska Workmen's Compensation Act is not applicable where a resident em-

ployee's employment by a nonresident employer for services to be performed outside the State of Nebraska was neither in nor incidental to any trade, business, profession, or vocation carried on by the employer in this state. See *Freeman v. Higgins, supra.*

While the reasons given by the Workmen's Compensation Court for rejecting jurisdiction may have been erroneous, the determination that the Nebraska Workmen's Compensation Court did not have jurisdiction in this case was correct.

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

AFFIRMED.

WHITE, J., participating on briefs.

BRODKEY, J., Retired, dissenting.

I must strongly dissent because I am convinced that the majority opinion is clearly wrong. Not only does it ignore the plain words of the amendment to the workmen's compensation laws of this state, enacted by the Legislature in 1973 in L.B. 150, but it also incorrectly applies the applicable law with reference to that amendment, and relies upon cases decided before the adoption of that amendment.

At the outset, I wish to point out that there are no conflict of law questions (in the sense of whether the law of Nebraska, Kansas, or Colorado applies), nor any constitutional questions involved in this case; and none were raised in the court below, either in the one-judge hearing or in the rehearing before the three-judge panel, and none are raised by the parties on appeal to this court. The sole question involved in this appeal is whether the statutory law of Nebraska on the date of the hiring of Jensen or on the date of his accident or injury should be applied. Under the authorities hereinafter cited, there can be no question but that the latter is correct.

The following chronology of events is important in the decision of this case, and there is no dispute in

the record about them. (1) Clifford Jensen was employed by the defendant, Floair, Inc., in 1971, the contract being concluded in Bellevue, Nebraska, over the telephone; (2) The Nebraska workmen's compensation statute, Neb. Rev. Stat. § 48-115(2)(c) (Reissue 1978), was enacted and became law in 1973, that statute providing, among other things: "If an employee subject to this act suffers an injury on account of which he or, in the event of his death, his dependents would otherwise have been entitled to the benefits provided by this act, the employee or, in the event of his death, his dependents shall be entitled to the benefits provided under this act if the injury or injury resulting in death occurred within this state, *or if at the time of such injury* (a) the employment was principally localized within this state, (b) the employer was performing work within this state, or (c) *the contract of hire was made within this state*" (emphasis supplied); (3) The decedent suffered a fatal heart attack on November 10, 1977, at Denver's Stapleton Airport; (4) The plaintiff filed this action under the Nebraska workmen's compensation laws on November 9, 1979. It is to be noted that both Jensen's injury and the filing of the lawsuit occurred after the amendment of the Nebraska workmen's compensation laws. Only his hiring preceded the amendment referred to.

In the first hearing of the matter in the Nebraska Workmen's Compensation Court, Judge Novicoff, before whom the matter was heard, stated in his order of dismissal: "There are two issues to be determined in this case. The first issue is that of jurisdiction. In 1973, the Nebraska Workmen's Compensation Law was amended to provide additional bases of jurisdiction for the operation of the Nebraska Workmen's Compensation Law. One basis for jurisdiction was if the contract of hire was made within the State of Nebraska. The evidence is that the decedent entered in to a contract of hire with the de-

fendant when he was called from Kansas over the telephone by the defendant while the decedent was at his home in Nebraska. The contract of hire was entered into over the telephone. Since the acceptance of the offer of employment was in Nebraska, the Court finds that it is the place of acceptance which governs and therefore, the contract of hire was made within the State of Nebraska and this Court does have jurisdiction. The Court specifically finds, however, that by taking jurisdiction, the court does not imply that there may not be concurrent jurisdiction in a sister state."

On rehearing, the case was heard before a three-judge panel, which in its dismissal on rehearing stated: "It is conceded that the hiring of Mr. Jensen occurred prior to the enactment of the addendum to Section 48-115(2) quoted above. It therefore becomes necessary to determine whether the enactment was primarily procedural in nature and therefore operative as to all injuries and diseases occurring after its effective date, regardless of the date of hiring, or whether it is primarily substantive in nature and therefore operative only to cases in which the *hirings* occurred after its effective date. We conclude that the amendment was primarily substantive in nature in that it extended the extraterritorial operation of the compensation act." The court based its decision on certain Nebraska cases decided long before the enactment of the amendment referred to. The court then continued: "Having reached the conclusion that part (c) of the previously quoted amendment to Section 48-115(2) has no retroactive effect, it becomes unnecessary to determine whether the contract of employment was made in Nebraska, as claimed by the plaintiff, or in Kansas, as claimed by the defendant. Similarly, it is unnecessary to decide whether Mr. Jensen's death arose out of his employment.

"The Order of Dismissal hereinbefore entered on

April 10, 1980, by Judge Ben Novicoff should be modified to conform to the findings herein made."

The three-judge panel was clearly wrong in its ruling on rehearing that § 48-115(2)(c) operates only for those cases in which the contract of hire was entered into after the effective date of the amendment. The general rule is well established in a majority of jurisdictions that the law in force *at the time of the injury or accident* governs the right to, or liability for, compensation, in the absence of any provisions of the contrary effect. 99 C.J.S. *Workmen's Compensation* § 21 (1958); 81 Am. Jur. 2d *Workmen's Compensation* § 89 (1976). In other words, the law which must control the right to compensation is that law which is in effect *at the time the right to compensation springs into existence.* In *Chadd v. Western Cas. & Sur. Co.,* 166 Neb. 483, 89 N.W.2d 586 (1958), this court determined that the time for which wages were to be recompensed under Neb. Rev. Stat. § 48-126 (Reissue 1978) of the compensation act was at the time of the accident under the contract of hiring in force. "It is apparent that all calculations were intended by the Legislature to have reference to wages, percentages, and results as of the time of the injury." *Id.* at 491, 89 N.W.2d at 591. In this case, Jensen's injury occurred years after the adoption and effective date of the amendment previously referred to. It was clearly the intention of the Nebraska Legislature in adopting L.B. 150, amending § 48-115, as set out above, to extend the extraterritorial operation of the Nebraska Workmen's Compensation Act to all contracts of hire made within the state, without any qualification that the employer be a resident of Nebraska, perform services in Nebraska, or be engaged in any trade or business in this state. L.B. 150, 83d Leg., 1st Sess. (1973), was introduced by Senator John Cavanaugh who, in his "Statement of Purpose" contained in the legislative history of that bill, stated: "The following consti-

tute my reasons for this bill and the purposes which are sought to be accomplished thereby: The intent of LB 150 is to provide for additional bases of jurisdiction for workmen's compensation cases so that the state could take jurisdiction if the employment was principally localized in Nebraska, if the contract of hire was made in Nebraska, or the injury occurs in Nebraska, in addition to present jurisdictional bases." Likewise, the report on L.B. 150 made by the Committee on Labor makes the same statement as that set out above.

The majority opinion also argues that Neb. Rev. Stat. § 48-106 (Reissue 1978) provides in part that the provisions of the Workmen's Compensation Act shall apply "to every employer in this state, including nonresident employers *performing work in the State of Nebraska*" (emphasis supplied), and also that that language has remained unchanged since 1957. It is interesting to note, however, that in another section of the Nebraska Workmen's Compensation Act the term "performance of work" is defined as follows: "For purposes of this section, performance of work shall include but not be limited to situations in which (i) the injury or injury resulting in death occurred within this state, (ii) the employment was principally localized within this state, or (iii) the contract of hire was made within this state." Neb. Rev. Stat. § 48-175.01 (Reissue 1978). This is practically the identical language used in the previously referred to amendment.

Although as previously stated no issue was made either in the Workmen's Compensation Court or in this court with reference to problems of conflict of laws, and the issue should therefore not be discussed in this case, nevertheless, the majority opinion does refer to and cite various matters relating to conflict of laws. Much has been written upon the subject of conflict of laws in workmen's compensation cases, and it is clear that many and varied rules have been

suggested and adopted in that regard. The National Commission on State Workmen's Compensation Laws has endeavored to unify the rule which frequently arises in various jurisdictions with reference to their workmen's compensation laws. We note that in The Report of The National Commission on State Workmen's Compensation Laws, Part II, *Evaluations & Recommendations* at 48 (July 1972), the following appears: "We recommend that an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired." Here, again, is the identical language used in the Nebraska Workmen's Compensation Act.

Finally, we point out that in construing the Workmen's Compensation Act, it has long been the policy of this court to give a liberal construction to it so that its beneficent purposes may not be thwarted by technical refinements of interpretation. *Spiker v. John Day Co.,* 201 Neb. 503, 270 N.W.2d 300 (1978); *Marlow v. Maple Manor Apartments,* 193 Neb. 654, 228 N.W.2d 303 (1975). In *Dobesh v. Associated Asphalt Contractors,* 138 Neb. 117, 119-20, 292 N.W. 59, 60 (1940), we stated: "In all questions under the workmen's compensation law, it is our duty to avoid rules of technical construction as much as possible, and to determine the intention of the Legislature from the language of the act as a whole, rather than from the loose words or phrases of isolated paragraphs." Likewise, in *Union Packing Co. v. Klauschie,* 210 Neb. 331, 336, 314 N.W.2d 25, 29 (1982), we stated: " ' ' "The primary purpose of the workmen's compensation act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of proof,

but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion." ' " See, also, *White v. Western Commodities, Inc.*, 207 Neb. 75, 295 N.W.2d 704 (1980). If there ever was a case in which the foregoing rules should apply, it is the instant case.

I am firmly convinced that Judge Novicoff was correct in his finding that the Nebraska Workmen's Compensation Court had *jurisdiction* of this case under the 1973 amendment to the Nebraska workmen's compensation statutes, and that the court on rehearing erred in holding that § 48-115(2)(c) operated only as to cases in which the contract of hire was entered after the effective date of the amendment. However, since it is clear from the record that the court on rehearing made no findings or decision on the merits of the case, the question of liability should be remanded for a hearing in that court on that issue alone. I would do so.

PHILIP G. SCHMER, APPELLANT, V.
DORIS M. SCHMER, APPELLEE.
318 N.W.2d 876

Filed April 30, 1982. No. 44261.

Attorney Fees. The allowance of attorney fees and costs in a dissolution of marriage case is discretionary with the trial court and depends upon a consideration of all the facts and circumstances presented.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

James G. Egley of Moyer, Moyer & Egley, for appellant.

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

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

MCCOWN, J.

This is an action for dissolution of marriage. The decree granted custody of the minor child to the wife; fixed child support, alimony, and property settlement amounts in accordance with the stipulation of the parties; and directed the petitioner husband to pay costs and attorney fees. The husband has appealed challenging the award of custody and the assessment of costs and fees.

The parties were married in 1963. The husband owns and operates a corporate trucking business with 10 power units, and also owns and operates a 280-acre farm and livestock unit. The husband was 55 years old at the time of trial and the wife was 53. Their son, Charles, was born December 1, 1971, and was adopted by the parties as an infant. After an extended trial the District Court entered its decree dissolving the marriage and finding that both husband and wife were fit and proper persons to have the custody of the minor child, and awarded custody to the wife with detailed visitation rights granted to the husband. The court also ordered the wife and minor child to obtain psychological family counseling on a regular basis, with requirements for review.

The court found that a stipulation of settlement of the parties at trial was proper and reasonable and not unconscionable, and ordered compliance with it. The stipulation and decree required the husband to pay child support of $400 per month plus hospital and surgical insurance and payment of all medical expenses of the child. The wife received her residence in Columbus, and the husband received all other real estate of the parties. The husband received all the stock of his corporate business, all livestock and

farm machinery and equipment, and all life insurance policies on his life. The husband also received all other personal property in his possession plus certain specified items of furniture and equipment, and the wife received all personal property in her possession except the items specifically awarded to the husband. The stipulation directed the payment of indebtedness by the husband except for debts personally incurred by the wife after January 4, 1981. The stipulation and decree required the husband to pay alimony to the wife in the sum of $82,800, payable without interest at the rate of $600 per month until paid in full. The alimony is not terminable by the death or remarriage of either party or by any other contingency. The husband was directed to pay to the wife as property settlement $200,000, payable $60,000 without interest on or before June 1, 1981, the balance of $140,000 payable at the rate of $14,000 per year beginning June 1, 1982, with a like amount payable the 1st day of June thereafter until paid in full. Interest thereon was payable at the rate of 12 percent per annum from March 11, 1981, and the interest was payable quarterly commencing June 1, 1981.

The stipulation of the parties also provided that the matters of expert witness fees, court costs, attorney fees, and deposition fees should be submitted to the court for its decision at a hearing to be conducted by the court following submission of the stipulation to the court. The court, after reviewing the evidence, ordered the husband to pay the costs, appraisal and witness fees, and attorney fees of both parties. The total of costs and fees to be paid by the husband was approximately $26,000, which included $9,437.15 for the wife's attorney fees and $7,793.21 for the husband's attorney fees.

In his appeal in this court the husband contends that custody of the son was erroneously awarded to the wife and that the assessment of the costs and

fees against the husband was also erroneous and an abuse of discretion.

The husband contends that the wife has psychological problems and is incapable of properly caring for the son. Two expert witnesses, a psychiatrist and a professional family counselor, generally testified that the wife was fit and capable of caring for the child as the custodial parent. The guardian ad litem for the son filed an extensive report and recommended that custody of the child be placed with the wife, and that both the wife and child should continue family psychological counseling. The son expressed a preference to remain with his mother. The trial court found both parents fit to have custody but ordered custody placed with the wife, and ordered the wife and minor child to obtain psychological family counseling on a regular basis.

In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. *Turner v. Turner,* 205 Neb. 6, 286 N.W.2d 100 (1979). In the present case a review of the record de novo supports the determination of the trial court and establishes that the award of custody of the minor son to the wife was correct.

Finally, the husband contends that the trial court abused its discretion in taxing all the expenses of the litigation, including the attorney fees of both parties, to him. His position is that since the stipulation of settlement on issues except custody and costs and fees was satisfactory to both parties, therefore the costs should be equally divided and each party should be required to pay his or her own attorney fees.

The argument overlooks several relevant facts. During the pendency of the action, on several occasions the husband refused to answer interrogatories, refused to produce documents, ignored the

court's pretrial order, and violated the court's orders to answer interrogatories and produce information. He was twice ordered to show cause why he should not be held in contempt. He also failed to file a financial statement at any time. On the morning of trial the wife's attorney was advised of substantial changes in some of the assets. At that point the wife moved the court to impose sanctions on the husband for failure to cooperate with discovery orders and orders of the court. Following the trial the court overruled the motion for sanctions, but stated that the taxation of costs and fees was, to some extent, due to the husband's propensity not to cooperate with discovery orders or produce documents which had necessitated substantial extra work.

Perhaps more importantly, the wife presented to the court a balance sheet of the husband given to the Bank of Norfolk on July 16, 1980, which showed the husband's net worth was more than $1 million. The record also establishes that the earning capacity of the husband was far greater than that of the wife.

The allowance of attorney fees and costs in a dissolution of marriage case is discretionary with the trial court and depends upon a consideration of all the facts and circumstances presented. *Friedenbach v. Friedenbach,* 204 Neb. 586, 284 N.W.2d 285 (1979); *Witcig v. Witcig,* 206 Neb. 307, 292 N.W.2d 788 (1980). There was no abuse of discretion by the trial court in the case at bar.

The judgment of the District Court is affirmed. The wife is allowed the sum of $1,500 for the services of her attorney in this court.

AFFIRMED.

JOHN L. HOPPE, JR., APPELLEE, V. PHOENIX HOMES, INC., APPELLEE, JAMES E. LINTEL AND ELDON KRUGMAN, APPELLANTS.

318 N.W.2d 878

Filed April 30, 1982. No. 44462.

1. **Subrogation.** Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. It differs from legal subrogation which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights.
2. _____. Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and either the debtor or creditor.
3. _____. No general rule can be laid down which will afford a test in all cases for conventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration.
4. _____. Where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid, provided the debt secured by the encumbrance is not one for which the payor is primarily liable, and the grant of such relief is equitable.
5. _____. Where one pays or advances money to pay a mortgage debt with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation, although the creditor is not a party to the agreement.

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

John J. Goc and David J. Powers, for appellants.

Ward F. Hoppe of Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, for appellee Hoppe.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

The appellants, James E. Lintel and Eldon Krugman, appeal from a judgment entered by the District Court for Lancaster County, Nebraska, finding that the appellee John L. Hoppe, Jr., is entitled to a first lien upon certain real estate located in Lancaster County, Nebraska, under the doctrine of conventional subrogation. Lintel and Krugman, judgment lienors, were determined by the court to hold liens subordinate and inferior to the lien of Hoppe. We affirm, except as otherwise modified in this opinion.

Prior to June of 1980, Haugland Development, Inc., was the owner in fee simple of Lots 17 and 18, C. E. Montgomery's Addition to the City of Lincoln, Lancaster County, Nebraska (Lots 17 and 18). This property, together with other property owned by Haugland, was subject to mortgages in favor of First National Bank & Trust Company of Lincoln (First National Lincoln) totaling $37,300. There were no other liens or encumbrances on Lots 17 and 18. Haugland Development, Inc., later changed its name to Phoenix Homes, Inc., although the corporate officers and ownership remained the same. It defaulted in this matter and, for purposes of this appeal, may be disregarded.

On June 2 and 3, 1980, Lintel and Krugman, respectively, were awarded judgments against Phoenix. These judgments were rendered in the District Court for Lancaster County, Nebraska, and constituted judgment liens against Lots 17 and 18, as well as any other property owned by Phoenix in Lancaster County, subject only to the lien in favor of First National Lincoln.

In July of 1980, Phoenix, then being indebted to Hoppe, advised Hoppe that Phoenix was then in default of payment on the mortgage to First National Lincoln. Phoenix proposed that Hoppe pay $18,000 to First National Lincoln and obtain a release of mortgages as to Lots 17 and 18. Phoenix would then

convey title to Hoppe who, in turn, could obtain a first mortgage loan on the property. The parties proposed to construct two duplexes on the property and share the profits 50-50. Phoenix would do the construction work and Hoppe would provide the material. The parties further agreed that any profits which Phoenix might realize from the duplexes would be first applied to the debt to Hoppe.

Pursuant to the plan, Hoppe executed and delivered to First National Lincoln an unsecured note in the amount of $18,000 and in return received releases of the mortgages as to Lots 17 and 18. Title to the property was then conveyed by Phoenix to Hoppe, who then proceeded to obtain a construction loan from First Federal Savings and Loan Association of York, Nebraska (First Federal). It was at this point that Hoppe was advised by First Federal that it could not make a loan on Lots 17 and 18 due to the judgment liens of Lintel and Krugman. Suit was then filed by Hoppe seeking to have it declared that Hoppe held a first lien upon Lots 17 and 18, and to foreclose the interests of Lintel and Krugman. Following a trial to the court, the trial court entered a judgment generally in favor of Hoppe. Specifically, the trial court found and decreed that Hoppe held a valid first lien on Lots 17 and 18 to the extent of $18,000 plus interest. The trial court further found that Lintel held a second lien and Krugman a third lien by reason of their judgments. The trial court ordered Lintel and Krugman, or either of them, to pay to Hoppe the amount of his first lien, and in the event of default of payment of the amount due Hoppe within a period of 40 days, ordered the title to the two lots quieted in Hoppe as against the interests of Lintel and Krugman and a final decree entered quieting title in the name of Hoppe and against Lintel and Krugman after the lapse of 40 days if redemption was not made.

In arriving at its decision, the trial court employed

the doctrine of conventional subrogation. The trial court was correct in doing so. In the case of *Hoagland & Co. v. Decker,* 118 Neb. 194, 197, 224 N.W. 14, 15 (1929), we explained the doctrine, saying: "Courts recognize two kinds of subrogation, legal and conventional, and sometimes when the term is used without qualification legal subrogation is meant and may thus give rise to a misunderstanding of some of the court's holdings. The word 'conventional' is defined as growing out of or established by convention; that is, an agreement or mutual engagement between persons. As the name implies, conventional subrogation is founded upon some understanding or agreement, express or implied, and without which there is no 'convention.' Legal subrogation follows as a matter of legal right without any agreement."

The distinction between conventional subrogation and legal subrogation had earlier been set out in our decision in *State v. Holdrege State Bank,* 110 Neb. 814, 819, 195 N.W. 120, 122 (1923), where we said: "Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. It differs from legal subrogation which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and *either* the debtor or creditor." (Emphasis supplied.)

We have acknowledged that the use of conventional subrogation is intended to promote the ends of justice and no clear and concise rules can be laid down concerning its application. In *Jones v. Rhodes,* 162 Neb. 169, 171-72, 75 N.W.2d 616, 618 (1956), we said: " 'No general rule can be laid down which will afford a test in all cases for con-

ventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration.' . . .

" '* * * where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid, provided the debt secured by the encumbrance is not one for which the payor is primarily liable, and the grant of such relief is equitable.' "

In the case of *Prudential Ins. Co. v. Qualset,* 116 Neb. 706, 218 N.W. 734 (1928), this court was presented with a situation somewhat similar to the instant case. In determining that the doctrine of conventional subrogation should be applied, we said at 709-10, 218 N.W. at 735: " 'The right of subrogation for moneys loaned on a mortgage used to pay prior mortgages must be predicated upon some recognized equitable principle, such as mistake, an agreement or understanding that the loan was for the express purpose designed, or the like.'

. . . .

" '. . . And generally, where one pays or advances money to pay a mortgage debt with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation, although the creditor is not a party to the agreement.' "

And, likewise, in the case of *American Savings & Loan Ass'n v. Barry,* 123 Neb. 523, 529, 243 N.W. 628, 631 (1932), when again presented with a case requiring the application of conventional subrogation, we said: " 'Where a prior mortgage was released and a new one executed for the same debt, but owing to negligent search intervening judgments were not

discovered, the mortgagee was entitled to be restored to the lien of its canceled mortgage as against the judgment creditors; they not having changed their position to their prejudice.' "

We believe that the facts of the case, as generally agreed to by the parties, justify the application of the doctrine of conventional subrogation. It is clear that the mortgage loan to First National Lincoln was already in default. Had no payments been made to First National Lincoln by Hoppe, it is likely that First National Lincoln would have proceeded to foreclose against the property, and the rights of the judgment creditors, Lintel and Krugman, would have been extinguished. It was only because of Hoppe's agreement to make payment on a debt which he did not owe, but which he did nevertheless pay for the purpose of protecting another debt owed to him by Phoenix, that the mortgage of First National Lincoln as to the two lots in question was released. Obviously, the same result could have been obtained had the parties thought to receive an assignment of the mortgage. It cannot be said that Hoppe was a volunteer. Moreover, it is clear that Hoppe would not have assumed the debt to First National Lincoln except for Phoenix's promise that Hoppe would thereby acquire title to Lots 17 and 18 free and clear so that a construction loan could be obtained. No one denies those facts. Just as we applied the doctrine of conventional subrogation in the *American Savings & Loan* case and the *Prudential* case, we believe that it should likewise be applied in the instant case. The trial court was correct in doing so in this case.

We are, however, uncertain as to why Lintel and Krugman should be required to pay Hoppe or be foreclosed of any interest in the property prior to an actual sale of the property. Hoppe argues to us, as he apparently argued to the trial court, that by so decreeing the trial court did nothing more than what

a sale of the property by the sheriff might bring about. That may be true. On the other hand, the first lienholder may not wish to bid the full value of his lien. We cannot, as a matter of law, say that the first lienholder must bid the full value of his lien, though, to be sure, in most instances that will be the case. Nevertheless, the junior lienholders are entitled to the same treatment as anyone else in a foreclosure of real estate and are entitled to have the property sold at public auction and await the outcome of the purchase price. Hoppe cites no legal authority to us which supports such a rule of law as contended for by Hoppe or granted by the trial court. The action of the trial court in attempting to expedite the legal process is commendable, but apparently without legal authority. We believe that portion of the order requiring Lintel and Krugman to make payment or be foreclosed should be deleted. We therefore affirm the decree of the trial court insofar as it determined that Hoppe has a first lien on Lots 17 and 18 to the extent of the payment made by Hoppe to First National Lincoln, plus interest, that Lintel has a second mortgage by reason of his judgment and Krugman has a third mortgage by reason of his judgment, but we delete any further requirement that obligates Lintel or Krugman to make payment within a specific time. The property should be foreclosed and ordered sold in the normal manner. The judgment of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
GARY W. POPE, APPELLANT.

318 N.W.2d 883

Filed April 30, 1982. No. 44492.

1. **Constitutional Law: Attorneys at Law: Conflict of Interest.** In

order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

2. _____: _____: _____. The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

3. **Jury Instructions: Appeal and Error.** The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal.

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

Steven Lefler and Frederick Gray of Warren C. Schrempp Law Offices, for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz, for appellee.

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

KRIVOSHA, C.J.

The appellant, Gary W. Pope, convicted of the crime of first degree murder and sentenced to life imprisonment, has now appealed to this court. In this appeal he does not raise any issues as to the sufficiency of the evidence upon which his conviction was based but, rather, maintains that the trial court erred in failing to declare a mistrial on the court's own motion when, during trial, it allegedly became apparent that Pope's trial counsel was acting under an actual conflict of interest. We believe that the claim is without merit and the conviction and sentence must be affirmed.

Pope was charged with the crime of murder in the first degree in connection with the slaying of Richard Don Rogers, whose body was found in the vicinity of Ashland, Nebraska, on September 14, 1979. At a conference with the court held the day before trial

began, the State requested leave to endorse the names of four additional witnesses on the information. The State advised the court and Pope's trial counsel that two of the individuals, Leisa Green and Daniel Donovan, were known to Pope's trial counsel and the defendant. Pope's trial counsel acknowledged that they were his clients, and nothing more was said in that regard.

During the course of the trial, both Green and Donovan testified for the State. Donovan testified that he was a close friend of Pope and had known him for about 5 years. The balance of his testimony was of little significance to the State's case. On cross-examination, Donovan testified that, to the best of his knowledge, Pope never had any guns and that the victim was a friend of Pope's.

Green testified that she had known Pope for about 3½ years and she had lived with him during the preceding year. She likewise gave no testimony on direct examination which was in any way harmful to Pope.

On the third day of trial, after the State's rebuttal witnesses had testified, a conference was held in chambers with the court and all counsel present. The record reflects the following conversation:

"THE COURT: Plaintiff's counsel has indicated to me certain information which places me in a position I am not going to be able to submit this case to the jury until it has been resolved to my satisfaction.

. . . .

"THE COURT: The State has come to me with some information this morning indicating that there is a problem that has developed which leads me to believe that I cannot submit the case to the jury. It puts Mr. Troia in a very compromising position.

"He cannot represent his client by giving him advice, that's about what it comes down to."

And, further, the court said: "That the information which the State has received and conveyed to

the Court has been conveyed to the defendant's counsel, that it appears that *if* this information were to be true, that it would create a conflict in the representation of the defendant by Mr. Troia and that upon the Court's own motion, I have appointed Everett Inbody to represent the interests of the defendant when this information is relayed to him which will be immediately following this conference." (Emphasis supplied.)

Thereafter, a further conference was held in the presence of Pope, Leisa Green, counsel for the State, Mr. Inbody, Mr. Troia, and the two State Patrol investigators. Counsel for the State and Mr. Inbody, representing Pope, indicated to the court their stipulation and agreement that Pope take a lie detector test solely for the purpose of assisting the court in determining how to proceed in the matter. The court then stated: "Well, the only thing that occurs to me is, I think perhaps for the record and the record is somewhat skimpy on this entire issue, I ought to recap for you the sequence of events that have occurred as I know and understand them.

"I was advised by the State of Nebraska that they had come into possession of some information which bore on the nature of this particular incident and had to do with who may or may not have committed the crime that we are here to try.

. . . .

"I don't know a great deal about the evidence they received, they told me enough so that I could make a judgment on it.

"The obvious thing that occurred to me was, even before I talked to Mr. Troia, that it placed Mr. Troia in a very peculiar position because the information bore on several individuals that he represents and so he did not say, 'I do not believe I can represent,' I said, 'You cannot represent because you cannot conscientiously advise one person of their rights when you have been representing somebody else who may

be implicated and who may not be implicated.' And at that point, I appointed Mr. Inbody who knew nothing about the case, absolutely nothing, but he is a man I consider to be a competent attorney and willing to represent your interests and that has been his sole role in this particular case.

. . . .

"Mr. Inbody has been instructed that he is to be available to you [Pope] at any time during the weekend and I think I ought to perhaps make one comment. *If we determine to go forward, we will then have determined that Mr. Troia is not compromised in this situation. If we determine not to go forward, he is then perhaps compromised in this situation and under those circumstances, you ought to be able to judge for yourselves that it is very difficult for Mr. Troia to give you advice at this particular period of time.*

"THE DEFENDANT: Yes, sir, I understand.

"THE COURT: This is an unusual situation, unusual proceeding.

"I would ask that you keep me advised wherever we might be during the weekend." (Emphasis supplied.)

The record, unfortunately, is silent as to what gave rise to a possible conflict of interest or what were the results of the weekend activities. Nevertheless, the record does disclose that the trial resumed following the weekend recess, and Pope's trial counsel, Troia, went forward with defense surrebuttal. No objection to the procedure was ever made by anyone, including Mr. Inbody. In fact, Mr. Inbody, appointed as counsel to represent the interests of Pope regarding potential problems which may have arisen from information received by the State, was relieved of that responsibility by the court prior to the resumption of trial following the weekend recess, although defense counsel indicated he preferred to have Mr. Inbody present during the remainder of the trial.

As we have already noted, we are never advised as to what facts existed which created the potential conflict, nor are we advised in what manner it was resolved, if it ever existed. We do know, however, by reason of the trial court's earlier statements, that, by proceeding with trial, we are to conclude that no conflict existed and that defense counsel was not compromised so as to be unable to continue representing Pope.

Pope now argues that the trial court erred in not declaring a mistrial or granting him a continuance on the court's own motion to allow Inbody, appointed "because of the conflict," time in which to familiarize himself with the case, investigate it, and prepare the case for Pope. However, as we have already indicated, Pope provides us with no evidence as to whether in fact there was a conflict and, if so, the nature of the conflict. Certainly the fact that the trial counsel for Pope has other clients, including some of whom testified at the trial, is not sufficient to constitute a conflict of interest requiring the trial court to declare a mistrial.

A criminal defendant's right to a trial free of a conflict of interest is required by the defendant's sixth amendment right to the effective assistance of counsel. See *Holloway v. Arkansas,* 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). But, as noted in *Cuyler v. Sullivan,* 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), *Holloway* reaffirmed that multiple representation does not violate the sixth amendment unless it gives rise to an actual conflict of interest. In *Cuyler, supra* at 348, the U.S. Supreme Court said: "Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the

possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where ' "[a] common defense . . . gives strength against a common attack." ' "

The U.S. Supreme Court in *Cuyler* then set out the requirements for establishing such a conflict of interest entitling an accused to a mistrial, saying at 348-50: "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. . . .

. . . .

". . . Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See *Holloway, supra,* at 487-491. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See *Glasser, supra,* at 72-75.

". . . We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance."

Following the *Cuyler* decision, the U.S. Court of Appeals for the Eighth Circuit in *Parker v. Parratt,* 662 F.2d 479, 483 (8th Cir. 1981), reviewing an alleged sixth amendment violation resulting from a claimed conflict of interest, said: "It must also be acknowledged, however, that joint representation of multiple defendants with conflicting interests by a single attorney 'is not *per se* violative of constitutional guarantees of effective assistance of counsel.' " The court then quoted from *Cuyler* and concluded by saying at 484: "Therefore, a two-step test must be

met in a case of multiple representation of conflicting interests. A claimant must establish: (1) actual conflict of interest; and (2) adverse effect on the lawyer's representation." We believe the two-step test an appropriate interpretation of *Cuyler, supra*. We are unable to find any evidence in this record to meet either the tests set out in *Parker* or the requirements announced in *Cuyler*. As we have already noted, if the record establishes anything, it is that the trial court made an investigation of the alleged claim and concluded that there was no actual conflict of interest.

In support of his claim that a conflict of interest existed, Pope provides us with an affidavit of his brother. The affidavit does nothing to establish any actual conflict of interest on the part of Pope's attorney but, rather, shows that, with full knowledge of all the facts, Pope chose to proceed with the trial. The affidavit recites in part: "Mr. Inbody informed me that an informant had come forward who could clear my brother if I would be willing to talk to my brother and pursuade [sic] him to turn State's evidence against one, Daniel R. Donovan. . . . I met with Gary and conveyed the information to him and Gary said he would not do so because if he did his wife and his children would be in deadly danger and that his minor children would be totally endangered." How it can be argued that Pope's trial counsel could have done anything to overcome Pope's choice not to turn State's evidence is impossible to understand. We believe that the record simply fails to disclose any evidence from which it can be concluded that an actual conflict of interest did exist on the part of Pope's trial counsel so as to entitle Pope to a new trial.

Pope further argues that the trial court erred in one of its instructions to the jury concerning the commission of a felony murder. We may dispose of the claim quickly. No objection to the instruction

was made by Pope, nor to any other instruction tendered. We have frequently held that the failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal. See *State v. Duis,* 207 Neb. 851, 301 N.W.2d 587 (1981).

Pope has raised several other objections which we have also examined and determined to be without merit. The judgment is affirmed.

AFFIRMED.

JOSE L. GUERRA, APPELLEE, V.
IOWA BEEF PROCESSORS, INC., APPELLANT.
318 N.W.2d 887

Filed April 30, 1982. No. 44509.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Workmen's Compensation Court after rehearing have the force and effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
2. _____: _____. In testing the sufficiency of evidence to support the findings of fact of the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workmen's Compensation: Words and Phrases.** "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.

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

Smith, Smith & Boyd, for appellant.

Smith & Smith and William L. Binkard, for appellee.

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

McCOWN, J.

This is a workmen's compensation case. At the initial hearing a single judge of the Workmen's Compensation Court dismissed plaintiff's petition. Upon rehearing before a three-judge panel of the compensation court, the court made an award to plaintiff for temporary total disability, medical expense, and for 10 percent permanent partial loss of earning power. The defendant has appealed.

The plaintiff, Jose L. Guerra, age 63 at the time of trial, had been employed by the defendant, Iowa Beef Processors, Inc., for approximately 11 years prior to the incident involved here. His job was to trim fat and pieces of hide from 75- to 90-pound rounds of beef as they passed his work station on hooks. A large pan on the floor catches the trimmings. His usual duties required very little lifting, but occasionally a round of beef would fall from the hook and have to be lifted.

On September 16, 1980, at about 11:30 p.m., approximately 15 minutes before the end of Guerra's shift, a round of beef dropped from the hook onto the pan in front of Guerra. He picked up the round, took three or four steps to his left, and put the round on a conveyor belt. He immediately felt pain in his left thigh and a coworker heard him say something about feeling pain and observed that he also showed pain through his facial expression. Guerra finished the remaining 15 minutes of his shift. His foreman was gone by that time and the dispensary was closed. He went home and complained to his wife that he had hurt himself at work.

The next day Guerra telephoned the defendant's personnel office and told them he had been hurt at work and had to see a doctor. He consulted his family physician and was hospitalized the same day. His complaints to the family physician were of pain in the left thigh, traveling down the left leg. His family physician referred him to an orthopedic sur-

geon who examined him first on September 22, 1980. The orthopedic surgeon performed a laminectomy on October 3, 1980, to repair a herniated disc in plaintiff's lower back. The orthopedic surgeon testified that the herniated disc was the cause of the problem with Guerra's leg and gave his opinion as to the medical causative connection between the accident of September 16, 1980, and the resulting disability. The doctor also testified that the plaintiff had suffered a 10 percent disability of the body as a whole.

There was also evidence that Guerra had had previous back problems in 1976, and that some of his statements to the doctors had indicated that he had had back pain for several days prior to the incident of September 16.

It is stipulated that Guerra returned to work after surgery on January 19, 1981, worked through February 10, 1981, was then off work and returned to work on March 9, 1981. He has since been performing the same job as before the injury except that he cannot lift heavy objects, wears a back brace while working, and still has occasional pain. On the date of the accident plaintiff was earning $8.02 per hour and his wage at the time of rehearing was $8.50 per hour.

The Workmen's Compensation Court on rehearing found that Guerra had maintained his burden of proving that the accident and injury he sustained on September 16, 1980, were the cause of his temporary total disability and permanent partial loss of earning power, and entered an award for temporary total disability and for 10 percent permanent partial loss of earning power, and directed the payment of medical and hospital bills necessarily resulting from the accident and injury.

The defendant contends that the finding of the Workmen's Compensation Court on rehearing that the plaintiff suffered an injury to his back arising out of and in the course of his employment by the de-

fendant is not supported by the evidence. The defendant also contends that the evidence does not support an award of permanent partial loss of earning power because Guerra is again working at his former job and currently receives a higher wage than before the injury.

Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Reissue 1978). This court has consistently held that such findings of fact will not be set aside on appeal unless clearly wrong, and that in testing the sufficiency of evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party. *Meyer v. First United Methodist Church,* 206 Neb. 607, 294 N.W.2d 611 (1980). The evidence in the case at bar was clearly sufficient to support the finding of the Workmen's Compensation Court that the accident and injury Guerra sustained on September 16, 1980, was the cause of his resulting disability. That finding was not clearly wrong and must be sustained.

The defendant also contends that because Guerra returned to the same job and earns 48 cents per hour more than before, he has not suffered any loss of earning power even though he has a 10 percent loss of bodily function. In *Akins v. Happy Hour, Inc.,* 209 Neb. 236, 239, 306 N.W.2d 914, 916 (1981), this court stated: " 'Earning power,' as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted."

In the case at bar it is clear that Guerra's ability to lift objects has been substantially impaired and

he is required to wear a brace in performing his work. The inability to lift is an important limitation in any kind of employment for which Guerra is fitted, and adversely affects his ability to procure and hold a job. The fact that an employer is willing to continue to employ a person whose ability to perform his tasks has been restricted ought not to destroy the employee's rights to compensation benefits.

In a similar case involving an almost identical back injury and a similar percentage loss of bodily function after the performance of a laminectomy, this court upheld an award for loss of earning power and said: "[T]he Workmen's Compensation Court was entitled to take into consideration not only the 10 percent loss of bodily function because of the lumbar laminectomy, but also the facts that the plaintiff was engaged in common labor and that that was his primary skill. His ability to lift was impaired and his employability was thus reduced." *Sidel v. Travelers Ins. Co.,* 205 Neb. 541, 547, 288 N.W.2d 482, 485-86 (1980).

The finding of the Workmen's Compensation Court in the present case that Guerra had suffered a permanent partial loss of earning power was also a factual finding, is supported by the evidence, and is not clearly wrong.

The judgment is affirmed. Plaintiff is awarded $750 as attorney fees in this court.

AFFIRMED.

MICHELLE A. EARNEST, APPELLANT, V. LUTHERAN MEMORIAL HOSPITAL AND LUTHERAN HOSPITALS AND HOMES SOCIETY, APPELLEES.

319 N.W.2d 66

Filed April 30, 1982. No. 44516.

1. **Workmen's Compensation: Appeal and Error.** In reviewing workmen's compensation cases, this court is bound by the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1978). Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. _____: _____. Where a record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court.
3. **Workmen's Compensation: Attorney Fees.** When the employer files an application for a rehearing before a three-judge compensation court and fails to obtain any reduction in the amount of the award, the court ordinarily should allow the employee a reasonable attorney fee.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

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

Chesley S. Baker of Lauritsen, Baker & Brownell, for appellees.

Heard before BOSLAUGH and WHITE, JJ., and CLARK and KNAPP, D. JJ., and RONIN, D.J., Retired.

KNAPP, D.J.

This is an appeal in a proceeding under the Workmen's Compensation Act. Plaintiff alleged that on November 21, 1979, while engaged in the performance of her duties as a housekeeper for defendants, she slipped and, in attempting to avoid a fall, injured her back, causing total disability.

The matter was heard before a single judge of the compensation court, who, on June 23, 1980, found plaintiff to have been temporarily totally disabled

from the date of the accident through March 4, 1980; temporarily partially disabled to the extent of 37½ percent from March 5, 1980, through April 27, 1980; temporarily totally disabled from April 28, 1980, through May 15, 1980; and temporarily totally disabled from May 23, 1980, through the date of the award. The judge further found that plaintiff would remain temporarily totally disabled for an indefinite future period of time, awarded benefits in accord with his findings, and required temporary total disability payments to continue "for so long in the future as the plaintiff remains temporarily totally disabled."

Defendants refused to accept the judge's findings and requested a rehearing before the three-judge court. Prior to the rehearing, and following a court-ordered examination of plaintiff by defendants' physician, defendants ceased making temporary total disability payments, and from February 18, 1981, through April 28, 1981, the date of the rehearing, paid to plaintiff $6.16 per week based upon their physician's rating of a 5 percent permanent partial disability to plaintiff's body as a whole.

On rehearing, the three-judge panel affirmed the original award as to the various periods of temporary total and temporary partial disability and found further that plaintiff's temporary total disability continued from the date of the original award through February 17, 1981, and that it then ceased, leaving plaintiff with a permanent partial disability, consisting of a 25 percent reduction in earning power, entitling her to $20.53 per week for 236⅜ weeks commencing February 18, 1981.

The court, with Judge Monen dissenting, further found that defendants had obtained a reduction in the original award and that, therefore, plaintiff could not be awarded an attorney fee.

Plaintiff appeals, assigning as error the findings that her temporary total disability terminated on

February 17, 1981, and that defendants had obtained a reduction in the earlier award.

In support of her first assignment of error, plaintiff directs our attention to the March 25, 1981, report of Dr. Robert M. House, who stated that plaintiff was then still under treatment; a 10 percent permanent partial impairment to the body as a whole could be expected; the impairment would be to the functions of bending, stooping, lifting, walking, and standing; he did not expect her to be able to return to her former work as a housekeeper; and her release for work would be dependent upon the type of job obtained and her response to treatment. However, the court also had before it the report of John G. Yost, M.D., dated February 6, 1981, wherein that doctor concluded that there were no objective findings to substantiate plaintiff's subjective complaints; that there was no reason why plaintiff could not then be doing work that did not require continuous lifting; and that, as of the date of his examination, plaintiff had a maximum permanent partial disability to the body as a whole not to exceed 5 percent.

In reviewing workmen's compensation cases, this court is bound by the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1978). Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Shaw v. Gooch Feed Mill Corp.,* 210 Neb. 17, 312 N.W.2d 682 (1981). Where a record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court. *Union Packing Co. v. Klauschie,* 210 Neb. 331, 314 N.W.2d 25 (1982). There was clearly sufficient evidence before the court on rehearing to support its finding that plaintiff's temporary total disability had terminated by February 17, 1981, if not before.

Plaintiff's first assignment of error is without merit.

The finding of the majority of the court on rehearing that defendants obtained a reduction in amount of the original award is inexplicable and cannot stand. The original award was affirmed in all respects. That award contemplated a cessation of temporary total disability at a date to be determined in the future. The court on rehearing in fact determined that date, a date long subsequent to the date of the original award. This was in no sense a diminution of the original award but was in complete accord therewith. Where the employer files an application for rehearing before a three-judge compensation court and fails to obtain any reduction in the amount of the award, a reasonable attorney fee is ordinarily allowed the employee. *Harrington v. State,* 198 Neb. 4, 251 N.W.2d 653 (1977); Neb. Rev. Stat. § 48-125 (Reissue 1978). There appears no reason for disallowance of an attorney fee in this instance. We therefore hold that the compensation court should have allowed, and shall allow, a reasonable attorney fee to plaintiff for her counsel's appearance before the three-judge compensation court.

The award of the Workmen's Compensation Court is affirmed in all respects except the disallowance of an attorney fee in that court. That part of the award denying the plaintiff an attorney fee is reversed. The cause is remanded to the Workmen's Compensation Court with directions to allow the plaintiff a reasonable fee for the services of her attorney in that court.

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

STATE OF NEBRASKA, APPELLEE, V.
ROBERT H. BECKNER, JR., APPELLANT.
318 N.W.2d 889

Filed April 30, 1982. No. 44532.

1. **Entrapment.** Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer or agent provides a favorable opportunity for the violation does not constitute entrapment.
2. _____. The mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense of entrapment.
3. **Witnesses: Evidence.** Corroboration is sufficient if the cooperating individual is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
4. **Appeal and Error.** In determining the sufficiency of the evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
5. **Sentences: Appeal and Error.** Where the sentence imposed is within statutory limits, it will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court.

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

Richard L. Kuhlman, for appellant.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellee.

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

CAPORALE, J.

Robert H. Beckner, Jr., defendant-appellant, was charged in an information filed in the District Court for Dodge County, Nebraska, with delivery of a controlled substance, to wit: marijuana, in violation of

Neb. Rev. Stat. § 28-416(1) (Reissue 1979). Following a jury trial the defendant was convicted as charged. He was sentenced on August 3, 1981, to a term of 1 to 3 years' imprisonment in the Nebraska Penal and Correctional Complex, with a credit of 27 days granted for time served.

In his brief on appeal, appellant has listed 12 assignments of error on the part of the trial court. However, many of the assigned errors are not discussed in his brief. Therefore, pursuant to Rule 8.a.2.(3) of this court, these allegations of error are not considered. *Cockle v. Cockle,* 204 Neb. 88, 281 N.W.2d 392 (1979). The remainder of appellant's assignments can be summarized as follows: (1) That the appellant was entrapped; (2) That the statements of the cooperating individual were not corroborated sufficiently; and (3) That the sentence imposed was excessive. We find these assignments of error to be without merit.

The record reveals that in January of 1981, Jeffards R. Byington was employed as a "cooperating individual" or informant by the Nebraska State Patrol. He was to gather information about drug traffickers and to relay that information to law enforcement officials. Byington operated in Dodge County where he became acquainted with the appellant through a mutual friend. On February 5, 1981, Byington arranged for a meeting between Officer Dennis J. Mayberger, an undercover drug investigator for the Nebraska State Patrol, and the appellant at the trailer home owned by Beckner in Ames, Nebraska. Upon their arrival, negotiations commenced between Mayberger and Beckner concerning the purchase of a quantity of marijuana. The appellant produced a plastic bag which contained several smaller plastic bags, each containing approximately 1 ounce of marijuana. In addition, Beckner produced another quantity of marijuana. Officer Mayberger asked the appellant how much he

wanted per ounce of marijuana, and was told by Beckner the price was $40 an ounce. Mayberger also inquired as to the purchase price for a quarter pound of marijuana, and was told by the appellant that the cost was $130. Thereafter, Mayberger purchased a quarter pound of the controlled substance from the appellant.

Appellant does not deny the possession of marijuana, nor contest selling a quarter pound of the substance to Officer Mayberger. He alleges, however, that he was improperly induced to sell the drugs by informant Byington and was therefore entrapped. We note the parties have stipulated that the chain of custody of the evidence was proper and that the chemical analysis performed by the State Health Laboratory identified the substance purchased from appellant as marijuana.

In reviewing claims of entrapment by criminal defendants in drug-related cases, this court has held that where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer or agent provides a favorable opportunity for the violation does not constitute entrapment. *State v. Lampone,* 205 Neb. 325, 287 N.W.2d 442 (1980); *State v. Amen,* 190 Neb. 362, 208 N.W.2d 279 (1973). In addition, we have held that the mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense of entrapment. *State v. Ransburg,* 181 Neb. 352, 148 N.W.2d 324 (1967). The rationale for employing such stratagems was stated by the U.S. Supreme Court in *United States v. Russell,* 411 U.S. 423, 432, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), as follows: "The illicit manufacture of drugs is not a sporadic, isolated

criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation . . . ." See, also, *Sherman v. United States,* 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958); *Sorrells v. United States,* 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932).

In support of the contention that he was entrapped, appellant testified that Byington had made repeated promises to do bodywork on a truck owned by Beckner, refinish several stereo speakers, and acquire a safety inspection sticker for a van owned by the appellant which was in defective condition. Byington testified that he made such offers to the appellant, but stated that he had never performed any of the tasks and that the offers were not made in the hopes of acquiring marijuana. It appears from the record that such offers were made by the informant as an attempt to gain the appellant's friendship. There is nothing in the record which indicates Byington suggested or preconceived any plan for the sale of the marijuana to Officer Mayberger. The record reflects that after Byington introduced the appellant to Mayberger, the law enforcement officer negotiated for the sale of the substance and Byington had no role in determining how the sale was made. Byington testified that he observed the appellant sell marijuana to another individual approximately 5 days prior to the sale of the substance to Officer Mayberger. This testimony was relevant in that it reveals a predisposition originating on the part of the appellant to traffic in drugs.

It is doubtful that the above evidence is sufficient to raise the defense of entrapment. Annot., Modern Status of the Law Concerning Entrapment to Commit Narcotics Offense—State Cases, 62 A.L.R.3d 110 (1975). It is certainly insufficient to support a finding that the appellant was entrapped as a matter of law, which is what he contends. In any event, the issue of entrapment was submitted to the jury under instructions, the correctness of which the appellant does not challenge, and the jury found against the appellant.

Nor can we concur with appellant's allegation that the testimony of Byington should have been excluded as not sufficiently corroborated. Neb. Rev. Stat. § 28-439 (Reissue 1979) provides: "No conviction for an offense punishable under sections 28-401 to 28-438 shall be based solely upon the uncorroborated testimony of a cooperating individual." Appellant argues that any testimony of a cooperating individual on the essential elements of a crime which is not corroborated by other evidence cannot be considered by the trier of fact. A simple reading of the language of the statute leads to a contrary conclusion. The statute only requires that a conviction be based on something more than only a cooperating individual's testimony. Such a reading of the statute is supported by the Statement of Purpose of the introducer of L.B. 276. "A corroboration requirement does not mean that a commissioned law enforcement agent would have to be physically present at the time a drug purchase is made. Corroboration could be supplied, by instance, through the use of electronic surveillance, observations which indicate simply that the meeting between the subject and the cooperating individual actually took place, searches of the cooperating individuals both before and within a reasonable time after the drug purchase is alleged to have taken place, the use of marked buy money, the use of cooperating individu-

als in teams, the use of fingerprint analysis and numerous other investigative techniques." During the floor debates the argument was equated to that necessary to support a conviction for the offense of rape. Floor Debate, 85th Leg., 2d Sess. 5696 (January 16, 1978). In that regard this court has previously held that corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. *State v. Thompson,* 198 Neb. 48, 56, 251 N.W.2d 387, 391 (1977). In the present case, the testimony of Byington was sufficiently corroborated by Officer Mayberger who was present and testified as to the negotiations for the sale of the marijuana.

The testimony produced at trial clearly presented a factual dispute for the resolution of the jury. In this case, the jury resolved the issues in favor of the State and found the appellant guilty as charged. The rule is well established that in determining the sufficiency of the evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Weible, ante* p. 174, 317 N.W.2d 920 (1982); *State v. Rust,* 208 Neb. 320, 303 N.W.2d 490 (1981).

Finally, we turn to appellant's contention that the sentence imposed by the District Court was an abuse of discretion and that the court erred by sentencing him to a term of imprisonment rather than probation. Pursuant to Neb. Rev. Stat. § 28-416(2) (Reissue 1979), the offense for which the appellant was convicted was a Class III felony which carries a maximum term of 20 years' imprisonment, a $25,000 fine, or both. The sentence imposed on the appel-

lant is well within the statutory guidelines and cannot be said to have been an abuse of discretion on the part of the trial court. A review of the sentencing proceeding indicates that the District Court considered the appellant's education and work record, his prior criminal record which consists of numerous traffic convictions and the conviction for the offense of petit larceny for which he was sentenced to a term of probation, and the seriousness of the offense with which appellant was involved. It is well established in this jurisdiction that where the sentence imposed is within statutory limits, it will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. *State v. Wredt,* 208 Neb. 184, 302 N.W.2d 701 (1981); *State v. Janis,* 207 Neb. 491, 299 N.W.2d 447 (1980).

The jury's verdict and the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOHN R. MORSE, APPELLANT.

318 N.W.2d 893

Filed April 30, 1982. No. 81-574.

1. **Appeal and Error.** In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Blood, Breath, and Urine Tests.** Under the provisions of Neb. Rev. Stat. § 39-669.09 (Reissue 1978), if the law enforcement officer requires the arrested party to take a breath test pursuant to Neb. Rev. Stat. § 39-669.08 (Reissue 1978), the party does not have the option of electing a blood or urine test. The option is available only if the officer directs a test of blood or urine.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Paul M. Conley, for appellant.

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

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

CLINTON, J.

The appellant, John R. Morse, was charged with driving while under the influence of alcohol - second offense, refusal to submit to a pretest, and refusal to submit to a chemical test. He was convicted of all three charges in the municipal court of the city of Lincoln and subsequently appealed to the District Court for Lancaster County, which affirmed all three convictions. The appellant brings the case to this court, appealing the convictions of the first and third charges respectively.

In the early morning hours of October 22, 1980, the appellant was stopped while operating his motor vehicle in Lincoln, Nebraska, by an officer of the Lincoln Police Department. The officer requested the appellant to submit to a pretest for the possible consumption of alcohol. When the appellant refused to give a breath sample for the pretest, the officer arrested him for refusal to submit to a pretest and suspicion of driving while intoxicated.

The officer transported the appellant to the police station and attempted to administer a breath test on a machine called an Intoxilizer which would indicate the appellant's breath alcohol level. After being instructed on how to activate the Intoxilizer, the appellant blew into the machine, but did not activate it in such a manner so as to obtain a measure of the alcohol in his breath. The officer instructed the appellant in regards to providing an adequate breath sample. Yet after five requests and five attempts, the

appellant did not provide a breath sample adequate to obtain a reading. The appellant makes two assignments of error, and additional facts will be discussed where necessary in relation to those assignments.

The appellant first urges the State produced evidence insufficient to find him guilty of driving while under the influence of alcohol. "In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Weible, ante* p. 174, 182, 317 N.W.2d 920, 924 (1982). We have reviewed the record, which reveals the arresting officer testified the appellant's vehicle was traveling 40 to 45 miles per hour in a 25-mile-per-hour zone on N Street and 35 miles per hour in a 25-mile-per-hour zone on 9th Street. He further testified the appellant's vehicle at one point straddled the centerline for about a quarter of a block. When the police officer stopped the appellant, he observed the appellant's breath smelled of alcohol, his eyes were bloodshot and watery, and his stance was unsteady. The officer also noted the appellant had some difficulty walking in a straight line, and his speech was slurred. In the officer's opinion the appellant was under the influence of an alcoholic beverage the morning on which he was arrested. As such, sufficient evidence exists to uphold the appellant's conviction, and the first assignment of error is unpersuasive.

Under appellant's second assignment of error, he claims he did not "refuse" to submit to a chemical test, as prohibited by Neb. Rev. Stat. § 39-669.08(4) (Reissue 1978), because he was unable to give an

adequate breath test. According to the appellant's testimony, his inability to activate the Intoxilizer stemmed from a stuffed up nasal passage caused by a cleaning solution he uses as a contract painter and dry-waller. He further claims that when he was unable to give the breath test, he requested a blood test be administered. Neb. Rev. Stat. § 39-669.09 (Reissue 1978) reads in part: "The law enforcement officer who requires a chemical blood, breath, or urine test pursuant to section 39-669.08 may direct whether the test shall be of blood, breath, or urine; *Provided,* that when the officer directs that the test shall be of a person's blood or urine, such person may choose whether the test shall be of his blood or urine." Under the language of the statute, the intent as to one's right to request a particular type of test is clear. That right only arises when the officer has directed either a blood or urine sample. The appellant cites the case of *State v. Wahrman,* 199 Neb. 337, 258 N.W.2d 818 (1977), for the proposition that one has a right to choose the type of test administered. That case, however, addressed one's province to choose between blood or urine tests when one of those tests is directed, as is provided for in the statute. *Wahrman* did not hold that a general right to choose exists beyond the grant of the statute. It is arguable that a true physical disability to take a breath test without an opportunity to submit to another form of test would be due process violation. We need not reach that question in this case, however. Whether or not the appellant was truly physically unable to activate the Intoxilizer was a question of fact to be resolved by the trial court. The record reveals the arresting officer at no time prior to the actual administration of the breath test observed any difficulty in the breathing of the defendant. He also testified that the Intoxilizer was not very difficult to activate. When evidence such as this exists in the record, it is not within the province of this court to

overrule the factual finding of the trial court in relation to the appellant's breathing ability. *State v. Weible, supra.* As such, the appellant's second assignment of error is unpersuasive. His convictions of driving while under the influence of alcohol and refusal to submit to a chemical test are affirmed.

AFFIRMED.

SUSAN M. NOLAND, APPELLEE AND CROSS-APPELLANT, V. SCOTT E. NOLAND, APPELLANT AND CROSS-APPELLEE.

318 N.W.2d 747

Filed April 30, 1982. No. 81-793.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Scott E. Noland, pro se.

Susan M. Noland, pro se.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record de novo as it is required to do, finds that the decree of the trial court should be affirmed. Attorney fees are not allowed.

AFFIRMED.

IN RE PROCEEDINGS TO CHANGE BOUNDARIES OF HEARTWELL SCHOOL DISTRICT R-4 AND MINDEN SCHOOL DISTRICT R-3.

BOARD OF EDUCATION OF HEARTWELL SCHOOL DISTRICT R-4 ET AL., APPELLANTS, V. SARAH JEPSEN, KEARNEY COUNTY SUPERINTENDENT OF SCHOOLS, ET AL., APPELLEES.

319 N.W.2d 68

Filed May 7, 1982. No. 43922.

1. **Schools and School Districts.** The authorization to change the boundaries of school districts under Neb. Rev. Stat. §§ 79-402 and 79-402.03 (Reissue 1976) and related sections is not limited to lands in one compact contiguous area, nor is the transfer of land from one school district to another school district limited to land which is contiguous to the common boundary between the two districts.
2. **Statutes: Legislature.** This court will not, by interpretation or construction, usurp the function of the legislative body and give a statute a meaning not intended or expressed by the Legislature.

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

Arthur R. Langvardt of Fitzke & Langvardt, for appellants.

Knapp, Mues, Sidwell, Anderson, Shofstall & Beavers, for appellees Jurgensmier and Joyce.

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

MCCOWN, J.

This is an appeal from a judgment of the District Court for Kearney County affirming an order of the Kearney County superintendent of schools transferring certain real estate from Heartwell School District R-4 to adjacent Minden School District R-3. The Board of Education of Heartwell School District R-4 and various taxpayers in that school district have appealed.

On February 16, 1979, the Board of Education of Minden School District R-3 voted to authorize a joint

petition with the Board of Education of Heartwell School District R-4 to change the boundaries of the two school districts. The Board of Education of Heartwell School District R-4 also voted to authorize the joint petition on February 19, 1979. Both school districts are in Kearney County.

The joint petition was filed with the Kearney County School District Reorganization Committee on March 1, 1979. The joint petition stated that it was filed under the provisions of Neb. Rev. Stat. §§ 79-402, 79-402.03 (Reissue 1976), and other statutes. The petition sought to change the boundaries of the two districts and detach the various tracts of land from the Heartwell district and attach, annex, and include them in the Minden district. The petition called for the transfer of 28 parcels of land totaling 4,392 acres. None of the tracts to be transferred were contiguous to the Minden district. Some of the 28 parcels were contiguous to each other and there were some 8 or 9 separate areas or tracts distributed through the Heartwell district. It was stipulated that some of the owners whose land was to be transferred did not have children in school. The petition stated that the proposed reorganization and change of boundaries was to be made so that the property to be transferred was to be assessed, valued, and taxed as a part of the Minden district and no longer as a part of the Heartwell district.

On May 7, 1979, the State Committee for School District Reorganization reviewed the petition proposal and voted to approve it. The state committee directed the Kearney County superintendent of schools to proceed with hearing and determination of the validity and sufficiency of the petition as prescribed by statute.

In a case filed by a member of the Board of Education of the Heartwell district in the District Court, the court issued a writ of mandamus to the county superintendent of schools on June 19, 1979, ordering

her to advertise and hold a hearing to determine the validity and sufficiency of the signatures on the joint petition and, if found valid and sufficient, to effect immediately the changes in boundaries as called for in the petition. The statutory procedures were then followed and the county superintendent of schools ordered the land transferred from the Heartwell district to the Minden district effective August 17, 1979. On August 27, 1979, the Board of Education of Heartwell School District R-4 and various residents and taxpayers appealed to the District Court.

The District Court found that the order of the county superintendent of schools implementing the change of boundaries sought in the joint petition of the boards of education of the Heartwell and Minden districts was proper in all respects, and affirmed the order of the county superintendent. This appeal followed.

The appellants contend that a school district must consist of one compact contiguous area of land within one set of boundary lines, and that under § 79-402 and related sections separate legally described tracts of land in one school district cannot be transferred to another school district to which they are not contiguous.

The statutory provisions involved stem from § 79-402. That section provides in part: "The county superintendent shall create a new district from other districts, or *change the boundaries* of any district upon petitions signed by sixty per cent of the legal voters of each district affected . . . ." The remainder of the section specifies the requirements for petitions and their review and approval or disapproval, and specifies that the county superintendent shall hold a hearing to determine the validity and sufficiency of the petitions, and: "Upon determination, as a result of the hearing, that sufficient valid signatures are contained in the respective petitions, the county superintendent shall proceed to ef-

fect *the changes in district boundary lines* as set forth in the petitions . . . ." (Emphasis supplied.)

Section 79-402.03 provides: "In addition to the petitions of legal voters pursuant to section 79-402, changes in boundaries or the creation of a new district from other districts may be initiated and accepted by:

"(1) The board of education of any Class III, IV, V, or VI district; and

"(2) The board of education of any Class I or II district in which is located a city or incorporated village."

Neb. Rev. Stat. § 79-402.06 (Reissue 1976) provides: "Petitions presented pursuant to sections 79-402.03 to 79-402.05 shall be subject to the same requirements for content, hearings, notice, review, and appeal as petitions submitted pursuant to section 79-402."

Neb. Rev. Stat. § 79-426.01 (Reissue 1976) provides in part: "As used in sections 79-426.01 to 79-426.19 and 79-426.22, unless the context otherwise requires: (1) The term reorganization of school districts shall mean the formation of new school districts, the alteration of boundaries of established school districts, and the dissolution or disorganization of established school districts through or by means of any one or combination of the methods set out in section 79-426.02 . . . ."

Neb. Rev. Stat. § 79-426.02 (Reissue 1976) provides: "Reorganization of school districts may be had and accomplished through or by means of any one or more of the following methods: (1) The creation of new districts; (2) the uniting of one or more established districts; (3) the subdivision of one or more established districts; (4) *the transfer and attachment to any established district of a part of the territory of one or more districts;* and (5) the dissolution or disorganization of any established district for any of the reasons specified by law." (Emphasis supplied.)

The appellants contend that by using the language "change the boundaries" of school districts the Legislature intended to restrict the authorization to a common boundary line between two school districts which are in one compact and contiguous mass and to limit any transfer of property from one district to another to property which is contiguous to the common boundary line. They rely on the definition of boundary in Black's Law Dictionary 169 (5th ed. 1979): "Every separation, natural or artificial, which marks the confines or line of division of two contiguous properties." We note that the same dictionary defines the term "boundary" as: "Limits or marks of enclosures . . . or the boundaries or limits stated in title deed . . . ." Lands within any school district are described by legal description for taxation, and inclusion of the land within the school district furnishes the basis for school district taxation.

The most obvious demonstration of what the Legislature intended when it referred to "boundaries" of school districts is found in Neb. Rev. Stat. § 79-403 (Reissue 1976). That section provides for freeholder transfers of land from one school district and attachment to another under which no requirement of contiguity is imposed and under which, if the necessary requirements are met, land described by tax descriptions is detached from one school district and attached to another district. The section is divided into two parts, the first of which authorizes transferring the land from one school district to an adjoining school district when certain conditions have been met. That portion of § 79-403 provides in part: "The board may, after a public hearing on the petition, thereupon change the boundaries of the districts so as to set off the land described in the petition and attach it to such adjoining district as is called for in the petition whenever they deem it just and proper and for the best interest of the petitioner or petitioners so to do."

The second portion of § 79-403 deals with freeholder transfers from a nonaccredited district to an accredited district in the county of the petitioner's residence or an adjoining county. That portion provides in part: "All procedures as provided in subsection (1) of this section including provisions for the transfer of property across county lines shall apply to this subsection except that the board shall in this instance change the boundaries where it is found that all provisions as herein set forth have been met."

Neb. Rev. Stat. § 79-409 (Reissue 1976) provides: "The county superintendent shall file in his office all petitions that have been granted for change of boundaries or for the formation of new districts. Such petitions so filed and granted shall be prima facie evidence of the boundaries of districts. All conflicting records of boundaries shall be made to correspond with the petitions so filed and granted."

There can be no serious question that the Legislature has clearly indicated that the boundaries of school districts are not restricted to compact contiguous areas of land but may include separated and noncontiguous areas as well. The numerous cases of freeholders' petitions over the years is a graphic demonstration of the legislative policy as to school district boundaries. Exhibit 2 in the case at bar shows at least five separate areas of noncontiguous land not involved in the present case which are presently a part of the Minden school district, four of which are located in an adjoining county.

An examination of the statutes dealing with the area and boundaries of school districts convinces us the authorization to change the boundaries of school districts under §§ 79-402 and 79-402.03 and related sections, where the districts are adjoining, is not limited to lands in one compact contiguous area, nor is the transfer of land from one school district to another school district limited to land which is contigu-

ous to the common boundary between the two districts. It would have been easy enough for the Legislature to express that intention had it desired to do so, and it may also change that expression if it so desires.

This court will not by interpretation or construction usurp the function of the legislative body and give a statute a meaning not intended or expressed by the Legislature. This court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes. See *Bessey v. Board of Educational Lands & Funds,* 185 Neb. 801, 178 N.W.2d 794 (1970).

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

AFFIRMED.

BETTY ANN MCBRIDE, APPELLEE AND CROSS-APPELLANT, V. GLEN MCBRIDE, APPELLANT AND CROSS-APPELLEE.

319 N.W.2d 72

Filed May 7, 1982. No. 43978.

1. **Alimony: Property Division.** Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion.
2. **Property Division.** In determining what percentage of the marital estate each person is to receive, the court must consider all pertinent facts in reaching an award that is just and equitable.
3. _____. The court, in dividing the property, must take into consideration the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment.

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

E. Terry Sibbernsen of Welsh, Sibbernsen & Bowen, for appellant.

Warren S. Zweiback of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, WHITE, and CAPORALE, JJ., and FINN, D.J.

FINN, D.J.

Glen McBride, respondent-appellant herein, has appealed to this court from a decree entered by the District Court of Douglas County, Nebraska, dissolving the marriage of the petitioner, Betty Ann McBride, and respondent, Glen McBride. In its decree entered on November 13, 1980, the trial court found that the marriage between the parties was irretrievably broken, and dissolved the marital relationship. The trial court in its decree awarded the residence of the parties, located at 1036 South 35th Street, Omaha, Nebraska, an undivided one-half interest to petitioner and an undivided one-half interest to respondent. The petitioner was awarded a 1977 Chevrolet Caprice automobile; a $2,000 certificate of deposit, together with interest thereon; a $900 checking account in petitioner's name; all furniture and fixtures located at 1036 South 35th Street, Omaha, Nebraska; and other personal, tangible, or intangible property now in her possession. The respondent was awarded a 1978 Chevrolet pickup truck; $1,800 in a checking account maintained in his possession; a silver coin collection in his possession; and other personal, tangible, or intangible property in his possession. The respondent was ordered to pay to petitioner for the rest of her natural life the sum of $300 per month, payable $300 commencing on the 10th day of November 1980, and $300 on the 10th day of each month thereafter until the death of petitioner.

In his brief on appeal, Glen McBride makes the

following assignments of error: (1) The trial court erred in awarding petitioner $300 per month alimony for an indefinite period of time; and (2) The trial court erred in awarding an excessive amount of alimony in light of the circumstances of the parties.

The petitioner, Betty Ann McBride, in her brief on cross-appeal, makes the following assignments of error: (1) The District Court erred in awarding to the wife less alimony than is appropriate in light of the circumstances of the parties; (2) The District Court erred in failing to consider the husband's fully vested interest in his pension plan as a marital asset and in failing to award to the wife the appropriate share thereof; and (3) The District Court erred in failing to return to the wife compensation for the inheritance received by her from her mother less than 2 years prior to the separation of the parties.

The factual background of this appeal, as revealed in the record, indicates that the parties were married in Lincoln, Nebraska, on January 13, 1952, and as of the date of the trial they had been married for 28 years. Two children were born of this marriage. Both children are over 19 years of age. One child, Michael, is approximately 25 years of age and is classified as incompetent by reason of mental retardation. The court awarded the care, custody, and control of Michael to respondent. Petitioner was 17 years of age at the time of the marriage of the parties. She worked from the date of the marriage up until 1956, when the oldest child was born. She then returned to work in 1969 and has worked continuously. She is presently employed at a men's clothing store in Omaha, Nebraska, and her gross earnings for the past 5 years are as follows: 1975, $5,684.99; 1976, $6,717.55; 1977, $7,354.68; 1978, $8,320.41; and 1979, $9,139.41. Her present gross pay is $751.67 per month; her net take-home pay is $516.49. The record reveals that the assets of the parties consisted of a house, the stipulated value of

which was $25,000; a 1978 Chevrolet pickup valued by the respondent at $4,000; a 1977 Chevrolet automobile valued by the respondent at $4,000 and by the petitioner at $2,400; miscellaneous household goods and furnishings, value unknown; and a certificate of deposit at Commercial Federal Savings and Loan Association in the amount of $2,000. The parties had no debts. Petitioner testified that as of July 15, 1980, she had accumulated $1,082 in a checking account in her name alone.

Respondent testified that he was 50 years of age at the time of trial, presently employed as an over-the-road truckdriver for Metz Baking Company, and has been so employed for approximately 25 years. According to the 1979 joint income tax return of the parties, the respondent's gross income for 1979 was $21,267.30.

The most valuable asset of the parties at the time of trial was Glen's interest in his then fully vested pension fund. Among his benefits under this plan would include his right to draw a minimum of $675 per month when he reaches the age of 60 for the first year of retirement, should he elect to retire; to draw a minimum of $725 per month in his second year of retirement; and a minimum of $775 per month thereafter for life.

Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. *Olson v. Olson,* 195 Neb. 8, 236 N.W.2d 618 (1975). See, also, *Burton v. Burton,* 205 Neb. 865, 290 N.W.2d 658 (1980); *Ragains v. Ragains,* 204 Neb. 50, 281 N.W.2d 516 (1979); *Sullivan v. Sullivan,* 192 Neb. 841, 224 N.W.2d 542 (1975); *Kullbom v. Kullbom,* 209 Neb. 145, 306 N.W.2d 844 (1981).

In determining what percentage of the marital estate each person is to receive, the court must consider all pertinent facts in reaching an award that is just and equitable. *Chrisp v. Chrisp,* 207 Neb. 348, 299 N.W.2d 162 (1980); *Matlock v. Matlock,* 205 Neb. 357, 287 N.W.2d 690 (1980); *Kullbom v. Kullbom, supra.* The court, in dividing the property, must take into consideration the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment. Neb. Rev. Stat. § 42-365 (Cum. Supp. 1980). See, also, *Buker v. Buker,* 205 Neb. 571, 288 N.W.2d 732 (1980); *Kullbom v. Kullbom, supra.*

Glen's assignment of error is concerned with the trial court's award of $300 per month alimony for an indefinite period of time or for the life of petitioner. Betty assigns as error on her cross-appeal that the District Court erred in awarding not enough alimony, in failing to consider the husband's full vested interest in his pension plan as a marital asset, and in failing to return to Betty her inheritance received by her from her mother less than 2 years prior to the separation of the parties.

In *Kullbom v. Kullbom, supra,* this court approved three methods for dealing with pension funds, the first being that the court could consider the amount of the employee's contribution to the fund, plus interest, and award the wife an appropriate share. Second, the trial court could attempt to calculate the present value of the employee's retirement benefits when they vest under the plan. Under either of the first two methods, the trial court would have the discretion to order the payment to the wife of her share in either a lump sum or in installments, depending primarily on the other assets and relative financial

positions of the parties. The third method referred to by the court is to determine a fixed percentage for the wife of any future payments the husband receives under the plan, payable to her as, if, and when paid to the husband.

This court on numerous occasions has held that alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, but they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. In the case at hand, it appears that the trial court, after considering the circumstances of the parties, the duration of the marriage, the history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment, felt that Betty was entitled to alimony, and in this we concur. However, had Glen not acquired a fully vested pension plan as described basically herein, it is doubtful the trial court would have awarded Betty $300 per month alimony for the remainder of her life. It appears obvious to this court that the trial court felt that respondent could well afford, with his present income of $21,267.30 per year, to pay alimony in the sum of $300 per month to Betty until such time as he reached retirement age.

This court has held in previous decisions that the trial court must include as part of the marital estate, for the purpose of division of property and/or the assessment of alimony, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, vested or not vested. It seems apparent that the trial court must have considered Glen's pension fund in its

award of alimony or the trial court would not have extended the $300 per month alimony payment for the life of Betty. The record reflects that if Glen retires at age 60, he would draw a minimum of $675 per month, which would increase to $725 per month the second year, and $775 per month thereafter for his lifetime. It appears that Glen can well afford to make the $300 per month alimony payment from the pension income after his retirement.

We are of the opinion that the trial court's method of considering Glen's pension fund by awarding alimony to Betty in the amount of $300 per month for her lifetime falls within the approved method set forth in *Kullbom v. Kullbom,* 209 Neb. 145, 306 N.W.2d 844 (1981).

We do not feel that the trial court erred in awarding Betty $300 per month alimony for an indefinite period of time or that the award was excessive when it appears obvious from the record that the trial court considered Glen's pension fund for making this award.

With regard to Betty's assignments of error in her brief on cross-appeal, we do not feel that the trial court erred in awarding to Betty less alimony than was appropriate in light of the circumstances. We do not find that the trial court erred in failing to consider the husband's fully vested interest in his pension plan as a marital asset, because it appears evident that the trial court did consider Glen's pension plan when making an award of alimony. We also do not feel that the trial court erred in failing to return to Betty her inheritance received from her mother less than 2 years prior to the separation of the parties, for the reason that it appears from the record that the trial court took this into consideration when dividing the assets of the parties and making an award of alimony to Betty.

For the foregoing reasons, we do not feel that the trial court abused its discretion in either dividing

the property of the parties or assessing alimony, and, therefore, the decree entered by the trial court should be and hereby is affirmed.

We are of the opinion that the petitioner should receive an additional $500 for the services of her attorney on appeal to this court.

AFFIRMED.

McCOWN, J., concurs in the result.

JAMES ERICKSEN, APPELLEE AND CROSS-APPELLANT, V. DEAN C. PEARSON, DOING BUSINESS AS NORTHEAST NEBRASKA INSURANCE AGENCY, AND A. R. BERRY, EMPLOYEE, APPELLANTS AND CROSS-APPELLEES.

319 N.W.2d 76

Filed May 7, 1982. No. 44002.

1. **Insurance: Principal and Agent.** Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured. Neb. Rev. Stat. § 44-329 (Reissue 1978).
2. _____: _____. Any person, firm, or corporation in this state who shall with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall with authority receive or receipt for money from other persons to be transmitted to any such company or individual thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise make or cause to be made any contract or contracts of insurance for or on account of such company, shall be deemed to all intents and purposes an agent or agents of such company. Neb. Rev. Stat. § 44-328 (Reissue 1978).
3. **Insurance: Principal and Agent: Releases.** The general rule is that in the absence of a specific statute, where the liability of a principal for a tort committed by his agent is predicated solely upon the doctrine of respondeat superior, a valid release of either of the parties in such relationship operates to release the other.

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

Vince Kirby, for appellants.

Maurice S. Redmond, Dakota County Attorney, and J. Patrick Ryan, for appellee.

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

BRODKEY, J., Retired.

Plaintiff, James Ericksen, brought this negligence action against the defendants, Dean C. Pearson, doing business as Northeast Nebraska Insurance Agency, and A. R. Berry, employee, for failure to procure insurance in the amounts of coverage requested. A jury returned a verdict for the plaintiff, and defendants appeal from that verdict. The plaintiff cross-appeals on the issues of the credit allowed against the verdict and the failure of the court to allow attorney fees.

The facts out of which this case arose are as follows. Plaintiff, James Ericksen, was the owner of a gasoline filling station in Hubbard, Nebraska. In the fall of 1975, Ron Ericksen, the plaintiff's son, entered into negotiations with one A. R. Berry, an agent and employee of Pearson, for the purpose of purchasing various insurance policies from Northeast Nebraska Insurance Agency (Northeast), owned by Dean C. Pearson. As a result of the negotiations, the plaintiff agreed to purchase a fire and extended coverage policy for the filling station.

The filling station was already insured against fire by State Farmers Insurance Company (State Farmers) for $20,000 coverage for the building and $5,000 for the stock and fixtures. Plaintiff was unhappy with the State Farmers policy and planned to cancel coverage under that policy.

After examining the old State Farmers policy given him by plaintiff for the purpose of obtaining the legal description of the real estate, Berry filled out an application to Iowa Mutual Insurance Com-

pany (Iowa Mutual) for fire and extended coverage for the filling station, but only for approximately the same amounts as recited in the State Farmers policy. Ron Ericksen testified that he had requested and Berry had agreed to apply for $50,000 of the coverage for the filling station and $30,000 coverage on the contents.

On November 14, 1975, the filling station was severely damaged in a fire before the Iowa Mutual policy was delivered. The plaintiff's son testified he called Mr. Berry immediately and was assured by him that the Iowa Mutual policy was in force. However, Berry denied he had said the policy was for $80,000. On about November 19, 1975, the plaintiff received a copy of the Iowa Mutual policy and discovered the coverage was listed at $25,000 only.

After the fire, the plaintiff discovered that even though he had called State Farmers to cancel his existing policy, the policy had not been effectively canceled.

The plaintiff then began negotiating a settlement with both insurance companies under each of their respective insurance policies. When the parties were unable to reach any settlement, the plaintiff filed an action on September 3, 1976, against both insurance companies, praying for $25,000 from each of them. On April 1, 1977, the plaintiff amended his petition, adding A. R. Berry and Dean C. Pearson, doing business as Northeast Nebraska Insurance Agency, as defendants. On or about October 31, 1977, the plaintiff settled with State Farmers for $18,000 and later released it from all further claims and causes of action. The release is made part of the record, but was not admitted into evidence because of the possible prejudicial effect of permitting the jury to learn of the amount of the settlement. On July 11, 1978, the plaintiff successfully moved to separately docket his cause of action against the agents, Berry and Pearson, and the principal in-

surer, Iowa Mutual. In his separate petition the plaintiff prayed for damages against the agents in the amount of $78,446.80 and against Iowa Mutual in the same amount, and also prayed for reformation of the insurance policy to reflect $80,000 of coverage. On November 20, 1979, the plaintiff entered into an agreement with Iowa Mutual, releasing it from all further claims and causes of action in consideration of $25,000, the face amount of the policy, which release was testified to but was not admitted in evidence on plaintiff's motion in limine. The case proceeded to trial against Berry and Pearson, doing business as Northeast, then the sole defendants under an amended and separate petition filed by plaintiff, and the jury returned a verdict for the plaintiff in the amount of $60,000. The trial court, sua sponte, reduced the judgment by $50,000, apparently on the basis of the face value of the two policies under which the plaintiff settled.

In their brief on appeal to this court, the defendants have set out 12 separate assignments of error, contending that the court erred (1) in allowing the plaintiff to file separate petitions against Iowa Mutual and these defendants; (2) in overruling defendants' demurrer as amended, based upon the contention that the statute of limitations had run against this action; (3) in failing to sustain defendants' motion for summary judgment; (4) in setting aside its order dismissing the petition of the plaintiff for failure to produce certain requested documents; (5) in sustaining plaintiff's oral motion in limine restricting the defense from mentioning settlement with State Farmers and Iowa Mutual; (6) in allowing the testimony of a certain witness with regard to damages; (7) in admitting into evidence exhibit 5; (8) in overruling defendants' motion to dismiss or, in the alternative, for a directed verdict at the end of plaintiff's case in chief; (9) in giving instruction Nos. 2, 3, 4, 6, 7, 8, 9, 10, and 11 to the jury; (10) in

overruling defendants' motion to dismiss or, in the alternative, for a directed verdict after all evidence was adduced; (11) in overruling defendants' motion for judgment notwithstanding the verdict; and (12) in overruling defendants' motion for a new trial.

While it appears that at least some of the foregoing assignments of error are possibly meritorious, we believe that it is possible to completely dispose of this appeal on the ground that the settlement of the plaintiff with Iowa Mutual, and plaintiff's release given to Iowa Mutual, had the effect of also releasing the defendants in this appeal, absolving them from all liability to the plaintiff for any negligence on their part in failing to obtain the proper insurance coverage and in failing to provide Iowa Mutual with the proper and correct information to be included in the policy issued to the plaintiff by Iowa Mutual.

This case was tried and submitted to the jury on the amended and separate petition filed by the plaintiff on September 10, 1980, the second amended answer to that petition filed by the defendants on October 30, 1980, and the reply of the plaintiff to defendants' amended answer. As previously stated, the amended and separate petition against the defendants Pearson and Berry is based upon allegations of negligence alone. After setting out the background facts previously recited, the plaintiff alleges specific acts of negligence on the part of the defendants and alleges that as a direct and proximate result of their failure to provide the plaintiff with the coverage which Berry assured him he had, the plaintiff was damaged in the amount set forth in the petition. In defendants' second amended answer to plaintiff's petition, they set out numerous defenses to the allegations contained therein, and further specifically state: "Further answering and as an affirmative defense to the Amended and Separate Petition filed herein by the plaintiff, defendants allege that the de-

fendants herein are and were at all times material hereto the duly authorized agent of Iowa Mutual Insurance Company and not the agents of the insured plaintiff; that consequently the acts of the defendants are the acts of the Iowa Mutual Insurance Company; that because of the aforesaid principal-agent relationship the dismissal of the principal is the dismissal of the agent; that the settlement, dismissal and release of the principal, Iowa Mutual Insurance Company, amounted to a settlement, dismissal and release of the defendants." They also allege as a defense: "That in his Separate Petition filed against the said Iowa Mutual Insurance Company plaintiff alleges that said litigation against Iowa Mutual Insurance Company arose 'due to the defendant's failure to provide the plaintiff with the amounts of coverage originally applied for and which plaintiff was assured existed' and 'that as a direct and proximate result of defendant Iowa Mutual Insurance Company's failure to provide plaintiff with the coverage which its agents and employees assured him he had, the plaintiff has been damaged in the sum of $78,446.80.' "

In his instruction No. 11 given to the jury at the conclusion of the trial, the district judge stated as follows: "The Court has determined as a matter of law the truth of the foregoing propositions and you must accept them as true:

"(1) That at all times material Ronald Ericksen was the agent of James Ericksen.

"(2) That at all times material the Defendant A. R. Berry was an employee of Dean C. Pearson, d/b/a Northeast Nebraska Insurance Agency and was acting in the scope of his employment.

"(3) That at all times material Dean C. Pearson, d/b/a Northeast Nebraska Insurance Agency, was an agent for the Iowa Mutual Insurance Company.

"(4) That on or about November 14, 1975, a fire oc-

curred on the Plaintiff's property in Hubbard, Nebraska."

We have carefully reviewed the record in this case and believe that the aforesaid conclusions of the trial court are supported by the evidence. We believe it is clear that at all times material to this case Berry was acting as agent and employee to Pearson, and that the relationship between Pearson and Iowa Mutual was that of agent and principal. This is particularly true under the Nebraska statutes and authorities. Neb. Rev. Stat. § 44-328 (Reissue 1978) provides as follows: "Any person, firm or corporation in this state who shall with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall with authority receive or receipt for money from other persons to be transmitted to any such company or individual for a policy or policies of insurance, or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, *or who shall in any wise make or cause to be made any contract or contracts of insurance for or on account of such company, shall be deemed to all intents and purposes an agent or agents of such company.*" (Emphasis supplied.) Also, Neb. Rev. Stat. § 44-329 (Reissue 1978) provides: "Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured." In this connection, see *Squires v. Implement Dealers Mut. Ins. Co.*, 188 Neb. 590, 198 N.W.2d 469 (1972); *Heikes v. Farm Bureau Ins. Co.*, 181 Neb. 827, 151 N.W.2d 336 (1967); *Krug Park Amusement Co. v. New York Underwriters Ins. Co.*, 129 Neb. 239, 261 N.W. 364

(1935); *State Ins. Co. v. Jordan,* 29 Neb. 514, 45 N.W. 792 (1890).

We now comment upon the releases themselves as revealed by the record in this case. Exhibit 11 was a release given by the plaintiff to State Farmers in settlement of his claim. Exhibit 12 is the release given by the plaintiff to Iowa Mutual. Both of these releases appear in the record but were not admitted in evidence by order of the court, in response to a motion in limine filed by the plaintiff, on the ground that the settlement amounts recited in the respective releases might be prejudicial and influence the minds of the jurors. Notwithstanding, testimony was received with respect to both exhibits. We quote the testimony of James Ericksen, the plaintiff, with regard to exhibit 12: "Q. I show you what is Exhibit No. 12, do you recognize that document, sir? A. It looks like an insurance company document. I signed it, yes. Q. Did you sign that on the 20th day of November, 1979? A. It says the 20th of November, 1979, yes. It looks like I did, yes. Q. Did you sign that again under oath before Maurice Redmond [one of plaintiff's attorneys]? A. I signed it before Maurice Redmond, yes. Q. Did you read and understand the terms of that document, sir, at the time you signed it? A. I imagine, yes. I imagine I did. Q. Exhibit No. 12 is entitled a Release, is that correct? A. That's what it says, Release. Q. Does it also say--- MR. RYAN [plaintiff's other attorney]: Your Honor, for the same reason objected to on the last document, counsel has marked [and] not admitted into evidence by the Court's ruling; I object to counsel's reading or attempting to read any part of this other than inquiring as to the witness's signature and that he signed the document. Counsel is attempting by his actions to get the content of this in before he's made an offer into evidence. THE COURT: Mr. Ryan, the reason the Court would not allow the exhibit is it does state

an amount in dollars and cents. In other respects, the document is admissible. I will allow the witness to proceed and if you wish to refer to the document then offer it into evidence. . . . Q. This is between the Iowa Mutual Insurance Company, a Corporation, is that correct? A. Yes. Q. And James Ericksen, is that correct? A. Yes. Q. It's an agreement between you and the Iowa State Mutual Insurance Company? A. I would say, yes, that's what it is. Q. Is it true that by virtue of this document you do hereby release, acquit, and forever discharge, said Iowa Mutual Insurance Company of any and all claims and demands, actions or causes of action, damages or claims for damages, both known and unknown growing out of the damage to the real and personal property, all as more specifically set forth herein before, is that what that provides? A. Down to here, that's what it says. Q. And that further does hereby release, acquit, and forever discharge Iowa Mutual Insurance Company of any liability whatsoever under or upon said policy, is that correct? A. Correct." The release was thereafter offered in evidence but the offer was denied by the court.

The only reference to the settlements made by the plaintiff with the two insurance companies that appears in the court's instructions to the jury is contained in instruction No. 9, which reads as follows: "In this case the Plaintiff has made settlement with State Farmers Insurance Company and Iowa Mutual Insurance Company. The amounts of the settlements have been disclosed to the Court but not to the jury.

"If you should find under the Court's instructions that the Plaintiff is entitled to recover against the Defendants, Dean C. Pearson, d/b/a Northeast Nebraska Insurance Agency, and A. R. Berry, an employee, then you shall award damages to the Plaintiff for the same amount you would have awarded

if no such settlements had been made." This instruction was specifically objected to at the instruction conference by counsel for both the plaintiff and the defendants.

From what we have stated above it appears that at least two things are clearly established: (1) That a principal and agent relationship existed between the defendants to this action and Iowa Mutual Insurance Company; and (2) That Iowa Mutual Insurance Company did settle its dispute with the plaintiff and received a release of liability upon such settlement. The question to be decided, therefore, is as to the effect of such settlement upon any claims the plaintiff may have had against Pearson and Berry. The court did not instruct the jury on this aspect of the case.

The general rule is stated in 76 C.J.S. *Release* § 50 at 689 (1952) as follows: "In a situation where several persons are not actively joint tort-feasors, but one person commits the tort and is primarily liable while the liability of the other person is derivative or secondary, as where it arises under the doctrine of respondeat superior, the releasor's acceptance of satisfaction from one, discharges the other as well, as in the case of master and servant or principal and agent; and it has been held that this is true despite an attempted reservation of rights against the person secondarily liable, since if the rule were otherwise, such person would be liable without having recourse against the person primarily liable, the latter having been released . . . ."

Also, in an annotation entitled "Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa," appearing in 92 A.L.R.2d 533 et seq. (1963), the author of that annotation, after analyzing the pertinent cases, states in his summary at 537 the following: "Most of the cases decided in the absence of a specific statute support the view that a valid release of

one of the parties to the master-servant or principal-agent relationship releases the other." The same author also states at 540: "Although based upon different theories, and although in some instances the basis of the decision does not appear or is not stated clearly, the following cases support the view that where the liability of a master or principal for a tort committed by his servant or agent is predicated solely upon the doctrine of respondeat superior, a valid release of either of the parties in such relationship operates to release the other." Following the above citation, the author lists cases from 14 jurisdictions supporting that view. In 53 Am. Jur. 2d *Master and Servant* § 408 (1970), the rule is stated at 416 as follows: "Although it is generally recognized that where the liability of a master for a tort of his servant is based solely on the doctrine of respondeat superior, the master and the servant are not joint tortfeasors, it is nevertheless the general rule that in such a case a valid release of either of the parties operates to release the other. The decisions so holding usually do so upon the theory that the damages recoverable for the tort are entire and not severable, or the theory that the injured person is entitled to receive but one compensation for his injury."

We then must ask: "What is the rule in Nebraska?" It appears that Nebraska has already passed upon the question of whether the release of an agent by a third party also releases the principal, and has decided that in the affirmative; but so far as we have been able to ascertain, this court has not directly passed upon the question of the reverse situation, that is to say, whether the release of the principal also releases the agent where the action is predicated upon negligence and the liability of the principal arises under the respondeat superior doctrine.

In *Dickey v. Meier,* 188 Neb. 420, 197 N.W.2d 385 (1972), in an opinion by McCown, J., this court held

that in a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or principal from liability, even though the release specifically reserves all claims against the employer-principal. In that case, this court stated at 422-24, 197 N.W.2d at 387-88: "The plaintiff contends that under the circumstances here Matthew Meier and Katherine Meier were joint tort-feasors, and that in such a situation release and discharge of one joint tort-feasor on settlement and payment of damages is not a defense to an action against another unless it was agreed between the parties to the settlement that such payment was in full satisfaction of all damages suffered. . . .

"The critical factor, however, is that Matthew Meier and Katherine Meier were not joint tort-feasors under the facts here. [Cases cited.] In each of these cases it is apparent that the employer could have been guilty of independent negligence. None of them fit the situation involved here where the liability of the employer-principal arises only by virtue of the doctrine of respondeat superior, and not through any independent negligence of the employer-principal. The employer-principal here was not a joint tort-feasor in the technical sense. Her liability was purely derivative, stemming from the sole negligence of the employee-agent, and resting upon the employer-principal only because of the doctrine of respondeat superior.

"Courts generally have not made this distinction or have followed rules applicable to true joint tort-feasors even though recognizing the distinction. See Annotation, Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R.2d 533, at page 536 et seq.

. . . .

"Consideration of the many and divergent legal principles and the practical problems in multiplicity

of litigation and in determining whether satisfaction was full or only partial, all lead us to the view adopted by most courts which have considered the issue. See Annotation, 20 A.L.R.2d 1044. We hold that in a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or principal from liability, even though the release specifically reserves all claims against the employer-principal. See, Max v. Spaeth, 349 S.W.2d 1 (Mo.); Bacon v. United States, 321 F.2d 880 (8th Cir.). Both courts held in those cases: 'The master's liability under the doctrine of respondeat superior is based not on his own misdeeds but those of his servant, and therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable. It matters little how the servant was released from liability; as long as he is free from harm, it appears to us that his master should also be held blameless.' "

We are of the opinion that the same rules should be applicable to a release given by a third party to the principal, that is to say, such release should release the agent from any liability, notwithstanding the fact that they are not technically joint tort-feasors. We believe it is clear from the record that Iowa Mutual's liability in this case arises, if at all, from the application of the doctrine of respondeat superior. The record does not reveal any independent negligence on the part of Iowa Mutual. It issued the policy which the application received from its agent requested. Its failure to include the coverage desired by the plaintiff was due, we believe, to the failure of the agent to supply the required information to the principal. Under the authorities above cited, the general rule is that in the absence of a specific statute, and Nebraska has no such statute, a valid release of either of the parties to the principal-agent relationship releases the other. In support of

the majority view that a valid release of either master or servant from liability for tort operates to release the other where liability is based upon the doctrine of respondeat superior, we cite *Geib v. Slater,* 320 Mich. 316, 31 N.W.2d 65 (1948); *Drinkard v. William Pulte, Inc.,* 48 Mich. App. 67, 210 N.W.2d 137 (1973); *Lackey v. Brooks, Adm'r,* 204 Va. 428, 132 S.E.2d 461 (1963); *Mayfair Fabrics v. Henley, et al.,* 101 N.J. Super. 363, 244 A.2d 344 (1968); *Mid-Continent Pipeline Co. v. Crauthers,* 267 P.2d 568 (Okla. 1954); *Spradley v. McCrackin,* 505 S.W.2d 955 (Tex. Civ. App. 1974); *Smith v. Lincoln,* 52 Misc. 2d 66, 275 N.Y.S. 2d 74 (1966). A case factually similar to the facts of the instant case is *Lippert v. Bailey,* 241 Cal. App. 2d 376, 50 Cal. Rptr. 478 (1966), which was an action against insurance agents to recover for fire loss on the basis of the agents' failure to obtain specified amounts of insurance protection. From a judgment of the Superior Court of Orange County in favor of the agents, the insureds appealed. The District Court of Appeal held that the negligent invasion of the insureds' contractual right by insurance agents' failure to obtain adequate insurance was, by virtue of their agency relationship to the insurer, attributable to agents' principal and that the release of all claims against the insurer extinguished insureds' sole primary right, with reservation of right to proceed against agents in release given being a nullity.

Our conclusion, therefore, is that the release of Iowa Mutual by the plaintiff herein operated to release the liability of the agents, the defendants herein, also; that the court obviously applied the incorrect law in the trial of this case; and, as a matter of fact, since all the pertinent evidence was before the court in the hearing on defendants' motion for summary judgment, such motion should have been sustained.

In view of what we have stated above, we conclude

that the judgment of the District Court was incorrect, and that such judgment must be reversed.

REVERSED AND DISMISSED.

LISSIE M. BLUE, APPELLANT, V. CHAMPION INTERNATIONAL CORPORATION, A CORPORATION, APPELLEE.

319 N.W.2d 83

Filed May 7, 1982. No. 44047.

1. **Pensions: Disability Contracts.** The provisions of the Social Security Act do not make it unlawful for an employer to establish a private pension or disability contract which offsets against disability payments those governmental benefits to which the employees may become entitled.
2. _____: _____. Bad faith on the part of an employer pension committee in denying disability payments does not necessarily compel a finding that a wholly unrelated provision of the contract itself shall not be enforced.
3. _____: _____. A pension or long-term disability plan provided to employees by an employer which is not offered primarily for profit nor which coverage is limited to employees and not resulting from advertisement or solicitation of insurance business from the public, and which does not cause the employer to hold itself out as doing business as a commercial insurer, is neither "any type of insurance policy" nor "a certificate issued by a fraternal beneficiary association" within the meaning of Neb. Rev. Stat. § 44-359 (Reissue 1978).

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

John J. Higgins of Higgins & Okun, for appellant.

John E. Hubbard of Kutak Rock & Huie, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and HASTINGS, JJ., and QUIST, D.J.

HASTINGS, J.

This is the second appearance of this case. Our

original opinion, which reversed a summary judgment and remanded the case for trial in the District Court, may be found at 204 Neb. 781, 285 N.W.2d 511 (1979). Following that trial, a judgment was entered in favor of Lissie M. Blue on a disability plan furnished by her employer, Champion International Corporation. However, because of certain setoffs allowed Champion, as well as the denial of attorney fees to Mrs. Blue, she has appealed. The assigned errors include the allowance of setoffs against benefits due because of disability income payments received by Mrs. Blue and her minor son, Rickie, from the Social Security Administration; the failure of the court to find that the disability review committee of Champion acted in bad faith in denying disability benefits; and the failure of the trial court to award her attorney fees.

Mrs. Blue began working for Champion sometime in 1968. Prior to October of 1974, she began to experience pain in her back. She received certain short-term disability payments, commencing in 1974, until May of 1975, when she commenced receiving long-term benefits. These continued until August of 1977, when all benefits ceased.

Since sometime in 1977, Mrs. Blue has been receiving social security benefits on a total disability basis. In August of 1977, she began receiving an additional check from Social Security, representing benefits for her 17-year-old son, Rickie.

The disability benefit plan under which Mrs. Blue claimed benefits required her to contribute one-half of one percent of her weekly base pay to that plan. The award of benefits under the plan was administered by a long-term disability committee which consisted of three members appointed by the pension and employee benefits committee of Champion International. It was this committee which rejected Mrs. Blue's claim for benefits beyond August of 1977.

The long-term disability plan provided in part as follows: "5.5 *Non-Duplication of Benefits.* Benefits payable under this Section 5 shall be reduced by the sum of: . . . (b) 50% of the amount of disability income benefits payable for time lost from work under Federal Social Security to which the Employee or his dependents may become entitled . . . ."

The appellant, in effect, concedes that her first assignment of error is without merit. She states at page 20 of her brief: "The provisions of the Social Security Act does [sic] not make it unlawful for an employer to establish a private pension or disability contract which offsets against disability payments, those governmental benefits to which employees may become entitled." That statement is drawn almost verbatim from *Hurd v. Illinois Bell Telephone Company,* 234 F.2d 942 (7th Cir. 1956).

However, moving on to her second assignment of error, in reliance upon *Marsh v. Greyhound Lines, Inc.,* 488 F.2d 278 (5th Cir. 1974), she contends that if a disability review committee performs its functions in bad faith, the provisions for allowing an offset will not be allowed. However, that is not the holding of *Marsh.* Rather, the court there was faced with the problem of reviewing the action of the trustees of an employer pension trust in denying disability benefits to an employee. The plan itself provided that " 'all decisions of the Trustees in administering the Plan shall be final.' " *Id.* at 280. The court responded: "This provision of course will not be permitted to accord complete and unbridled discretion to the Trust. . . . However, Texas law, which governs this diversity case, is fairly clear that such a provision is to be given effect by requiring a showing of bad faith before the courts will interfere with a decision of the Trustees." *Id.* at 280.

Also cited by Mrs. Blue in support of her second assignment of error is *Golden v. Kentile Floors,*

Inc., 512 F.2d 838 (5th Cir. 1975), which is simply a restatement of *Marsh.*

However, whether bad faith existed in the instant case or not, the trial court did interject itself in the decision-making process and overturned the decision made by the review committee. Neither of the cited federal cases compels a finding that bad faith on the part of the committee in determining the existence of disability will require a finding that a wholly unrelated provision of the contract itself will not be enforced. In any event, it was not the committee that concluded that the offset provision shall apply; it was the action of the trial court itself which brought into play that provision of the plan. There is no merit to appellant's second assignment of error.

Finally, Mrs. Blue contends that the disability plan was an insurance policy, and therefore, under the terms of Neb. Rev. Stat. § 44-359 (Reissue 1978), she should have been awarded an attorney fee. The cases cited by Mrs. Blue in support of this proposition relate exclusively to benefit plans originated and administered by various independent relief or employee benefit associations and are not related to company-administered plans. More nearly in point is the case of *Killebrew v. Abbott Laboratories,* 359 So. 2d 1275 (La. 1978). In denying attorney fees because Abbott was not an insurer, the court stated at 1279: "Abbott is not 'engaged in the business of making contracts of insurance' merely because it provides, through a trust, a long-term disability plan for its employees. Abbott does not offer the program primarily for profit, nor is the coverage of its own employees the result of advertisement or solicitation of insurance business from the general public or of holding itself out or doing business as a commercial insurer." See, also, *Mutual Life Ins. Co. v. N Y S Tax Comm.,* 32 N.Y.2d 348, 352, 298 N.E.2d 632, 634, 345 N.Y.S.2d 475, 478 (1973), in which the court

stated that "the coverage of the petitioner's own employees is not the result of solicitation of business or of the petitioner's holding itself out or doing business as a commercial insurer." The disability plan provided by Champion was neither "any type of insurance policy" nor a "certificate issued by a fraternal beneficiary association" within the meaning of § 44-359.

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

AFFIRMED.

FRANK CONNEALY, APPELLEE, V. ROGER MUELLER, APPELLANT.

319 N.W.2d 86

Filed May 7, 1982. No. 44058.

1. **Quiet Title.** An action to quiet title to real estate in this state is statutory.
2. _____. An action to quiet title may be brought under the statute which, by the strict rules of equity, could not have been maintained.
3. _____. An allegation that the legal remedy is adequate is not a defense to an action to quiet title brought under the statute.
4. **Acceptance of Rent: Breach of Lease.** Acceptance of rent, which accrued prior to the breach of the lease, after the breach has occurred is not a waiver of the breach.

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

R. Steven Geshell of Robak & Geshell, for appellant.

Noyes W. Rogers of Albert, Leininger & Grant, for appellee.

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

BOSLAUGH, J.

The defendant, Roger Mueller, as lessee, and

Kermit Wagner, as lessor, entered into a lease of farmland on April 24, 1979. The lease involved a quarter section of land that had been owned by the defendant.

In 1978, pursuant to a decree of foreclosure in the United States District Court for Nebraska, the land was to be sold to satisfy the liens against it. To prevent the sale, and in order to give the defendant an opportunity to save the land, Wagner paid off the liens and took a deed to the property from the defendant.

The lease provided for cash rent and contained an option for the defendant to purchase the land on March 1, 1982, for $125,500, the amount Wagner had paid to discharge the liens. The lease contained a covenant against subletting without the written consent of the lessor and authorized the lessor to terminate the lease for breach of any covenant or condition.

Sometime prior to December 12, 1979, Wagner learned that the defendant had subleased the property and received some information to the effect that the defendant had offered the property for sale. Wagner then terminated the lease to the defendant.

This action was commenced on January 30, 1980, by an assignee of Wagner to declare the lease terminated and to quiet title to the land in Wagner. On December 18, 1980, the trial court found that the lease was terminated and quieted title to the land in Wagner or his assignees. The defendant has appealed.

The defendant makes two contentions: the plaintiff was not entitled to equitable relief because the legal remedy was adequate, and the lessor waived the breach when he accepted a rent payment on February 14, 1980.

In Nebraska an action to quiet title to real estate is statutory. Neb. Rev. Stat. § 25-21,112 (Reissue 1979) provides: "An action may be brought and prose-

cuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to, or an estate in real estate against any person or persons who claim, or apparently have an adverse estate or interest therein, for the purpose of determining such estate, or interest, canceling unenforceable liens, or claims against, or which appear to be against said real estate, and quieting the title to real estate."

As noted in 65 Am. Jur. 2d *Quieting Title* § 4 at 144 (1972), such statutes were enacted to enlarge the jurisdiction of the courts, and generally permit actions to be brought to determine any adverse claim, interest, or estate in lands. An action may be brought under the statute which, by the strict rules of equity, could not have been maintained. An allegation that the legal remedy is adequate is not a defense to an action to quiet title brought under the statute.

The termination here was not for nonpayment of the rent, and the rental payment which the lessor accepted on February 14, 1980, was rent which had accrued under the lease and was due and owing even though the lease had been terminated. The unpaid rent was a debt and, in the absence of an agreement to reinstate the tenancy, acceptance of the money did not waive the forfeiture. *O'Connor v. Timmermann,* 85 Neb. 422, 123 N.W. 443 (1909). The owner may claim the forfeiture and at the same time collect past due rent. *Bowen v. Selby,* 106 Neb. 166, 183 N.W. 93 (1921).

The general rule is that acceptance of rent, which accrued prior to the breach of the lease, after the breach has occurred is not a waiver of the breach. 49 Am. Jur. 2d *Landlord and Tenant* § 1070 at 1034 (1970); Annot., 109 A.L.R. 1267 (1937). The cases upon which the defendant relies involve the acceptance of rent or other payments which accrued subsequent to the breach.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

ARTHUR E. JONES, BRADLEY D. MILLER, AND STEVE F. SOMMERS, FOR THEMSELVES AND FOR ALL OTHER PERSONS SIMILARLY SITUATED, APPELLEES, V. COMMERCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLEE, OMAHA BUILDING CONTRACTORS EMPLOYERS ASSOCIATION ET AL., INTERVENORS-APPELLANTS.

319 N.W.2d 88

Filed May 7, 1982. No. 44061.

1. **Labor and Labor Relations: Constitutional Law.** The preemption doctrine, generally, seeks to insure the accommodation of a uniform national labor policy. Additionally, in cases where the state is seeking to regulate activities impacting commerce under federal law, preemption is constitutionally based on the supremacy clause.
2. **Labor and Labor Relations.** Congress, by enacting comprehensive legislation which governs labor relations affecting commerce and creating a centralized administrative body charged with administering that legislation, intended to exclude the various states from enforcing conflicting regulations or procedures.
3. **Labor and Labor Relations: Courts.** Under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), suit may be brought in either state or federal court for breach of a collective bargaining agreement.
4. **Labor and Labor Relations: Trust Funds.** Employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents to the exclusion of all others.
5. **Labor and Labor Relations: Courts.** State courts must follow the federal law, as fashioned by the federal courts, to effectuate the statutory policy of enforcement of collective bargaining agreements.

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

Dean G. Kratz of McGrath, North, O'Malley &

Kratz, P.C., for intervenor-appellant Omaha Building Contractors Employers Association.

David D. Weinberg of Weinberg & Weinberg, P.C., for appellees Jones et al.

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

CAPORALE, J.

This is an appeal from an action to determine the validity of assignments directing a depositary to distribute portions of a Holiday Trust Fund allocated to the assignors' individual passbook accounts for the payment of assignors' dues and assessments to a labor union.

The appellants, impleaded defendants and employer trustees Cal Solem and George Gilmore, together with intervenor and impleaded defendant Omaha Building Contractors Employers Association (OBCEA), assert, through the brief of OBCEA, that the District Court of Nebraska for Douglas County erred in decreeing the assignments valid and ordering Commercial Federal Savings and Loan Association (Commercial Federal) to honor them. Specifically, appellants urge that the assignments are invalid because they violate § 302 of the Labor Management Relations Act, 29 USC § 186 (1976). We agree with appellants and reverse the decree of the trial court.

This class action was commenced on September 12, 1979, by the plaintiffs-appellees, Arthur E. Jones, Bradley D. Miller, and Steve F. Sommers, for themselves and for all other persons similarly situated, requesting a declaratory judgment to determine whether the defendant herein, Commercial Federal, should honor certain assignments executed by the named plaintiffs in favor of the International Laborers' Union of North America, Local No. 1140, for the payment of union dues and assessments. Com-

mercial Federal filed a motion for interpleader requesting a court order directing the Holiday Trust Fund to appear and maintain or relinquish any claim it might have against the defendant with respect to the trust which was established by collective bargaining. In response to defendant's motion, the trial court ordered the trust fund to appear. Solem and Gilmore, employer trustees to the trust fund, responded to the order and requested that the petition be dismissed on the ground that, under the trust agreement, the money can only be used for the purpose of providing vacation benefits for laborer employees of Local 1140, and not for the payment of union dues or assessments.

The appellees thereafter filed a motion to bar the trust fund from asserting any claim and a motion to strike the answer and response of trustees Solem and Gilmore. On November 30, 1979, OBCEA filed a petition in intervention, requesting the court to allow it to intervene in the action for the reason that it was the multiemployer bargaining association which had negotiated the collective bargaining agreement with Local 1140, under which the Holiday Trust Fund had been established pursuant to § 302 of the Labor Management Relations Act, *supra*. An objection to Commercial Federal's motion for interpleader was next filed by the appellees on February 15, 1980.

On March 12, 1980, the trial court sustained the motion for interpleader and ordered that the employer trustees, Solem and Gilmore, and employee trustees, Donald Lewis and Leonard Schaefer, be made parties to this action. In addition, the court ordered that the motions of the appellees to strike the answer and response to the order of interpleader and to bar the Holiday Trust Fund from asserting any claim be denied. Having been made parties to this action, Local 1140, OBCEA, and the employee trustees all filed answers to the petition.

This matter was heard by the trial court on Oc-

tober 10, 1980. The evidence submitted was based on four stipulations entered into among the parties. On December 10, 1980, the court entered its decree ordering Commercial Federal to comply with the assignments. A motion for new trial was filed by OBCEA and the employer trustees. The motion was overruled, from which order OBCEA and the employer trustees appealed to this court. OBCEA is the only appellant who filed a brief in this court.

The issue before the court presents a preliminary question as to whether the doctrine of preemption applies to the type of dispute involved in this appeal. The preemption doctrine, generally, seeks to insure the accommodation of a uniform national labor policy. Additionally, in cases where the state is seeking to regulate activities impacting commerce under federal law, preemption is constitutionally based on the supremacy clause. U.S. Const. art. VI, cl. 2. See, also, *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 199-200, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978). The U.S. Supreme Court has clearly stated that Congress, by enacting comprehensive legislation which governs labor relations affecting commerce and creating a centralized administrative body charged with administering that legislation, intended to exclude the various states from enforcing conflicting regulations or procedures. *San Diego Unions v. Garmon,* 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). See, also, Gorman, Basic Text on Labor Law Unionization and Collective Bargaining at 766-86 (1976).

In *Garmon, supra* at 244, the Court established the broad rule of preemption applicable to this case: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to

regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

The rule of federal preemption is not without its exceptions. Primarily, the judicially created exceptions are based on the Court's inability to discern a congressional intent to preempt local jurisdiction over the activity involved. "[T]he Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' " *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468, 480, 75 S. Ct. 480, 99 L. Ed. 546 (1955). Most of the cases which have resulted in exceptions to the preemption doctrine have fallen within one of two areas left open in *Garmon.* "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Assn. of Machinists v. Gonzales,* 356 U.S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon, supra* at 243-44. Violence and threats of violence have often been cited as the examples of such conduct.

Other exceptions to the rule have been specifically created by Congress. Under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), suit may be brought in either state or federal court for breach of a collective bargaining agreement. "When . . . the activity in question also constitutes a breach of a collective-bargaining agreement, the Board's authority 'is not exclusive and does not destroy the

jurisdiction of the courts in suits under § 301.' *Smith v. Evening News Assn.*, 371 U.S., at 197 [83 S. Ct. 267, 9 L. Ed. 2d 246 (1962)]. . . . [A]ctions within the purview of § 301 . . . may be brought in either state or federal courts, *Dowd Box Co. v. Courtney,* supra, [368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962)] . . . ." *William E. Arnold Co. v. Carpenters,* 417 U.S. 12, 16, 94 S. Ct. 2069, 40 L. Ed. 2d 620 (1974).

We determine that the present case does not present an unfair labor practice. Rather, we conclude that this appeal is to enforce the terms of the collective bargaining agreement entered into among the parties, and arises within the purview of § 185. This being so, the law which we must apply in this case is federal labor law. In *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962), the Supreme Court determined that, in enacting § 301, Congress intended that federal law prevail over inconsistent state rules in order to achieve a uniform scheme of labor regulation.

Next, we address appellees' argument that the only appellant filing a brief in this court, OBCEA, has no standing in the case. Appellees appear to urge that under Neb. Ct. R. 16 (Rev. 1977), the judgment of the lower court should therefore be affirmed or these proceedings dismissed. We disagree. OBCEA, as a multiemployer bargaining association, is to negotiate collective bargaining agreements on behalf of its members with labor organizations representing employees of the member contractors.

Such contracts are standard, if not a dominant bargaining pattern, in the construction industry. The multiemployer contract reflects the desire of small employers to seek greater leverage with single unions representing the employees who work in the industry, and aids in effectuating uniform terms and conditions of employment within a given industry. See Gorman, Basic Text on Labor Law Unionization and Collective Bargaining at 86-89 (1976); [1976]

Lab. Rel. Exp. (BNA) § 125. Such bargaining units have been recognized by the U.S. Supreme Court. In *Labor Board v. Truck Drivers Union,* 353 U.S. 87, 95-96, 77 S. Ct. 643, 1 L. Ed. 2d 676 (1957), it stated: "The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation. Rather, the compelling conclusion is that Congress intended 'that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.' "

The record in the present case indicates that OBCEA was designated the agent of the various employer members to negotiate and enter into the present collective bargaining agreement with Local 1140 on behalf of itself and the member employers. OBCEA signed the Agreement and Declaration of Trust in question and the underlying collective bargaining agreement as the "employer." Under § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152 (1976), the term "employer" is defined to include any *person* acting as agent of an employer, directly or indirectly. Furthermore, under § 2(1) of the act, "person" is defined to include such "associations" as present in the instant case. Multiemployer bargaining associations, acting on behalf of individual employers for collective bargaining purposes, have been held to be within the definition of "employer" for collective bargaining purposes. Gorman, *supra* at 87. We determine that since multiemployer as-

sociations fall within the definition of employer under § 185(a), OBCEA is a proper party to this action and has standing to file a brief as an appellant in this appeal.

The agreement in question provides in part that "[e]ffective June 1, 1971, and thereafter, the Employer agrees to pay the sum of ten cents (10¢) per hour for each hour worked" into an employee holiday benefit fund.

In response to this contractual requirement in the collective bargaining agreement, negotiations commenced between OBCEA and Local 1140 resulting in an Agreement and Declaration of Trust, which created a trust fund to be known as the Omaha-Council Bluffs Laborers' Union Local 1140 Holiday Trust Fund. The Holiday Trust Fund was established pursuant to the requirements of § 302 of the Labor Management Relations Act. See § 186. In accordance with § 186(c)(5)(B), the trust fund was established with a board of trustees consisting of two employees, Local 1140 members Schaefer and Lewis, and two employer representatives, Solem and Gilmore, in the administration of the fund.

The trust agreement provides in pertinent part: "Section 2. GENERAL PURPOSE: The fund shall be a Trust Fund and shall be used only for the purpose of providing vacation benefits to employees pursuant to the terms of the aforementioned collective bargaining agreements." Article V, entitled Contributions to the Fund, provides at § 4: "HOLIDAY BENEFIT FUND: The sum contributed by the Employer for each Employee shall be credited to the account of each respective Employee for the payment of vacation pay during the period set out in the collective bargaining agreements between the Associations and the Union. The collective bargaining agreements presently in force provide that the employees holiday pay can only be withdrawn between December 1st and April 1st."

In June of 1979, employee trustee Schaefer approached OBCEA to determine if the association would agree to the use of the Holiday Trust Fund as a checkoff for the payment of union dues and assessments. The request was rejected by OBCEA on July 9, 1979. Thereafter, the employee trustees requested a vote by the board of trustees to authorize such use of the trust funds. On July 11, 1979, the trustees met to consider changing the trust agreement; however, the vote was deadlocked with two in favor of the change and two opposed. This class action suit commenced shortly thereafter.

Employee benefit funds, established through collective bargaining and administered jointly by union and employer representatives, have become a widely used financing medium for fringe benefits, such as pensions and health and welfare benefits. Section 302 of the Labor Management Relations Act requires that such funds be held as trusts conforming to a prescribed structure. Goetz, *Employee Benefit Trusts Under Section 302 of the Labor Management Relations Act,* 59 Nw. U. L. Rev. 719 (1965). Section 302 was enacted in 1947 as part of the Taft-Hartley amendments to the National Labor Relations Act. Generally, § 302 is a criminal statute which, subject to certain specific statutory exceptions, prohibits payments by an employer to a representative of his employees and the acceptance of such payments. See § 186(a) and (b). See, also, 48 Am. Jur. 2d *Labor and Labor Relations* § 340 (1979). The exceptions to the prohibition of this section are for payments to employee benefit trusts established and operated in accordance with the requirements of § 186(c). The pertinent provisions of that section provide as follows:

"(c) Exceptions

"The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such repre-

sentative, *for the sole and exclusive benefit of the employees* of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and . . . (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative *for the purpose of pooled vacation, holiday,* severance *or similar benefits,* or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds . . . ." (Emphasis supplied.)

One of the primary purposes for the enactment of § 186 was to prohibit the use of employee benefit

funds for purposes unrelated to their benefit. Prevention of their use for aggrandizement of union leaders was specifically mentioned. Congress not only specified that such funds must be held in trust, but included the requirement that the trust must be for the sole and exclusive benefit of employees. "The more restrictive aspect of this provision is the requirement that the trust fund be established for the sole and exclusive benefit of certain employees and their dependents. This provision has a twofold effect: (a) it imposes a restriction on the *class of persons* the trust may benefit, and (b) it imposes a restriction on the *nature of the uses* to which the funds may be put." Goetz, *supra* at 732.

The sole and exclusive uses to which employee trust funds may be put have received a literal interpretation by the U.S. Supreme Court. In *United Mine Workers, etc. v. Robinson,* 455 U.S. 562, 102 S. Ct. 1226, 71 L. Ed. 2d 419 (1982), the Court discussed the sole and exclusive benefit requirement of § 186(c)(5), which, we note, is incorporated by specific reference in § 186(c)(6). "Its plain meaning is simply that employer contributions to employee benefit trust funds *must accrue to the benefit of employees and their families and dependents, to the exclusion of all others.* Indeed, this has been this Court's consistent interpretation of § 302(c)(5).

"Just last Term, the Court reiterated that 'the "sole purpose" of § 302(c)(5) is to ensure that employee benefit trust funds "are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . ." ' *NLRB v. Amax Coal Co.,* ____ U.S. ____, ____ (quoting 93 Cong. Rec. 4678 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, 1305 (Leg. Hist. LMRA)). See *Arroyo v. United States,* 359 U.S. 419, 425-426. Accord, *Walsh. v. Schlecht,* 429 U.S. 401, 410-411; *Lewis v.*

Benedict Coal Corp., 361 U.S. 459, 474 (Frankfurter, J., dissenting). This reading is amply supported by the legislative history. See, *e.g.*, 93 Cong. Rec. 4877 (1947), 2 Leg. Hist. LMRA, at 1312; *id.*, at 4882-4883, 2 Leg. Hist. LMRA, at 1321-1322. *The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees* and their families *might be diverted to other union purposes* or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers.

"Our interpretation of the purpose of the 'sole and exclusive benefit' requirement is reinforced by the other requirements of § 302(c)(5). Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making *direct or indirect payments to unions or union officials.* Each of the specific conditions that must be satisfied to exempt employer contributions to pension funds from the criminal sanction is consistent with the nondiversion purpose." (Emphasis supplied.) 102 S. Ct. at 1231-32.

The above-quoted language of the U.S. Supreme Court clearly indicates that the payment of trust fund money by Commercial Federal directly to Local 1140 under the proposed employee assignments is neither contemplated by § 186 nor permissible under the statute's sole and exclusive benefit requirement. The intended use to which the appellees would apply the trust funds is a purpose clearly outside the statutory exception. The separate holiday trust benefit requirement would be violated if the funds held therein were paid to anyone other than the employees for whose benefit the trust fund was created.

It is well established that state courts must follow the federal law, as fashioned by the federal courts, to effectuate the statutory policy of enforcement of collective bargaining agreements. *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962); *Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957); *Trust Fund Servs. v. Heyman*, 88 Wash. 2d 698, 565 P.2d 805 (1977). Consistent with this policy, we determine that the order of the District Court authorizing the assignment of funds from the Holiday Trust Fund administered by Commercial Federal must be reversed and the petition of the appellees dismissed.

REVERSED AND DISMISSED.

KEARNEY CLINIC BUILDING CORPORATION, DOING BUSINESS AS KEARNEY CLINIC, APPELLEE AND CROSS-APPELLANT, V. LAWRENCE WEAVER, DOING BUSINESS AS WEAVER CONSTRUCTION COMPANY, AND UNITED STATES FIDELITY AND GUARANTY CO., A MARYLAND CORPORATION, APPELLANTS AND CROSS-APPELLEES.

319 N.W.2d 95

Filed May 7, 1982. No. 44113.

1. **Limitations of Actions.** Ordinarily, a statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit.
2. **Limitations of Actions: Real Estate.** An action for deficiency in construction of an improvement to realty must be commenced within 4 years of the time such deficiency was discovered or could reasonably have been discovered.
3. **Appeal and Error.** This court will dispose of a case on appeal on the theory on which it was presented in the trial court.
4. **Judgments: Appeal and Error.** A judgment of the trial court in a law action where a jury has been waived will be set aside when it is clearly against the weight of the evidence.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and dismissed.

Kenneth F. George of State & Yeagley, for appellants.

William J. Ross of Ross, Schroeder & Fritzler, for appellee.

Heard before BOSLAUGH and WHITE, JJ., and CLARK and KNAPP, D. JJ., and RONIN, D.J., Retired.

CLARK, D.J.

This is an action to recover damages for deficiencies in the construction of an improvement to real property allegedly caused by the failure of the defendant Weaver Construction Company (Weaver) to construct the improvement in accordance with the contract documents. Suit was brought against Weaver and against Weaver's surety, United States Fidelity and Guaranty Company, on their contract performance bond.

Defendants answered by pleading that the action was barred by the statute of limitations, that Weaver performed all work in accordance with the contract documents, and that any problems complained of by plaintiff were solely caused by defects in design and not by any failure to perform on the part of Weaver. The plaintiff's architect was not a party to the action.

The case was tried without a jury on plaintiff's amended petition and defendants' amended answer and counterclaim. The District Court, after trial on the merits, found for the plaintiff and allowed a setoff on defendants' counterclaim. The court also found that plaintiff was entitled to attorney fees on the action against the surety. Defendants appeal from the allowance of attorney fees and plaintiff cross-appeals, claiming the allowance of attorney fees was not in sufficient amount. We reverse and dismiss the petition and the counterclaim.

Plaintiff was the owner and occupant of a building located in Kearney, Nebraska. In October 1973 plaintiff entered into a contract with Weaver for the remodeling of the existing structure and also for the building of a new addition thereto. Construction of the new addition actually commenced sometime in the fall of 1973. The roof of the new addition was started in June or July 1974 and was completed by the end of August 1974.

By January 1975 the plaintiff had completely moved into the new addition and was using it in the operation of its medical clinic. The original building had been occupied by plaintiff during the construction of the new addition, and upon completion of the new addition remodeling of the original building commenced.

Final inspection of the entire project was on April 3, 1975, and a "punch list" was prepared by plaintiff's project manager, setting forth the items to be corrected or finished. The punch list indicated that the project was substantially completed on the date the final inspection was made and that the work undertaken by Weaver was in general conformity with the contract documents.

As early as the fall of 1974, and especially around April of 1975, during the spring thaw and rains, plaintiff experienced serious water leakage problems both from the roof and from part of the foundation. Complaints were made to Weaver regarding these problems.

Various steps were taken by Weaver to attempt to alleviate the leakage problems. In the spring and early summer of 1975, Weaver flooded the roof and sprayed the walls of the "penthouse" which housed mechanical equipment on the roof. The leakage problems, however, continued, as did Weaver's attempts to remedy them.

Plaintiff withheld payment of some $12,764 from Weaver because of the alleged defects in the con-

struction. In January 1976 Weaver demanded final payment. In February 1976 plaintiff paid all of the contract price to Weaver except $2,000. Plaintiff commenced this action on June 20, 1979.

The trial court found that the leakage problems in the foundation area were caused by the contour of the adjoining land and parking areas, and not by the negligence of Weaver. This finding is not disputed by the plaintiff. The trial court further found that the contract was not substantially completed until January of 1976, and therefore the action was commenced within the 4-year statute of limitations. The court also found that the leakage problems in connection with the roof were caused by failure of Weaver to perform the work in a good and workmanlike manner. Judgment was awarded to the plaintiff in the amount of $13,500, with a setoff to the defendants on their counterclaim in the amount of $2,000. The court, in a subsequent hearing, determined that fair and reasonable attorney fees on the surety bond for the plaintiff would be in the amount of $5,000, but that since the action was against both the contractor and the surety, the liability of the surety on attorney fees should be only half of that amount.

Defendants assign as error that the trial court erred in not ruling that plaintiff's cause of action was barred by a 4-year statute of limitations; by ruling that Weaver's work was not in a workmanlike manner, and thus caused damage to plaintiff; and that the court erred in awarding attorney fees to plaintiff. Plaintiff, on its cross-appeal, argues that the trial court, after finding that reasonable attorney fees were in the amount of $5,000, erred in allowing plaintiff only one-half of that amount against defendant surety.

As the trial court correctly determined, the governing statute of limitations is Neb. Rev. Stat. § 25-223 (Reissue 1979), which provides in part:

"Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier."

Under the evidence in this case, it is clear that the only work performed by Weaver after April of 1975, other than testing measures undertaken in an attempt to isolate and remedy the water leakage problems, was of a minor nature and not related to issues in this action. It is equally clear that plaintiff was aware of those leakage problems as early as the fall of 1974, and by April of 1975 was aware that the leakage was considerable and the problem serious.

It is apparent, therefore, that plaintiff, being aware of the problem by April of 1975, had a cause of action against the defendants and could have brought suit at that time. It is not necessary that plaintiff had knowledge of the exact nature or source of the problem, but only knowledge that the problem existed. See *Grand Island School District #2 v. Celotex Corp.,* 203 Neb. 559, 279 N.W.2d 603 (1979). Substantial completion is not the issue under § 25-223, but when the defect was discovered or could reasonably have been discovered. "If there is a breach of warranty as to the quality or manner of construction and there is no attempt to conceal the breach, the statute of limitations will run, not from

the time of actual discovery, but rather from the date of the breach." 13 Am. Jur. 2d *Building, etc. Contracts* § 114 at 107 (1964). A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. See *T. S. McShane Co., Inc. v. Dominion Constr. Co.,* 203 Neb. 318, 278 N.W.2d 596 (1979). The present action was not filed until June 20, 1979, more than 4 years after the plaintiff was fully aware that a problem existed. Plaintiff, having slept on its rights for more than 4 years, is barred by the statute of limitations.

Plaintiff, belatedly, in this court attempts to show that the contract was a continuing one and that the statute did not begin to run until all efforts at remedying the leakage problem had ceased and Weaver had made final demand for payment. In this regard, plaintiff cites *Uptegrove v. Elsasser,* 161 Neb. 527, 74 N.W.2d 61 (1955). Plaintiff's reliance on *Uptegrove* is misplaced. In *Uptegrove* the court found from the evidence that there was a continuing obligation based upon the agreement of the parties. There is no such showing here. Furthermore, the theory of a continuing obligation and reliance thereon by the plaintiff is raised for the first time on appeal. This court will dispose of a case on appeal on the theory on which it was presented in the trial court. *Ward v. Nebraska Electric G. & T. Coop., Inc.,* 195 Neb. 641, 240 N.W.2d 18 (1976).

Under the evidence in this case, the findings of the trial court as to the application of the statute of limitations were clearly wrong. A judgment of the court in a law action where a jury has been waived will be set aside when it is clearly against the weight of the evidence. See *Fisher v. Beebe & Runyan Furniture Co.,* 200 Neb. 349, 263 N.W.2d 826 (1978).

In view of our finding in regard to the statute of limitations, it becomes unnecessary to consider de-

fendants' other assignments of error or the plaintiff's cross-appeal.

The judgment of the District Court is reversed. Petition and counterclaim are dismissed.

REVERSED AND DISMISSED.

PEERLESS INSURANCE COMPANY, APPELLEE, V. JOHN J. BUKACEK, APPELLANT.

319 N.W.2d 98

Filed May 7, 1982. No. 44147.

Parties: Judgments. In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Walter J. Matejka, for appellant.

Dennis P. Lee of Thompson, Crounse & Pieper, for appellee.

Heard before BOSLAUGH, MCCOWN, and HASTINGS, JJ., and QUIST, D.J., and RONIN, D.J., Retired.

QUIST, D.J.

The defendant, John J. Bukacek, has appealed from the District Court of Douglas County, Nebraska, which affirmed a judgment of $3,674 plus costs and interest entered against him. The judgment had originally been entered in the municipal court of the city of Omaha, Douglas County, Nebraska, which also dismissed the petition that had been filed against defendant's wife, Arlene.

On May 25, 1977, the defendants, John J. Bukacek and Arlene Bukacek, entered into a written indemnity agreement with plaintiff, Peerless Insurance Company. The Bukaceks entered into this agreement to secure the release of Donald M. Hurley from jail on bond. Peerless Insurance then posted a $3,000 bond in the District Court of Nemaha County, Nebraska, and Mr. Hurley was released. Subsequently, bond was forfeited when Mr. Hurley failed to appear in court and judgment was entered against Peerless Insurance Company for the full amount of the bond. Allied Bonding Company, Omaha, Nebraska, paid $3,000 to the clerk of the District Court of Nemaha County, Nebraska, on December 11, 1978.

Subsequently, Mr. Hurley was located in Grand Rapids, Michigan, and was returned from there by Mr. Copenhaver, general agent of Peerless Insurance Company, and the Nemaha County sheriff.

The amount of judgment in excess of $3,000 represents the expenses of Mr. Copenhaver in returning Mr. Hurley to Nemaha County, Nebraska.

Defendant argues that Peerless Insurance Company has failed to show that it has suffered an actual loss. Defendant maintains that the only evidence adduced at trial shows that Allied Bonding Company, a corporation owned by Jack E. Copenhaver, paid $3,000 to the clerk of the District Court of Nemaha County, Nebraska, ostensibly for the bond of Donald M. Hurley. Defendant further argues that the claim of Peerless Insurance Company is at best premature, and even if the contract is valid, Peerless is seeking indemnification against a loss, claim, or liability that has not yet occurred.

The evidence is undisputed that Peerless Insurance Company entered into a written indemnity agreement with the Bukaceks for the posting of the bond on behalf of Donald M. Hurley. The evidence further shows that the bond was posted, Mr. Hurley was released, and subsequently failed to appear at a

hearing. Bond was then forfeited and a judgment in the amount of $3,000 was entered against Peerless Insurance Company.

There was further evidence at the trial from which the trier of fact could conclude that the $3,000 judgment was paid by Allied Bonding Company on behalf of Peerless Insurance Company. Mr. Copenhaver testified that if he was unsuccessful in collecting the amount of the judgment from the Bukaceks, Peerless Insurance Company would have to pay that amount to Allied Bonding. The trial court had the opportunity to review the business relationship of Peerless Insurance Company and Allied Bonding Company and it concluded that Peerless Insurance Company was, in fact, the real party in interest.

In *Redding v. Gibbs,* 203 Neb. 727, 733, 280 N.W.2d 53, 57 (1979), this court said: " ' ' "In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end." ' "

This case meets the requirements set forth above and the defendant will be fully protected from any further liability on the indemnity agreement when the judgment is satisfied.

Defendant further contends that the judgment should be reversed because the indemnity agreement was not signed by him but only by Arlene Bukacek. The evidence clearly shows that at the time of the signing Mr. Bukacek had an injured hand and Mrs. Bukacek signed the agreement with the acquiescence and approval of Mr. Bukacek and on his behalf. This contention is, therefore, without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF RICHARD ANDREW SAIN.
PATRICIA L. ZERBS, APPELLANT, V.
RICHARD H. SAIN, APPELLEE.
319 N.W.2d 100

Filed May 7, 1982. No. 44218.

1. **Guardians Ad Litem: Minors: Adoption.** A guardian must be appointed for a minor child who had been abandoned by one of his parents, who in turn may execute the necessary consent required by Neb. Rev. Stat. § 43-104 (Reissue 1978).
2. **Courts: Jurisdiction: Guardians Ad Litem: Adoption.** The county court and not the juvenile court in each county has the authority to determine abandonment for the purpose of permitting the use of substitute consent, and has the authority to appoint the guardian who thereafter may be authorized to execute the consent.
3. **Guardians Ad Litem: Minors: Adoption.** A finding of abandonment for the purpose of substitute consent should not be made without first appointing a guardian for the minor child, who, if abandonment is found, may then be authorized to sign the consent.
4. _____: _____: _____. The guardian appointed for a minor child for whom adoption is being sought by the use of substitute consent pursuant to Neb. Rev. Stat. § 43-105 (Reissue 1978) should be an independent party not directly interested in the outcome of the adoption proceedings.
5. **Adoption: Proof.** Abandonment for purposes of permitting substitute consent pursuant to Neb. Rev. Stat. §§ 43-104 and 43-105 (Reissue 1978) must be established by clear and convincing evidence.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Steven J. Lustgarten of Lustgarten and Roberts, for appellant.

John B. Ashford of Bradford, Coenen & Ashford, for appellee.

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

KRIVOSHA, C.J.

The instant appeal presents to the court a case of first impression concerning the adoption statutes of the State of Nebraska, Neb. Rev. Stat. §§ 43-101 to 43-118 (Reissue 1978), and, in particular, §§ 43-104 and 43-105 involving substitute consent.

The appellant, Patricia L. Zerbs, is the natural mother of the child sought to be adopted and the current wife of Stephen T. Zerbs. The appellee, Richard H. Sain, is the former husband of Patricia L. Zerbs and the natural father of the child sought to be adopted.

On July 12, 1974, a decree of dissolution was entered by the District Court for Douglas County, Nebraska, wherein the marriage of Patricia L. Sain and Richard H. Sain was dissolved. The custody of the minor child of the parties was granted to the mother. On March 28, 1976, Patricia L. Sain married Stephen T. Zerbs. Thereafter, on July 6, 1979, the Zerbs filed a petition in the county court of Sarpy County, Nebraska, seeking to adopt the child involved in this action.

The county court of Sarpy County, Nebraska, found that Sain had abandoned his child for more than 6 months and ordered the adoption to proceed. This was appealed to the District Court for Sarpy County, Nebraska, where the District Court held that there was no appealable order. Even though the District Court held that there was no appealable order, it nevertheless proceeded to make findings on review as to what should be done. Specifically, it found that the jurisdiction to litigate the question of abandonment was vested in the county court having jurisdiction of the child's guardian and that two separate proceedings in the county court were required. One proceeding should be held for the ap-

pointment of a guardian on the grounds of abandonment, and a second proceeding to determine whether the adoption should be granted. After rendering this advisory opinion, the District Court then remanded the matter back to the county court with directions to dismiss the petition for adoption.

Mrs. Zerbs then filed a petition in the county court of Sarpy County to have herself appointed guardian of her minor child, on the basis that her former husband had abandoned their minor child for more than 6 months. The county court, after hearing, found that it had exclusive jurisdiction of all matters relating to guardianship; that the natural father had abandoned his minor child; and that his parental rights were terminated or suspended by reason thereof. The county court further found that Mrs. Zerbs was a suitable person to be appointed guardian of her minor child for purposes of adoption.

On appeal to the District Court, the District Court held that the guardianship proceedings required to permit the use of substitute consent must be brought in the juvenile court and not in the county court, even though in 90 of 93 counties it was the same court. The District Court nevertheless held that two separate proceedings had to be held and that, therefore, in Sarpy County the guardianship issue must be heard by the separate juvenile court, which is to appoint an independent guardian. The District Court remanded the matter to the county court with directions to vacate the order appointing the guardian and to dismiss the petition for appointment of a guardian for lack of jurisdiction in the county court.

The principal issue we are asked to address by this appeal is the appropriate procedure to be followed when one seeks permission to obtain substitute consent on the basis that one of the parents has abandoned the child, thereby eliminating the necessity of obtaining the natural parent's written con-

sent to the adoption as required by § 43-104.

One would anticipate that the answer to the question would be relatively simple and that a reading of the statutes would suffice. Unfortunately, such does not appear to be the case, and the court therefore is compelled to attempt to interpret the various statutes which may have application. The conflict, as presented to us, is between the authority of the county court, sitting as a court having jurisdiction over adoption matters, and the authority of the juvenile court, whether it is the county court or the separate juvenile court.

In reaching our conclusion we keep in mind several general principles of statutory construction annunciated by us recently in *PPG Industries Canada Ltd. v. Kreuscher,* 204 Neb. 220, 227-28, 281 N.W.2d 762, 767-68 (1979), where we said in part: "Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. Wang v. Board of Education, 199 Neb. 564, 260 N.W.2d 475. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers. State v. Jennings, 195 Neb. 434, 238 N.W.2d 477. To ascertain the intent of the Legislature, we examine the legislative history of the act in question. Norden Laboratories, Inc. v. County Board of Equalization, 189 Neb. 437, 203 N.W.2d 152. The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. Pelzer v. City of Bellevue, 198 Neb. 19, 251 N.W.2d 662. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. Matzke v. City of Seward, 193 Neb. 211, 226 N.W.2d 340. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the par-

ticular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately."

With these principles in mind, we now examine the applicable statutes.

Section 43-101 generally provides that a minor child may be adopted by an adult person and that an adult husband or wife may adopt a child of the other spouse.

Section 43-104 further provides in part: "No adoption shall be decreed unless the petition therefor is accompanied by written consents thereto executed by . . . (2) any district court or separate juvenile court in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court or separate juvenile court in the State of Nebraska, *and* (3) both parents, if living; . . . except that consent shall not be required of any parent who shall . . . (b) have abandoned the child for at least six months *next preceding the filing* of the adoption petition." (Emphasis supplied.) Section 43-105 then provides: "If consent is not required of both parents . . . because of the provisions of subdivision (3) of section 43-104, substitute consents *shall be filed* as follows: . . . (3) in all other cases where consent cannot be given as provided in subsection (3) of section 43-104, consent *must be given by the guardian* of such minor child appointed in accordance with sections 38-101 to 38-120, section 43-111.01, or sections 43-201 to 43-227, *which consent shall be authorized by the court having jurisdiction of such guardianship.*" (Emphasis supplied.)

One thing looms clear from a review of these statutes. A guardian must be appointed for a minor child who has been abandoned by one of his parents, who in turn may execute the necessary consent required by § 43-104. The question then is which court,

the county court or the juvenile court, has jurisdiction in an adoption proceeding. We believe it is the county court and not the juvenile court that has the authority to determine abandonment for the purpose of permitting the use of substitute consent, and that likewise appoints the guardian who thereafter is authorized to execute the consent.

Neb. Rev. Stat. § 24-517 (Reissue 1979) describes the authority of the county court. Specifically, § 24-517 reads in part as follows: "Each county court shall have the following jurisdiction: . . . (8) *Exclusive original* jurisdiction in *all* matters of adoption." (Emphasis supplied.) We believe the language to be fairly clear. If the county court is to have exclusive jurisdiction in all matters of adoption, and substitute consent is an integral part of the adoption, it follows that the county court must be the court to have jurisdiction over the determination of abandonment necessary to justify the appointment of a guardian to grant the consent required by § 43-105. We are not unmindful of the provisions of the juvenile court act, and, in particular, Neb. Rev. Stat. § 43-209(1) (Reissue 1978) which provides that the juvenile court may terminate all parental rights if "[t]he parents have abandoned the child for six months or more immediately prior to the filing of the petition." We do not believe, however, that that section is in conflict with what we now hold. A reading of the entire juvenile code makes it clear that one of the grounds upon which the juvenile court may take custody of a child is a finding that the child has been abandoned or is in need of parental supervision by the state. Once such a petition has been filed and the juvenile court has assumed jurisdiction, it may thereafter, under appropriate conditions, *terminate* the parental rights of the parents and authorize the child be adopted.

In that case, § 43-104(3)(*c*) applies and not § 43-104(3)*(b)*. This distinction is made clear when

we again look at § 43-105. That section authorizes the appointment of a guardian in accordance with *either* Neb. Rev. Stat. §§ 38-101 to 38-120 (Reissue 1978) *or* § 43-111.01 or Neb. Rev. Stat. §§ 43-201 to 43-227 (Reissue 1978). The authority to appoint a guardian pursuant to either §§ 38-101 to 38-120 *or* § 43-111.01 lies exclusively with the county court and arises in the ordinary adoption proceedings. On the other hand, the authority to appoint a guardian pursuant to §§ 43-201 to 43-227 lies exclusively with the juvenile court and arises *only* if the juvenile court has, prior to adoption proceedings, acquired jurisdiction over a dependent or neglected child. It is a limited situation and not applicable to the general adoption proceedings originated pursuant to the provisions of §§ 43-101 to 43-118.

Where, as here, the child has not been determined to be either dependent or neglected so as to come within the jurisdiction of the juvenile court, the juvenile court does not acquire any jurisdiction in the case and the matter remains exclusively an adoption matter with the county court's jurisdiction as provided by § 24-517.

We see little purpose, nor can we imagine the Legislature intended, that before substitute consent could be used in an adoption proceeding, every child must be declared to be neglected or dependent so as to give the juvenile court jurisdiction over the child, and that the parental rights of a parent or parents must be terminated before the decree of adoption is entered. This does not seem to be within the scheme of either act or in keeping with the intent of the Legislature. The county court has already acquired jurisdiction of the adoption, and in 90 of the 93 counties is the juvenile court. We see little purpose in suggesting that a separate and distinct proceeding must be filed absent a clear and absolute mandate from the Legislature. The county court, having been granted exclusive original jurisdiction in all

matters involving adoptions, is likewise the proper court to determine whether a parent has abandoned his child so as to permit the use of substitute consent provided for by § 43-105.

A second question raised by this appeal is whether a guardian must be appointed in order for substitute consent to be given, and who should be appointed guardian for the minor child. It appears to us that both the interests of the minor child and the language of §§ 43-104 and 43-105 are such that a finding of abandonment for the purpose of substitute consent should not be made without first appointing a guardian for the minor child, who, if abandonment is found, may then be authorized to sign the consent. In the instant case, the county court appointed the natural mother as guardian for the child. We believe that was in error. The mother is one of the petitioning parties and legally an interested party to the action. The District Court was correct in concluding that the minor child should be represented by an individual who has no direct interest in the outcome of the matter and who can more appropriately represent the minor child and thereafter execute the appropriate consent if the court determines such a consent should be signed. Little purpose would be served if anything less than an independent guardian is appointed.

The guardian appointed for a minor child for whom adoption is being sought by the use of substitute consent pursuant to § 43-105 should be an independent party not directly interested in the outcome of the adoption proceedings. It is clear from a reading of the adoption statutes that something *more* than a ministerial duty of signing a document is contemplated by the statutes requiring the appointment of a guardian. If the empty formality of a signature was all that was sought, the court itself could provide it. But more of the guardian is sought.

The purpose of having a signed consent, executed

either by the natural parent or by one appointed to stand in the parent's stead, is to obtain agreement from the natural parents. The interests of the adopting natural parent who, by reason of the adoption, continues as a parent and the interests of the natural parent whose rights as a parent are terminated by the decree of adoption may not be the same. Where, therefore, the nonadopting parent is absent and cannot protest if he or she chooses, an independent party is critical. The guardian, once appointed, may conclude that the best interests of the child will not be served by signing the consent and can so advise the county court.

The county court, unlike the juvenile court, does not terminate parental rights upon a finding of abandonment, but only authorizes the execution of substitute consent. It is the adoption itself which terminates the parental rights, and until the adoption is granted the parental rights are not terminated.

Even if abandonment is found to exist so as to permit the appointment of a guardian who is authorized to execute a substitute consent, the county court is not required to grant the adoption. Section 43-111.01 specifically provides that if, upon a hearing, the court denies a petition for adoption, the court may take such action as the court deems best for the child. Should the court refuse the adoption, the parental rights of the natural parents would remain intact unless and until a decree of adoption is in fact granted. The effect of a finding of abandonment under the adoption statute does not result in the termination of parental rights, as it does under the juvenile act, and therefore implies that the guardian is intended to protect the interests of the child and not the adopting parents.

It is argued to us that the county court is unable to appoint a guardian in an adoption proceeding because the applicable portions of §§ 38-101 to 38-120 have been repealed and are now found as part of the

Uniform Probate Code, and, in particular, Neb. Rev. Stat. §§ 30-2601 to 30-2616 (Reissue 1979). While, to be sure, it would have been helpful if § 43-105 had been amended when the sections in question were repealed, the failure to do so is not fatal. In repealing the applicable portions of §§ 38-101 to 38-120, the Legislature did leave one pertinent section, to wit, § 38-114, which reads as follows: "Nothing contained in this chapter shall impair or affect the power of any court to appoint guardians to defend the interests of minors impleaded in such court or interested in any matter then pending, nor their power to appoint or allow any person, as next friend for a minor, to commence, prosecute or defend any suit in his behalf."

Section 38-114 remains as the legislative bridge between the reference in § 43-105 and the provisions of §§ 30-2601 to 30-2616 as applicable. An appointment of a guardian pursuant to the applicable provisions of §§ 30-2601 to 30-2616 is an appointment made in accordance with the applicable portions of §§ 38-101 to 38-120, thereby giving the county court jurisdiction of such guardianship.

In view of our opinion in the instant case, one final question needs answering. The question raised is what should be the measure of proof required before a finding of abandonment is made by the county court. While the purposes of finding abandonment by the county court under the adoption statutes are somewhat different than the purposes to be exercised by the juvenile court under the juvenile statutes, the ultimate results are likely to be the same.

For that reason, we believe that all of the arguments which support a requirement that abandonment under the juvenile court must be based upon clear and convincing evidence apply equally to the adoption statutes. See, *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Interest of Farmer,* 210 Neb. 500, 315 N.W.2d 454 (1982);

State v. Souza-Spittler, 204 Neb. 503, 283 N.W.2d 48 (1979). We therefore hold that abandonment for purposes of permitting substitute consent pursuant to §§ 43-104 and 43-105 must be established by clear and convincing evidence. In view of the fact that these proceedings must be returned to the county court of Sarpy County, Nebraska, for the appointment of a guardian for the minor child and then a hearing on the basis of abandonment, we make no observations as to whether the evidence already adduced is sufficient to establish abandonment by clear and convincing evidence, but leave that initially to the trial court. The matter is remanded to the District Court with directions to remand the proceedings to the county court for the appointment of a guardian of said minor child and a determination as to whether the father has abandoned his child so as to authorize the use of a substitute consent.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion of the court which holds that Neb. Rev. Stat. § 43-105 (Reissue 1978) requires the appointment of a guardian to give a substitute consent in this case.

A substitute consent by a guardian is required only where consent is not required of *both* parents, if living, the surviving parent, or the mother of a child born out of wedlock. The statute describes a class of cases in which no parental consent is required.

Since the mother of the child is required to consent to the adoption in this case, it is not a case where consent is not required of *both* parents. The majority opinion construes the statute as if it read "one or both parents."

CLINTON, J., joins in this dissent.